

CANADA / JUDGMENT

Zell v. Carvajal

2019 BCSC 1979

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1979 Zell v. Carvajal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zell v. Carvajal,

2019 BCSC 1979

Date: 20191119

Docket: M160954

Registry: Vancouver

Between:

Jeffrey Zell

Plaintiff

And

Cresencia Popatco Carvajal and Gener Bano Carvajal

Defendants

- and -

Docket: M166208

Registry: Vancouver

Between:

Jeffrey Zell

Plaintiff

And

Amrik Gill and M.D. Transport Co. Ltd.

Defendants

- and -

Docket: M171694

Registry: Vancouver

Between:

Jeffrey Zell

Plaintiff

And

Magdalena Maggel Du Plessis and Jacques Herman Du Plessis

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

October 7-11 and 15-18, 2019

Place and Date of Judgment:

Vancouver, B.C.

November 19, 2019

Table of Contents

BACKGROUND. 4

i) Mr. Zell's Personal Circumstances. 4

ii) Mr. Zell's Professional Circumstances and the Growth of His Business. 5

THE CIRCUMSTANCES OF THE ACCIDENTS. 7

MR. ZELL'S PHYSICAL INJURIES. 8

i) Neck and Back Pain. 8

ii) Arm and Hand Difficulties. 10

iii) Sleep. 11

iv) Mood and Psychological Issues. 11

THE MITIGATION ISSUE. 15

i) Failure to seek out medical assistance. 16

ii) Failure to pursue physiotherapy or an active exercise regime or trigger point injections. 17

MR. ZELL'S LOSSES. 20

i) Non-Pecuniary Losses. 20

ii) Loss of Earning Capacity. 23

a) The relevant legal and factual framework. 23

b) Past loss of capacity claim.. 26

c) Future loss of earning capacity. 29

COST OF FUTURE CARE. 35

SPECIAL DAMAGES. 38

SUMMARY. 39

[1] The Plaintiff, Mr. Zell, claims damages for the injuries that he sustained in three different motor vehicle accidents (the "Accidents"). Various Consent Orders directed that individual actions, arising from the Accidents, be heard at the same time.

[2] Counsel for the parties, to their credit, have worked to agree on what they can and to distill what remains outstanding. Accordingly, the various Defendants have accepted liability in each of the Accidents. Mr. Zell discontinued the action that he commenced in connection with a fourth accident under Action Number M187106 and which was originally to be heard with the three remaining actions. The parties are in significant agreement on Mr. Zell's non-pecuniary losses and the Defendants have accepted Mr. Zell's claim for special damages. Furthermore, the Defendants do not question Mr. Zell's credibility or the reliability of his evidence. Finally, the Defendants chose not to examine Mr. Zell's economist on the expert report he had provided. Similarly, Mr. Zell chose not to examine an orthopedic surgeon on the expert reports he had provided on behalf of the Defendants.

- [3] The principal issues which remain outstanding at this point are:
- i. Whether Mr. Zell sustained any psychological injuries as a result of the Accidents;
 - ii. Whether Mr. Zell failed to mitigate his losses; and
 - iii. The quantum of Mr. Zell's past and future loss of earning capacity claim.

BACKGROUND

- [4] The history that follows is clear and not in dispute. I intend to further develop this general history as I address specific issues more fully.
- i) Mr. Zell's Personal Circumstances
- [5] Mr. Zell is presently 28 years old. He grew up in a loving family and in a comfortable environment in Ladner, British Columbia. Both his parents work. His father is an aircraft mechanic. His mother is a nurse. He has three siblings. He had no history of any illness, surgery or injury prior to the Accidents.
- [6] Mr. Zell met his common-law wife, Ms. Walker, in November 2014 and she moved into his home in September 2015. They had twin daughters in June 2017.
- [7] Mr. Zell was reasonably athletic and he played various sports when he was younger. His real passion, however, was for the outdoors. He began to duck hunt about a decade ago. He took up deer hunting shortly thereafter. He bought a motorcycle that he enjoyed. He belonged to an ATV club and he would go dirt biking with his friends.
- [8] At this point, and on account of the Accidents, he has effectively stopped all of these activities. He has sold his motorcycle. He no longer goes out on ATVs nor does he go dirt biking. He will still go hunting albeit infrequently and he struggles when he does so.
- ii) Mr. Zell's Professional Circumstances and the Growth of His Business
- [9] Somewhat unusually, but perhaps in keeping with his love of the outdoors, Mr. Zell developed an early and lifelong passion for landscaping. I was shown photographs of him with a toy lawnmower as well as of him gardening with his father when he was three or four years old. At the age of seven he bought his first lawnmower with money he had saved. His father built a small cart that Mr. Zell could haul the lawnmower on behind his bike and he began to cut the grass for nearby neighbours.
- [10] At the age of 12 he began to work at a small business that repaired small engines on, for example, lawnmowers and leaf blowers. In grades 10 and 11 he engaged in some sort of apprenticeship program that allowed him to both work at the repair shop part time and to go to school. Throughout this time he continued to cut lawns in his neighbourhood.

- [11] At the age of 16, or in about 2007, he began to work for a larger landscaping business that did work for some 300-350 property owners. He learned more about the business, about how the business could and should be operated efficiently, about what sort of revenues a single landscaping truck, with two employees, could generate, and about the skill set that the employees in such a truck should have. He believed that it was important for an owner to be out working with his employees.
- [12] In 2009 Mr. Zell went to work with a smaller landscaping company where he was the only employee. He worked for this company for three days a week and he serviced his own clientele, of about 20 customers, for the balance of each week.
- [13] That same year Mr. Zell, who was then only 18 or 19 years old, bought the business of his employer. The purchase price included a list of some 50 clients. This, together with his existing clients, provided him with some 70 clients. He registered the company, as a sole proprietorship, under the name Harbourside Lawn and Garden ("Harbourside").
- [14] Other related evidence is important. First, starting in 2006, when he was only 16 years old, Mr. Zell began to buy various pieces of equipment for his business. What specific pieces of equipment were purchased at what specific time is irrelevant. What is relevant is that Mr. Zell actively and energetically pursued his dream of building a business. Early on he purchased an older pickup truck. He then bought a second truck to accommodate a second landscaping crew. Over time he bought better pickup trucks, better mowers, and better general equipment. He purchased a new dump trailer, which could carry or tow 14,000 pounds, so that he could haul landscaping debris more efficiently and cost-effectively. He purchased a ride-on mower as he added larger properties to his client list.
- [15] In 2017, to occupy himself in the winter months, he began to do some snow removal and salting. He bought a bobcat and the equipment to do salting. In 2018, as this aspect of his business grew, he hired an individual who also had some snow removal equipment with which he could assist.
- [16] Second, Mr. Zell testified that from 2010 to 2014, when he had his first accident, he worked 50-60 hours per week. This included perhaps 8-10 hours a week of office work. Some days he worked up to 15 hours a day. These hours pertained to his landscaping business, which generally runs from mid-February to about October or mid-November of each year. In the winter months, and sometimes in the summer after work, Mr. Zell would drive to local beaches and cut up logs for firewood that he would then sell.
- [17] His business and client list grew and over time he came to operate in Richmond, Delta, Surrey, and Ladner. He generally grew his business by way of word-of-mouth, though he would sometimes advertise his services in different online publications.
- [18] All of this evidence, none of which was contested or challenged, speaks to an unusually motivated and hard-working young man.

- [19] I propose to address the further development of Mr. Zell's business, following the Accidents, when I consider Mr. Zell's loss of past and future earning capacity claims. What is clear, and what is not contested, is that Mr. Zell's ability to do certain types of physical work has been significantly diminished and that his ability to work extended hours, on a sustained basis, has been similarly curtailed.

THE CIRCUMSTANCES OF THE ACCIDENTS

- [20] Liability for each of the Accidents has, as I have said, been admitted. Nevertheless some brief description of the Accidents, and in particular the first and second accidents, is relevant. This is because these two accidents were reasonably serious, because aspects of Mr. Zell's injuries were immediately apparent, and because the second accident appears to have exacerbated and entrenched Mr. Zell's injuries.
- [21] The first accident occurred on February 24, 2014 (the "First Accident"). As he approached an intersection he saw a green SUV approaching the intersection from the left. The driver cut out, went through a stop sign, and entered his lane. Mr. Zell, though he tried to swerve, collided with the SUV. Mr. Zell estimated that he was travelling between 40-50 km/hr at the time of the impact.
- [22] Immediately upon impact, Mr. Zell tightened his grip on the steering wheel and his body lurched forward and then backwards. He testified that he immediately experienced pain in his wrists and neck. He went to a clinic within a day or two complaining of neck, back, and wrist pain. Within a few months of the First Accident he had developed headaches and tingling and numbness in his hands.
- [23] The second accident occurred on February 25, 2015 (the "Second Accident") as Mr. Zell was driving his truck and trailer in a northbound direction through the Massey Tunnel. A semi-truck rear-ended a Jeep which then hit the back of Mr. Zell's trailer pushing it into his truck. Mr. Zell described this as a "hard hit". His trailer was written off as a result of the Second Accident and he described the additional damage to his truck.
- [24] Mr. Zell said that aspects of his injuries from the First Accident had improved over time. The Second Accident, however, caused a deterioration in his condition. He recalls that his entire back hurt along with his neck and that his headaches got worse. Mr. Zell testified that his pain level after the Second Accident became "his new reality".
- [25] The third accident occurred on August 31, 2016 when he was sitting at a traffic light and when he was again rear-ended. The impact from this accident was relatively minor. Aspects of his symptoms deteriorated briefly, for about a week, at which point they reverted to their prior state. It appeared to be common ground between the parties and the various physicians who testified that this third accident did not materially contribute to Mr. Zell's injuries.

MR. ZELL'S PHYSICAL INJURIES

i) Neck and Back Pain

- [26] I have said that Mr. Zell suffered from various physical difficulties as a result of the Accidents. His most significant and enduring difficulties are in the muscles and ligaments of his neck, and his upper, mid and lower back. He has also developed cervicogenic headaches. There is similarly no doubt that, at this point, these difficulties and pain symptoms have become chronic. Nor is there any real issue about the prognosis for these various injuries. Finally there appears to be little question that these various conditions were caused by the Accidents.
- [27] Because the Defendants do not question, in any meaningful way, the existence, severity, prognosis or cause of Mr. Zell's injuries there is no need to develop these matters at great length. Nevertheless it is useful to note the consistency of the evidence, from multiple sources, that confirms these various matters. Thus, the evidence in relation to these various injuries was supported by the evidence of Mr. Zell. It was also supported by Ms. Walker; Mr. Zell's mother; Jacob Harris, a co-worker; and Mr. and Mrs. Hives who are friends of Mr. Zell. Mr. Zell has known Mr. Hives since his childhood. They hunt together. Their families socialize and Mr. Hives sometimes helps Mr. Zell with his work in the winter.
- [28] Various of these witnesses discussed Mr. Zell's condition prior to the Accidents. Each discussed his limitations at the present time. He is limited, for example, in his ability to bend over when gardening or when lifting his arms over his head to, for example, trim hedges. He is limited in his ability to bend over and bathe his daughters. He is limited in his ability to go hiking or hunting. It is apparent to everyone who is close to him that he is consistently in pain and that this is often so to a significant degree.
- [29] These various limitations and disabilities are supported by the medical opinions of Dr. Krassioukov, a physiatrist, Dr. Salvian, a vascular surgeon, both of whom were called by Mr. Zell, and Dr. Telfer, an orthopedic surgeon who file two expert reports on behalf of the Defendants. These physicians noted various limitations in Mr. Zell's lumbar and neck motion. They also identified tenderness in various parts of Mr. Zell's neck and back. As Dr. Telfer noted, "I think it is fair to say that all of the physicians who have assessed Mr. Zell are in agreement on several areas. We all agree that Mr. Zell has chronic neck pain and chronic mid-back pain".
- [30] Though Dr. Telfer's report indicates that he is not able to speak to the cause of Mr. Zell's difficulties or to the prognosis for those difficulties, Drs. Krassioukov and Salvian did not express any such reservations. Both were satisfied that Mr. Zell's various physical difficulties were caused by the Accidents and both were of the view that Mr. Zell was likely to continue to suffer from these difficulties. This was particularly so having regard to how long Mr. Zell had already laboured with his physical complaints and on account of the strenuous nature of Mr. Zell's work. I accept the evidence of both experts in relation to these matters. I also note that counsel for the Defendants did not, in her closing submissions, raise any of the questions or advance any of the reservations that are contained in Dr. Telfer's report.

[31] Finally, the nature and severity of Mr. Zell's neck and back issues are supported by the report and oral evidence of Mr. Pakulak who did a functional capacity evaluation of Mr. Zell and who prepared a cost of future care report. Mr. Pakulak's various forms of testing again confirmed significant restrictions in Mr. Zell's cervical, shoulder, and lumbar range of motion and mobility. Other forms of testing confirmed limitations in Mr. Zell's ability to do overhead work, or to engage in activities that involved neck flexion, or to bend over or to perform "below the waist" work and in his ability to lift various weights from and to various positions.

ii) Arm and Hand Difficulties

[32] There is also significant evidence that Mr. Zell developed thoracic outlet syndrome ("TOS") and carpal tunnel syndrome on account of the Accidents. Mr. Zell reported pain in his wrists immediately after the First Accident and that pain, together with burning, numbness, and tingling in his arms and hands continued thereafter.

[33] There is a detailed chronology that pertains to these symptoms and to the steps that Mr. Zell has taken to address these difficulties. Once again, there is no need to address this evidence in detail because Mr. Zell's evidence, in relation to these particular symptoms is supported by the medical evidence of Drs. Krassioukov, Telford and, in particular, Salvian who is an expert in TOS and its treatment. Again, Dr. Telford, in his July 10, 2019 report said, "All of the physicians who have assessed Mr. Zell also agree that he probably has some symptoms related to thoracic outlet syndrome".

[34] The reports and evidence of these various experts confirm, and I find, that Mr. Zell's difficulties with numbness, or burning, or pain or tingling in his arms and hands were caused by the Accidents.

[35] It also appears clear from the records, and Mr. Zell confirmed, that these difficulties have improved over time. Records from his attendance before Dr. Callier, in October 2017, confirm significant improvement in these and other symptoms. Mr. Zell said that at the present time he experiences various symptoms in his hands and arms irregularly and perhaps on a monthly basis. He also said that he was unable to discern any real pattern or activity that cause the symptoms to reappear.

iii) Sleep

[36] Mr. Zell's sleep patterns are very significantly disrupted. This is primarily on account of the pain in his neck and back though he has at times awoken from the numbness and pain in his arms and hands. Both he and Ms. Walker spoke about the severity of these symptoms, as do the various medical reports I have reviewed.

[37] Mr. Zell will generally sleep no more than four or five fitful hours per night. Both he and Ms. Walker observed that his having to get up at 3:00 a.m., to do the winter snow clearing work that he does, is made easier by the fact that he is often already awake at that hour.

iv) Mood and Psychological Issues

- [38] Mr. Zell testified, as did several other witnesses who know him well, that he is angrier than he used to be. He said that he is more volatile and, when he is tired or in pain, he can become agitated and say things that he should not. He also said that he was more distant, particularly with Ms. Walker.
- [39] Dr. Babbage, who is a psychiatrist and who was called by Mr. Zell, testified that Mr. Zell is not someone who is prone to expressing or describing his mood or psychological state. This is consistent with my own sense of Mr. Zell and, in fact, with his own evidence when he was asked if he suffered from depression. He said that he did not know what depression was or "what that would look like". He did say, however, that his symptoms "were bringing me down". He said there were days where he "did not want to get out of bed". There were times when he felt listless and without energy.
- [40] The primary issue, however, is not whether Mr. Zell suffers from a depression disorder. Dr. Babbage did not believe that Mr. Zell did at the time he was examined though he opined, as did Dr. Krassioukov, that Mr. Zell was more likely, on account of his chronic pain, to develop such a disorder.
- [41] The real issue in dispute between the parties is whether Mr. Zell developed a Somatic Symptom Disorder ("SSD") after the Second Accident. Dr. Babbage, who opined that Mr. Zell had developed such a disorder, explained the various criteria in the DSM-V for SSD. He further explained that SSD, with pain as its primary focus, recognizes that chronic physical pain has psychological components.
- [42] Individuals who suffer from SSD display various forms of behaviour. Some will become excessively preoccupied with their injuries and will focus, to an unreasonable degree, on their care and treatment. They will see an excessive and unreasonable range and number of care providers as they seek to address their injuries. This is not the case with Mr. Zell. Indeed, the Defendants, in arguing that Mr. Zell has failed to act reasonably to mitigate his losses, assert that Mr. Zell failed to seek out and pursue the medical treatments that he ought to have.
- [43] SSD is also, however, manifested by individuals who avoid various activities to an unreasonable or inordinate degree in order to avoid the pain they apprehend will accompany that activity. The difficulty is in ascertaining what constitutes such excessive avoidance behaviour. It is not unreasonable or excessive, for example, for Mr. Zell to avoid trimming hedges because that activity requires overhead work that directly engages the areas and muscles that he has injured.
- [44] Dr. Babbage's direct evidence and his cross-examination was captured on video prior to the trial. That procedure was appropriate in the circumstances but it foreclosed asking Dr. Babbage questions about what constituted excessive, as opposed to reasonable, avoidance behaviours.

- [45] These questions were put to Dr. Wiesenthal, who is also a psychiatrist, and who was called by the Defendants. Dr. Wiesenthal explained that individuals with SSD have a preoccupation with their pain that is out of proportion to their injury or to their pain.
- [46] In this case, Dr. Babbage, in his report and in his evidence, described, for example, Mr. Zell's anxiety with his ability to continue to work in the future. Dr. Babbage also commented that Mr. Zell has "persistent thoughts, feelings, and behaviours regarding his pain and pain related behaviours ... He worries constantly that the pain will not go away and get worse. He lacks confidence that he will be able to continue to work doing heavy work as a landscaper".
- [47] The difficulty is that it is hard to know or decide whether such thoughts are "excessive" or "disproportionate". Mr. Zell is a 28-year-old man, with two children, a home, and mortgage. He lives with consistent pain that is exacerbated by the work he does to earn his livelihood. It is not, in some senses, excessive for Mr. Zell to be anxious about his future and about his ability to support his family. It is not, in some senses, disproportionate for him to have persistent anxiety about his physical pain and its impacts on his daily function. That is particularly so when his pain is nearly always, to some degree, present.
- [48] Furthermore, there are, and have been, other sources of difficulty in Mr. Zell's life. His twin daughters were born prematurely and were kept in the hospital for almost three months after their birth. His relations with Ms. Walker have, for various reasons, been strained and they have, accordingly, seen a marriage counsellor. Such matters are independent sources of considerable stress, strain, and anxiety.
- [49] Dr. Wiesenthal, who did not examine Mr. Zell and who could not therefore provide any diagnosis in relation to Mr. Zell's psychological condition, nevertheless said in her cross-examination that significant aspects of Mr. Zell's behaviour were consistent with someone who is in pain and that such behaviour would not normally be regarded as disproportionate. She accepted that other behaviours might, depending on the circumstances, be regarded as excessive or disproportionate.
- [50] An example of this would be, for example, if Mr. Zell was concerned about cleaning the kitchen counter. His medical condition ought not reasonably to influence such a relatively benign activity. This example, which was put to Dr. Wiesenthal in her cross-examination, has some basis in the evidence. The evidence of Mr. Zell and of Ms. Walker is that Mr. Zell does virtually no household work. He does not buy groceries, or cook, or clean or do laundry. He does not walk the dog. He does do the yard work around their home.
- [51] During his examination by Dr. Krassioukov, Mr. Zell reported that prior to the Accidents he had shared all such activities with Ms. Walker but that his involvement in such activities had decreased by perhaps 30% on account of ongoing pain and discomfort. During his interview with Mr. Pakulak, he reported that he had no significant limitations in his ability to complete household chores but that he had to pace himself through tasks and to delay other tasks when he is in more pain on account of his work.

- [52] To the extent the reports Mr. Zell made to Dr. Krassioukov and Mr. Pakulak, respectively, were accurate, Mr. Zell's behaviours at home would likely be consistent with his injuries and would not be "disproportionate". To the extent, however, that Mr. Zell has avoided all household duties, ostensibly on account of his pain, such avoidance behaviours would be excessive and would not align with the severity of his injuries.
- [53] Similarly, Mr. Zell reports that he does not like being touched. To the extent this behaviour is ascribed to his pain symptoms this too would appear to be excessive.
- [54] Ultimately, however, Mr. Zell is an individual who takes no prescription medications for his pain or for any psychological symptoms. He has never received counselling that has been focused on any psychological concerns. I consider that most of his behaviours and anxieties are consistent with his injuries and are a reasonable, and not disproportionate, response to his concerns over his future employment, his future well-being and his pain. Thus, if Mr. Zell has SSD I consider that his condition is "mild". This finding or conclusion is consistent with the closing submissions made by counsel on behalf of the Plaintiff.

THE MITIGATION ISSUE

- [55] The Defendants argue that Mr. Zell has failed to act reasonably and to mitigate his losses arising from the Accidents. This submission has two related branches. First, it is argued that Mr. Zell failed to act reasonably in seeking out and obtaining medical care for his various physical difficulties, particularly since 2017. Second, it is asserted that Mr. Zell acted unreasonably in failing to actively and consistently pursue either, or both, physiotherapy and a focused exercise regime or to obtain trigger point injections.
- [56] Before turning to the evidence that underlies and addresses the submissions of counsel it is necessary to understand the relevant legal framework. That framework is clear and well established. When a failure to mitigate is alleged, the defendant has the burden of proving not only that the plaintiff acted unreasonably in not attending recommended treatment, but also the extent, if any, to which the plaintiff's damages would have been reduced had he or she sought out that recommended treatment.
- [57] The law, in the personal injury context, was succinctly summarized by the Court of Appeal in *Chiu v. Chiu*, 2002 BCCA 618:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.
- [58] These principles were expressed in similar terms in *Myatt v. Holicza*, 2000 BCSC 1149, where Justice Parrett said:

[96] The duty to mitigate rests on any personal injury victim. The burden of proof when a failure to mitigate is alleged rests with the defendant. The defendant, to meet that burden, must establish two things. Firstly, the specific steps which the plaintiff ought reasonably to have pursued to avoid the loss or some portion of it; and, secondly, the extent to which the plaintiff's loss could have been avoided. It is not sufficient to prove that a particular plaintiff was a difficult patient, or that he or she refused certain treatment. They must go further and prove, on a balance of probabilities, that the plaintiff should reasonably have pursued that treatment and that it would have reduced the loss.

i) Failure to seek out medical assistance

[59] In this case, Mr. Zell went to a walk-in clinic a few days after the First Accident. He was referred to the Delta Hospital for wrist x-rays, which came back negative. A few weeks later he attended at his family doctor, Dr. Blatchford, who sent him for further x-rays and gave him a referral for physiotherapy--a matter that I will return to. Mr. Zell's symptoms and difficulties continued throughout the summer of 2014 but they began to abate at the end of the landscaping year as his workload decreased.

[60] Mr. Zell testified that when he again saw Dr. Blatchford in September 2016 about his motor vehicle injuries, she suggested he go to a walk-in clinic. He said that he did so and that he was then again referred to physiotherapy. He was clearly upset by what he perceived to be Dr. Blatchford's lack of interest in his condition and he considered that her suggesting he go to a clinic was "bizarre". In any event, he did not again seek assistance from her nor did he attend at the offices of any other general practitioner between 2016 and 2019. He has, more recently, found a new general practitioner, who cares for Ms. Walker and their daughters, and who is willing to take him on as a patient, but only after this litigation is concluded.

[61] Counsel for the Defendants described Mr. Zell's failure to actively seek additional assistance as "perplexing" and, to some degree, I agree. He has suffered with a significant level of pain that is, at times, nearly debilitating and he has, in some respects, been relatively inattentive in addressing that problem.

[62] In saying this, I recognize that he has consistently and regularly obtained both massage and chiropractic treatments. He also saw Dr. Callier, a physiatrist, on three occasions between April and October 2017 to address the numbness and tingling in his hands. Still further, he was referred to and met with Dr. Faulds, a vascular surgeon, in March 2018 to ascertain whether some of the symptoms in his arms and hands could be ascribed to thoracic outlet syndrome.

[63] While it is possible to look at the more than five-year history since the First Accident and to observe that Mr. Zell could likely have addressed his physical and emotional difficulties more actively, that is not the issue or the proper legal question. The proper legal question is whether the Defendants are able to establish, on the balance of probabilities, that if Mr. Zell had acted differently or seen a family or other doctor more frequently, he could have avoided some aspects of his ongoing difficulties and some part of his losses. There is no

evidence before me, from any source, that this is so. Accordingly I do not consider that the Defendants have met the burden that rest with them on the first aspect of this issue.

ii) Failure to pursue physiotherapy or an active exercise regime or trigger point injections.

- [64] After the First Accident, Mr. Zell was given a referral to physiotherapy by his family doctor. He spoke to his mother, a nurse, who recommended that he see Dr. Shore at Fisko Health. Mr. Zell did so believing that Dr. Shore was a physiotherapist, though he later discovered that he was a chiropractor. Nevertheless, the treatments that Mr. Zell received from Dr. Shore were in the nature of physiotherapy. He attended at Dr. Shore's offices for more than a month. He was taught various exercises and stretches that he first did at Dr. Shore's offices and which he thereafter continued to do at his home. He testified that these exercises and activities did not assist him and, in fact, that he got worse over the course of the summer in 2014. I accept Mr. Zell's evidence in relation to these various issues. He appears to have communicated the same things to Dr. Callier several years ago.
- [65] Thereafter Mr. Zell began to go to massage therapy and to see a chiropractor relatively regularly. He continues to do so to this day. He accepts that those treatments do not resolve his difficulties but says, and I accept, that they provide him with temporary relief. It is relevant both that the Defendants do not question any of Mr. Zell's special expenses for these treatments and that Dr. Callier, in April 2017, expressly recommended that Mr. Zell continue with these massage treatments. Dr. Salvian similarly observed that while massage treatments are not "curative" they are often "beneficial".
- [66] The Defendants, however, emphasize that each of Drs. Babbage, Krassioukov, and Salvian have stressed the importance of physical exercise and of focused exercises for particular physical difficulties. Indeed, such exercises and training is a component of the Plaintiff's cost of future care claim. The Defendants asked that I infer from these care recommendations that if Mr. Zell had adhered to a focused training regime he would be in a different position today and that he would have reduced his losses.
- [67] I do not consider, however, that a careful examination of the evidence supports such an inference. Furthermore, Mr. Zell appears to have been given mixed advice on the issue. Thus, Dr. Callier's assessment notes state: "We did discuss that of working (sic) with a trainer but Jeff is very physically active and with his shoulders they are not in an excessively protracted position and I do not think this will prove significantly beneficial to the management of his systems at this time."
- [68] When Dr. Salvian was cross-examined in relation to a particular category of exercises that he had recommended, he observed that these exercises were helpful for some but not for others particularly if such individuals were already physically active. In such circumstances he considered that the exercises would "probably not be very beneficial". Dr. Salvian did, however, recommend various stretches to Mr. Zell. Mr. Zell confirmed that he did those stretches, at least for a period of time. Ms. Walker also confirmed that Mr. Zell did various stretches at various points in time.

- [69] Mr. Pakulak, in his cross-examination, commented that though exercise is "important", an exercise program can either improve a person's symptoms or, in some cases, aggravate and make those symptoms worse. People respond to exercise differently. It is hard to know in advance how someone will respond. He accepted that if someone's exercises aggravate their injuries they ought not to simply quit and they likely ought to try different exercises.
- [70] Finally, I observed that Dr. Tefler, the orthopedic surgeon who was retained by the Defendants, said nothing in either of his reports about Mr. Zell's failure to undertake and sustain a focused exercise regime and the significance of that failure in terms of his injuries and losses.
- [71] Having regard to the whole of the evidence, I again consider that the Defendants have failed to meet the burden that rests with them and to establish, on the balance of probabilities, that had Mr. Zell maintained a focused exercise and/or stretching regime, his injuries would have abated and his losses would have been diminished.
- [72] The last issue raised by the Defendants, which is similar in nature, is that Mr. Zell should have obtained various trigger point injections to assist with his physical difficulties. This recommendation was made to him by Dr. Callier. Mr. Zell said, however, that Dr. Callier's advice to him was a little bit more nuanced. She indicated that trigger point injections might be helpful but she provided him with no assurance that they would be beneficial. Indeed, she cautioned that such injections might actually exacerbate his difficulties. Mr. Zell said that Dr. Callier and he agreed to defer his receiving trigger point injections for the time being. The Defendants chose not to call Dr. Callier and I accept Mr. Zell's evidence on these issues. Still further, I observe that such trigger point injections do not form any part of the future care recommendations that have been made for Mr. Zell or that underlie his cost of a future care claim. In such circumstances I do not consider the Defendants have established that Mr. Zell's failure to obtain trigger point injections gave rise to any failure on his part to mitigate his losses.

MR. ZELL'S LOSSES

i) Non-Pecuniary Losses

- [73] The purpose of an award of non-pecuniary damages is to provide solace to a plaintiff for such things as pain, suffering, disability, inconvenience, and loss of enjoyment of life. The central principles that govern an award of non-pecuniary damages are set out in *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100. Such awards are intended "to meet the specific circumstances of the individual case": para. 45. A non-exhaustive list of pertinent considerations are described at para. 46 of *Stapley*.

- [74] Mr. Zell is a young man. The injuries he suffered in the Accidents, and the chronic conditions he has developed as a result of those injuries, impact every significant aspect of his life. Though some of his physical difficulties have improved with time, he continues to struggle with consistent pain in his neck and back, with consistent headaches, and with severely disrupted sleep.
- [75] His ability to participate in the recreational activities he enjoyed has been significantly diminished. He no longer rides a motorcycle or an ATV or dirt bike. He is less able to enjoy the outdoors and to hike or hunt. The activities that should give him pleasure instead cause him discomfort and pain.
- [76] His interactions with his wife and daughters also have been affected. While there are other difficulties in his relationship with Ms. Walker, his injuries have caused him to be less intimate with her and to otherwise be more distant from her. His injuries have interfered with his ability to help around their home and with the care of their children. When he comes home from work, his dominant purpose is to rest so that he can again work the next day. He is less able to play with his children. When the family goes on vacation, their activities are limited to sitting by a pool or going for a walk.
- [77] Mr. Zell was, prior to the Accidents, someone who derived significant pleasure from his work. That enjoyment has also been diminished. Instead, Mr. Zell now has significant anxiety about his future and his ability to provide for his family.
- [78] The inability to get restorative sleep causes him to be tired and listless. Because he is tired he is less patient and more prone to becoming angry with his family and others.
- [79] And yet, I consider there is some prospect of improvement in Mr. Zell's status and condition. This is relevant because an award of non-pecuniary damages addresses the losses that Mr. Zell has suffered up to the date of trial as well as the losses that he will suffer into the future.
- [80] I say this for several reasons. First, I consider that with these Reasons and with the benefit of the consistent advice from various physicians, Mr. Zell may change aspects of his behaviours in a way that benefits him. It is this expectation that underlies Mr. Zell's cost of future care claim. For example, Mr. Zell has an aversion to medications, injections or other procedures. Thus, Mr. Zell is unwilling to take any sleep medication. Instead he has, over the last several years, taken to drinking when he comes home to help him relax. Though his object in doing so is not to help him sleep, he acknowledged that when he drank more he sometimes slept better.
- [81] Mr. Zell's drinking is a source of some concern to Ms. Walker and, though not a serious problem, it was noted by number of the physicians who testified. Thus, Mr. Zell has to consider whether a dogged aversion to sleep medication, with the attendant fatigue and anger and other consequences of his disrupted sleep, makes sense. He must further weigh his concern with taking sleep medications with or against the wisdom and dangers of his drinking more than he likely ought to.

- [82] Similarly, Mr. Zell may benefit from the further focused physical training and exercise that he said he would likely be prepared to engage in. Though there are no assurances that this will help him, and though I have said that Mr. Zell's past failure to follow such an exercise regime does not constitute a failure to mitigate on his part, Mr. Zell must recognize that he is receiving consistent advice from multiple experts. He should endeavour to address his physical difficulties with the same focus and motivation that he has applied to growing his business.
- [83] Finally, Mr. Zell's pain symptoms improve when he does less strenuous forms of work. Thus, his symptoms tend to abate in the winter months. Mr. Zell has already, over the last several years, learned to work in a way that helps with aspects of his difficulties. For example, he avoids certain types of gardening work. He has bought a lawnmower that he can ride. I will return to this but there is some prospect that further changes in how Mr. Zell runs his business, or the prospect that he will undertake some other form of employment, will also assist his pain symptoms and improve the quality and enjoyment of his day-to-day life.
- [84] I said at the outset that the parties are in significant agreement on Mr. Zell's non-pecuniary losses. Mr. Zell asserts that a non-pecuniary damage award of \$100,000 to \$110,000 would, in all of the circumstances, be appropriate. The Defendants argue that an award of \$85,000 to \$90,000 would fairly compensate Mr. Zell for his non-pecuniary losses.
- [85] Both counsel provided me with various authorities that supported their respective submissions. On balance I consider that the authorities relied on by counsel for Mr. Zell are more closely aligned with Mr. Zell's general circumstances and with my assessment of his condition and circumstances. Accordingly, I consider that an award of \$105,000 addresses the various relevant factors that are identified in *Stapley* and in the authorities provided to me by counsel, that it properly weighs the evidence I have identified and that it provides Mr. Zell fair compensation for his non-pecuniary losses.

ii) Loss of Earning Capacity

a) The relevant legal and factual framework

[86] Recently, in *Williams v. Sekhon*, 2019 BCSC 1511, I said:

[132] The legal principles that address a loss of earning capacity are well developed. Those principles, in many respects, align in relation to past and future loss of capacity claims. A claim for past loss of earning capacity is based on what a plaintiff would have, not could have, earned but for the injury the plaintiff suffered: *M.B. v. British Columbia*, 2003 SCC 53 at paras. 49-50 and *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. The purpose of the award is to compensate a plaintiff for what he or she lost as a result of the accident: *DeGuzman v. Ge*, 2013 BCSC 1450 at para. 42.

[133] Both awards may be viewed as a loss of income earning capacity: *Ibbitson v. Cooper*, 2010 BCSC 1916 at para. 60, *aff'd* 2012 BCCA 249. Both are often based on hypotheticals. The standard of proof for hypothetical events, past and future, is the same. A "hypothetical

possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation": *Grewal v. Naumann*, 2017 BCCA 158 at para. 48. In both cases, to the extent possible, a court nevertheless looks to numerical signposts or guidance, or to other objective data, to assist with the exercise.

- [87] The evidence that underlies Mr. Zell's past and future loss of capacity claim is overwhelmingly consistent. The Defendants accept that Mr. Zell is an unusually motivated young man who, from a very early age, had a clear sense of what he wanted to do professionally. I have described Mr. Zell's early interest in landscaping and the steps that he took, from a young age, to turn that interest into both a livelihood and a successful business.
- [88] Mr. Zell testified that he developed "five-year plans" even when he was in his teens. One aspect of that early plan had him buying a home. He accomplished that purchase when he was approximately 21 years old. Another component of his plan pertained to the growth of his landscaping business. He pursued that growth with steadfast determination, with hard work, and with real acumen. He also reinvested his earnings into his business to foster its ongoing growth.
- [89] Counsel for Mr. Zell had him track the growth and activities of his business, on an annual basis, from 2010 to the present day. This evidence included the approximate number of clients Mr. Zell had in any given year, the employees he had in those years, the equipment he purchased, and the ongoing evolution of the business. Mr. Zell also tracked, through his income tax returns, the annual revenues and expenses of his business.
- [90] Still further, Mr. Zell's evidence dealt at length with the financial details of his landscaping business. He gave evidence about how many lawns a two-person crew could cut in a day. He gave evidence of what he generally paid his employees and what wages other, larger and more sophisticated landscaping companies, paid their employees. He described the various steps he had taken to make his operation more efficient.
- [91] Ultimately much of this detailed evidence is not, however, directly relevant. This is primarily on account of the legal theory that counsel for the Plaintiff relied on in advancing Mr. Zell's past and future loss of capacity claim.
- [92] There are, however, certain significant pieces of evidence that either explain why counsel for Mr. Zell chose to advance Mr. Zell's loss of capacity claim as he did or that give context to that claim.

- [93] First, the following table tracks the gross earnings of Harbourside from 2012 to 2018:

2011 Gross Profit

\$

47,384.00

2012 Gross Profit

\$

55,482.00

2013 Gross Profit

\$

79,600.00

2014 Gross Profit

\$

102,035.00

2015 Gross Profit

\$

98,990.00

2016 Gross Profit

\$

96,583.00

2017 Gross Profit

\$

103,483.00

2018 Gross Profit

\$

185,072.00

[94] Second, it was clear from Mr. Zell's evidence that notwithstanding his best efforts, he had ongoing problems attracting and keeping qualified employees. This was largely an account of what Mr. Zell described as a "Catch 22". Because of the nature of his landscaping work, which is seasonal and which was not sophisticated in nature, he could only afford to pay his employees \$15 or \$20 per hour. On account of these wages, and the seasonal nature of his work, he could not attract individuals who had landscaping experience. Though he did attract some able and hard-working people, others were quite unreliable. On the other hand, because his workforce was inexperienced and sometimes unreliable, he was unable to pursue and attract larger year-round projects which, in turn, might have attracted better employees who would then stay with him longer.

[95] This difficulty with attracting knowledgeable and reliable employees also impacted Mr. Zell's business plan. That business plan originally had him acquiring different trucks, which would then have two employees in each truck going out to work in different areas. One of these employees would be more knowledgeable and experienced, the other would just cut grass or do basic cleanup work. A truck with two workers, that is busy, can generate \$800 to \$1,200 per day. Though there were times that Mr. Zell had two trucks operating there were also times when Mr. Zell was not able to do so.

[96] Third, Mr. Zell did make some progress in changing the work profile of his business. In particular, he was able to secure all of the landscaping work for a large seniors' strata complex in Ladner called Southpoint. That contract was large enough that it occupied two days of the week for Mr. Zell and for two other employees. The contract also had the benefit of being based on 12 months of work and of providing a steady stream of income through the winter months.

[97] Fourth, Mr. Zell began, as I have said, to do snow clearing and salting work in 2017 and he expanded that aspect of his business in 2018. This side of his business has been particularly lucrative and it is also served to even out his workflow and to again provide him with revenue over the winter months. The significance of this new type of work is apparent from the increase in the revenue that Harbourside generated in 2018 (see para. 93 of these Reasons).

b) Past loss of capacity claim

[98] The theory that is advanced for Mr. Zell's past loss of capacity claim is, on its face, straightforward. Mr. Zell testified that prior to the Accidents, he worked 50 to 60 hours per week of which eight to ten hours were in the nature of administrative work. After the Accidents, he only worked, on average, about 40 hours per week. The difference between these two levels of work is approximately 15 hours per week.

[99] Mr. Zell also testified that when he quoted for work he would base that quote on a rate of \$75 per hour for himself and a lesser figure, of perhaps \$30 per hour, for his employees. It was argued that this total figure of approximately \$105 per hour, based on an eight-hour working day (not including administrative work) generally aligned with the \$800 to \$1,200 per day of revenue that could be expected from an efficient and busy truck.

[100] The \$75 per hour figure that Mr. Zell charged for himself was intended to cover certain variable costs that, his counsel argued, totalled approximately 20% of that figure or about \$15 per hour. The balance of what remained, or about \$60 per hour, was profit for Mr. Zell.

[101] Mr. Zell's counsel then argued that the \$60 per hour figure ought to be multiplied by the approximately 15 fewer hours per week that Mr. Zell worked after the Accidents over the course of the landscaping year, which went from approximately mid-February to mid-November or about 40 weeks. That calculation generated a loss of approximately \$36,000 per year.

- [102] Counsel for Mr. Zell had various reasons why his calculation should not pertain to the 2014, 2015 or 2016 years even though Mr. Zell had asserted in his evidence that he was working less hours during the 2015 and 2016 years. Counsel for Mr. Zell did submit that his general calculation should pertain to the years 2017, 2018, and 2019 (to the date of trial) for a total past loss of capacity claim of approximately \$110,000.
- [103] Before turning to the merits of this theory, it is useful to identify why this theory, rather than a different and more general assessment of Mr. Zell's past loss of capacity was advanced. For example, the Plaintiff could have advanced a theory that was based on some diminished ability on the part of Mr. Zell to grow his business.
- [104] The primary reason the Plaintiff relied on the theory that I have described was on account of the difficulty that Mr. Zell had with attracting and keeping employees who could do the additional work that he might secure. It seems clear that even absent the Accidents, Mr. Zell would have encountered some challenges in growing his business on account of this difficulty in securing a consistent and reliable workforce. Furthermore, though Mr. Zell said that he had given up certain work that he would have done had he not been injured, the evidence established that in some cases, Mr. Zell replaced parts of this foregone work with other work. Ultimately the difficulty with each such theory of loss lies in the lack of an adequate evidential foundation from which any reliable inferences might be drawn, from which calculations might be generated or from which an assessment of loss could be made.
- [105] I consider, however, that the theory advanced on Mr. Zell's behalf also suffers from various difficulties. First, and perhaps most importantly, the calculations advanced on behalf of Mr. Zell are unreasonably aggressive and do not align with the evidence. Though Mr. Zell may well have worked 50 to 60 hours on some weeks prior to the Accidents, he could not have done so consistently.
- [106] Even if Mr. Zell worked alone in the years prior to the Accidents, and he generally did not, the gross revenues that Mr. Zell would have generated, based on the calculations his counsel advanced, do not align with the revenues that Harbourside's business actually generated. For example, the \$75 per hour figure, which is a gross number, that Mr. Zell charged for his work multiplied by a 45-hour work week (55 hours per week less ten hours for administrative work) multiplied by a 40-week working year should generate gross revenues of \$135,000 per year. If Mr. Zell had others working with him between 2010 and 2013, and at times he did, that \$135,000 figure would be still larger.
- [107] A comparison with the actual revenues that Mr. Zell generated in the years from 2011 to 2013, again found at para. 93 of these Reasons, makes clear that the calculations that were advanced by the Plaintiff in respect of this head of loss are not sustainable.
- [108] There are other practical considerations that are relevant. For example, the calculation that is advanced on behalf of Mr. Zell pre-supposes that Mr. Zell would, but for the Accidents, have worked an uninterrupted nine-hour day. This does not align with the evidence at trial or with common sense. Absent being able to work in one location without interruption, and

the Southpoint work that Mr. Zell obtained in 2017 is an example of such work, it would have been necessary for Mr. Zell and his crews to travel from residence to residence. Though Mr. Zell said that he tried to line up his work so that the various residences he worked at were proximate to each other, it is inevitable that some time would be lost as he moved from worksite to worksite. Similarly, Mr. Zell worked in various municipalities. It would have been necessary for him to drive to and from those municipalities. Still further, the calculations advanced on Mr. Zell's behalf pre-suppose a full 45-hour working week from mid-February to mid-November. Aspects of his work would ramp up at the beginning of the year and other aspects would wind down at the end of the year. At times in his evidence, Mr. Zell said that his work would begin to wind down in October. There was some evidence that the summer of 2017 was particularly dry and that there was less landscaping work that year.

[109] All such considerations would erode from the general calculation that was advanced for Mr. Zell and that was based on an expectation or assumption of uninterrupted and consistent work over a precise period of time.

[110] Ultimately, however, a claim for past loss of earning capacity is an assessment. It need not be advanced with mathematical precision. There is no doubt that Mr. Zell was unable to work in the years from 2015 onwards as much as he would have liked to. There is similarly no doubt that there were many days when Mr. Zell left work by noon or by 1:00 p.m. and when there was other work that he might have done or generated. It is also clear, based on the history of the revenues that he generated from 2011 to 2018 (found at para. 93 of these Reasons), that the growth in his business effectively stalled in 2015 or at the time of the Second Accident. The increase in revenue that was created in 2018 is a product of the snow removal and salting work that Mr. Zell added to his work profile.

[111] Based on the foregoing evidence, and the various mathematical benchmarks that I have referred to, I consider that an award of \$70,000 fairly compensates Mr. Zell for his loss of past earning capacity. I am advised by counsel that they will undertake the necessary tax calculations that are relevant to this award.

c) Future loss of earning capacity

[112] Because of Mr. Zell's relatively young age, at the time of the Accidents and at present, aspects of assessing his future loss of earning capacity claim are more difficult. Those difficulties are further complicated by some of the operational difficulties in Mr. Zell's landscaping business that curtailed his efforts to grow his business and that I have described.

[113] In *Rosvold v. Dunlop*, 2001 BCCA 1, the Court provided useful guidance on the considerations that govern the assessment of a loss of future earning capacity claim:

- [8] The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Parypa v. Wickware* (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.
- [9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.
- [10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis*, [1994] B.C.J. No. 2128 (S.C.) (Q.L.) at para. 121, *aff'd* [1997] B.C.J. No. 2178 (C.A.) (Q.L.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware*, *supra*, at para. 31; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 126 (C.A.); and *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) per Finch J. They include:
- [1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
 - [2] whether the plaintiff is less marketable or attractive as an employee to potential employers;
 - [3] whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 - [4] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [114] Some aspects of the evidence that relates to the assessment of Mr. Zell's future loss of capacity claim are straightforward. Mr. Zell was clearly injured in the Accidents. Certain injuries, and in particular, the ongoing pain and loss of mobility in his neck and back are directly relevant. So too, though to a lesser extent, is the pain or numbness or tingling in his arms and hands. Each of these difficulties is directly relevant to the work that Mr. Zell does.
- [115] He described these various difficulties as did Mr. Harris, who has worked with him for several years, and Ms. Walker, who regularly visits him at his work sites. Mr. Zell is limited in his ability to bend over and to reach overhead. Holding heavy equipment, particularly if

it vibrates, affects his shoulders, back, and hands. These limitations impact on his ability to clean garden beds or to do general clean-up work or to trim hedges. Accordingly Mr. Zell has largely given up doing such work and will often not bid on such work if it is offered to him. It is relevant that each of these limitations aligned directly with the functional capacity evaluation that was undertaken by Mr. Pakulak and that I have earlier described.

- [116] Furthermore, many of Mr. Zell's day-to-day work activities exacerbate his physical difficulties. Thus, his pain symptoms tend to abate in the winter and are more acute during the landscaping year. It is for this reason that he has, for the last several years, taking to cutting his day short and coming home to rest.
- [117] These various realities directly engage the various considerations that an impairment of earning capacity, as a capital asset, raise and that were summarized by the Court of Appeal in Rosvold at para. 10.
- [118] Relying on projections, based on past earnings, provides some guidance in this case but such an analysis suffers from many of the frailties I have described. Counsel for Mr. Zell sought, in relation to this head of loss, to rely on the same legal theory and on the same figures as he did for Mr. Zell's past loss of capacity claim. Specifically, he argued that Mr. Zell was now able to work about 15 hours a week less, for about 40 weeks of the year and that he would have generated about \$60 per hour for each such lost hour.
- [119] In the case of this head of loss counsel sought, using the report from an economist, and relying on the economic multipliers in that report, to crystallize Mr. Zell's claim. In addition, the claim that was advanced, for approximately \$790,000, was premised on Mr. Zell working until he was 67 years old.
- [120] I consider that the Plaintiff's claim, in this form, suffers from numerous deficiencies. It is based on the same flawed assumptions that I identified in relation to Mr. Zell's past loss of capacity claim. While Mr. Zell may have worked 50 to 60 hours in some weeks into the future, and though he is now limited in his ability to do so, I do not accept that Mr. Zell would, but for the Accidents, have been able to or willing to work this way on a consistent basis.
- [121] First, there are seasonal fluctuations in Mr. Zell's work. There are problems in his getting proper assistance from reliable employees. There is travel time and other forms of downtime. Second, Mr. Zell now has two young children. His partner works three days a week. This necessarily makes working 10 to 12 hours a day, on a consistent basis, difficult. Furthermore, looking to the future, most 50 or 60-year-old men would struggle to do physical work, day in and day out, for 10 to 12 hours a day. All such considerations indicate that the Plaintiff's claim, as advanced, is unrealistic.

- [122] The fact, however, that the Plaintiff's work exacerbates his pain calls into question whether he can continue to do this work, in the same way that he presently does, into the future. This then gives rise to the issue of what options he has. Several considerations and bodies of evidence are pertinent.
- [123] I have said that Mr. Zell's vision for his company was that he would be out with his employees doing whatever work was required. This model may have been preferable to Mr. Zell but it is clear that other models can work as well.
- [124] If Mr. Zell was able to employ dependable work crews he would be able to take on more of a managerial role. This was the model that his first employer worked under. This would require him to develop a different work profile that allowed his employees to work year round and that would allow him to pay them better. The Southpoint strata complex work that Mr. Zell now does is an example of this. Mr. Zell's evidence suggested that there was other similar work that he might pursue. He repeatedly said that there was as much landscaping work available as one could do or want to do. Such work, perhaps in combination with his winter snow clearing and salting work, would round out the work year for his employees.
- [125] Furthermore, Mr. Zell has learned to avoid certain types of work and to take on other work that is easier for him. Doing the landscaping on larger properties, where he can ride a lawnmower, is an example of this. Ultimately the point is that Mr. Zell is, by nature, both resourceful and adaptable. The fact that Mr. Zell enjoys his work, and enjoys being outside, suggests that he will continue to do what he can to make things work for him.
- [126] Mr. Zell also met with Mr. Lawless, a vocational consultant, who then prepared a vocational report. Mr. Zell's overall academic scores are average but, for example, he is in the 87th percentile of high school graduates in sentence comprehension. This aligns with my own impressions. Mr. Zell is well spoken. He is confident. Over the course of the more than two full days that he was on the stand, he created a positive impression. When combined with his level of motivation, his work ethic, and his entrepreneurial instincts, he has much to commend him.
- [127] When Mr. Zell was asked by Mr. Lawless about other potential areas of interest or work, he had relatively little to say. These are not matters that he had fully considered. Some forms of employment that Mr. Zell raised, for example of becoming a heavy-duty mechanic, could also cause Mr. Zell some difficulty.
- [128] One particular form of alternative employment is, however, important. Ms. Walker's father is a longshoreman. He assisted Mr. Zell in making an application to become a longshoreman. That application was accepted together with many other applications. Mr. Zell is now on some sort of waiting list, which means that it will likely be several further years before a position becomes available to him.

- [129] The consistent evidence from Mr. Zell, Ms. Walker, and Mr. Lawless, however, is that such positions are quite lucrative. The base pay is significant. There is also significant opportunity for overtime and the job provides health benefits, a pension, and other advantages. The position was described, more than once, as a "golden ticket".
- [130] The question is whether this is work that Mr. Zell can do. Mr. Lawless suggested that Mr. Zell's injuries or physical difficulties would prevent him from getting a position or from being able to do the work.
- [131] Both Mr. Zell and Ms. Walker gave different evidence. Ms. Walker spoke of her father's experience and of the various types of jobs that are potentially available. To the extent she was told these things by her father, this would be hearsay evidence. It appears, however, that Ms. Walker also worked briefly as a longshoreman. She described different forms of training that are available and that enable workers to do different types of work, some of which are not physically demanding.
- [132] Mr. Zell also said he knew a number of individuals who worked as longshoremen and his evidence suggested that there were different forms of work available that he believed he could do. Again, an aspect of this evidence is hearsay. The reality, however, is that Mr. Zell applied for and that he is now on the waiting list for a position as a longshoreman. It seems unlikely that he would have applied, or that Ms. Walker's father would have assisted him, if there was some basic impediment that would prevent him from eventually securing a position or from being able to do the work.
- [133] Ultimately, apart from the foregoing evidence, there are various other positive and negative contingencies that are relevant. Mr. Zell's work is physical and there is a substantial possibility that aspects of that work would, in any event, have become more difficult for him over time. The economic multipliers that are contained in the economist's report that the Plaintiff relies on pertained to the general male population with a high school education and not to the subset of men who do physical work. I consider it self-evident that this subset of individuals would be more prone to some sort of injury or physical difficulty over time.
- [134] Mr. Lawless's report indicates that Mr. Zell's various difficulties put him at greater risk of future unemployment and underemployment.
- [135] I consider that there is a substantial possibility that with various changes in his business model, Mr. Zell will be able to continue to work as a landscaper. I also consider that there is a substantial possibility that Mr. Zell may transition to working as a longshoreman. In this case he might actually do at least as well, if not better, financially than he would have as a landscaper. There is also a substantial possibility that Mr. Zell himself will, with vocational counselling, turn to some other form of employment.

- [136] I should also deal briefly with the Defendants' submissions in relation to this head of loss. Counsel for the Defendants argued that Mr. Zell should be awarded perhaps two years of loss, at \$36,000 per year (based on Mr. Zell's thesis for his annual loss). Such an award would permit Mr. Zell, for example, to transition to some new employment. I do not consider that such an award adequately addresses the enduring nature of Mr. Zell's difficulties and the impairment of his earning capacity as a capital asset, or that it adequately considers the success that Mr. Zell was enjoying in his business prior to the Accidents, or that it adequately considers the options that remain available to Mr. Zell.
- [137] Instead, I consider that an award of \$300,000 fairly compensates Mr. Zell for his future loss of capacity. This award is both consistent with the relevant legal framework and it weighs the various considerations, including the positive and negative contingencies, that I have identified.

COST OF FUTURE CARE

- [138] The legal principles that govern this head of loss are straightforward. Indeed, both parties relied on the same authorities. An award for future care is based on what is reasonably necessary to promote the mental and physical health of a plaintiff. The relevant authorities established that there must be a medical justification for claims for cost of future care and that those claims must be reasonable: *Milina v. Bartsch*, [1985] B.C.J. No. 2762 (S.C.) at paras. 172, 198, and 211, *aff'd* [1987] B.C.J. No. 1833 (C.A.) and *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
- [139] The following additional principles are relevant:
- i) The court must be satisfied that the plaintiff would, in fact, make use of the particular care item; see *Suthakar v. Humble*, 2016 BCSC 155 at para. 127; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 40 and 54; and *Hans v. Volvo Trucks North America Inc.*, 2018 BCCA 410 at paras. 86-87.
 - ii) The court must be satisfied that the care item is one that was made necessary as a result of the accident or injury in question and that it is not a care item that the plaintiff would, in any event, have procured; *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244; *Shapiro v. Dailey*, 2012 BCCA 128 at paras. 54-55; and *Matheos v. Scott*, 2019 BCSC 1738 at para. 101.
 - iii) The court must be satisfied that there is no significant overlap in the various care items being advanced; *Johal v. Meyede*, 2015 BCSC 1070 at para. 9(f); *Myers v. Gallo*, 2017 BCSC 2291 at para. 231; and *Brodeur v. Provincial Health Services Authority*, 2016 BCSC 968 at para. 356.
- [140] Finally, the relevant authorities have addressed the appropriate standard of proof for a future loss of care claim. In *Suthakar*, Justice Ballance, at para. 126, said:
- [126] The standard of proof for an award of future care is the determination of the real and substantial future possibilities: *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 209.

[141] In Shapiro, Justice Neilson, for the Court, at para. 51, said:

[51] Assessing damages for costs of future care, like other hypothetical future events, has an element of prediction and prophecy. The award should reflect reasonable expectations of what the injured person will require with the aim of placing her in the position she would normally have occupied, but for the accident. The assessment is objective, based on the evidence, and must result in an award that is fair to both parties: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22.

[142] Aspects of the claim for cost of future care that is advanced on behalf of Mr. Zell are straightforward. Each of the care items that is being sought is supported by medical evidence. Each such care item is described and listed, together with a cost and an indication of the frequency with which that care item is required, in the report of Mr. Pakulak.

[143] In this case, the central issue that arises with respect to these care items is whether Mr. Zell will make use of the proposed care item. I have earlier said that Mr. Zell has not, to date, addressed his various difficulties in a particularly focused way. Furthermore, for example, he has not considered that various physical exercises have, in the past, assisted him. The question therefore becomes whether there is a substantial possibility that he will, in the future, take advantage of the various forms of care that are being proposed for him.

[144] The total of Mr. Zell's cost of future care claim is approximately \$106,000. This amount is based on the relevant multipliers and reflects the present value of the cost of all such items. Approximately \$95,000 of that figure is made up of four separate care items:

- i) A pass to a recreation centre into the future. This cost, over the years, amounts to slightly over \$20,000. This is the expense that I consider that Mr. Zell is least likely to take advantage of. Mr. Zell is engaged in a physically demanding profession and he is, generally speaking, very fit. Though he may well do the exercises that he is provided by a kinesiologist, I do not consider that there is a substantial possibility that Mr. Zell would make use of a gym pass.
- ii) Psychological counselling. The total cost of such counselling exceeds \$30,000. Though I did not accept the whole of the diagnosis that Dr. Babbage advanced on behalf of Mr. Zell, I do consider that Mr. Zell would benefit from some level of counselling. It is not enough for Mr. Zell to continue to try to "tough it out". He requires some assistance in guiding him through the anger that he feels and communicates to others as well as with his anxiety about his future. Mr. Zell also said that he was impressed with Dr. Babbage and that he would seek counselling with Dr. Babbage. While it is not clear that Dr. Babbage would take Mr. Zell on as a patient, the important fact is that Mr. Zell is receptive to counselling with the right person. Accordingly I consider that a significant portion of the amount being sought is reasonable.

iii) A chronic pain management program. The cost of such a program is slightly under \$14,000. Such programs are available publicly but there are waiting lists for them and the breadth of services that they offer is more limited. Mr. Zell indicated some receptiveness to attending at such a clinic and I consider that there is a substantial possibility that he would do so. Accordingly, I would award him some portion of this amount.

iv) Massage therapy. The total amount for massage therapy that is being claimed is approximately \$34,000. Mr. Zell has sought out such therapy in an ongoing and consistent basis. I am satisfied that he will continue to do so and I would award him the whole of this amount.

[145] The cost of the remaining care items is relatively modest though one of them, in particular, is important. I consider that Mr. Zell should and would attend at some vocational counselling. As I said earlier he has not explored his employment options in a considered way and I believe he would benefit from, and that he would take advantage of, some guidance in this respect.

[146] Based on the legal principles that I have identified, the evidence that I have referred to and my assessment of that evidence, I award Mr. Zell \$65,000 on account of his cost of future care claim.

SPECIAL DAMAGES

[147] The Defendants accept the Plaintiff's claim for special damages in the amount of \$8,810 and I award Mr. Zell that amount.

SUMMARY

[148] I have awarded Mr. Zell the following amounts in respect of the following heads of loss:

Non-pecuniary damages

\$

105,000.00

Loss of past earning capacity

\$

70,000.00

Future loss of earning capacity

\$

300,000.00

Cost of future care

\$

65,000.00

Special damages

\$

8,810.00

TOTAL

\$

548,810.00

[149] I am satisfied that an award of \$548,810 fully and fairly compensates Mr. Zell for his various losses arising from the Accidents.

[150] I also consider the Plaintiff should have the costs of his action. If, however, there are factors that I am unaware of, the parties are free to contact the Registry and fix a date to address the issue of costs more fully.

[151] I wish to commend counsel on the efficient manner in which this trial was conducted.

"Voith J."

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