IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Danroth v. Dufresne,*
2021 BCSC 864

Date: 20210506
Docket: M191041
Registry: New Westminster

Between:

Richard Carl Danroth

Plaintiff

And

Joseph Eloi Dufresne

Defendant

Before: The Honourable Mr. Justice Giaschi

Reasons for Judgment

Counsel for Plaintiff:	D.J. Brown J. Stanley
Counsel for Defendant:	P. Di Tomaso
Place and Date of Trial:	New Westminster, B.C. November 16-20, 2020 and November 23-25, 2020
Place and Date of Judgment:	New Westminster, B.C. May 6, 2021

Contents

Introduction

[1] The plaintiff alleges he suffered injuries in a motorcycle accident that occurred on May 29, 2016 near the intersection of 204th Street and 8th Avenue in the City of Langley. The plaintiff had stopped his motorcycle at a horse crossing. He was struck from behind by the defendant's motorcycle. The defendant admits liability for the accident. The only issues are the damages suffered by the plaintiff.

[2] The plaintiff alleges that as a consequence of the accident he suffers from headaches, neck pain, upper and low back pain, dizziness, tinnitus, sleep problems, depression and anxiety. The plaintiff claims:

a) General Damages;

b) Past and future loss of earning capacity and loss of pension contributions;

c) Special damages;

d) Costs of future care;

e) Tax gross up; and

f) A management fee.

Credibility

[3] Before turning to the evidence and issues, I wish to briefly address the credibility of the plaintiff. The defendant submits that the evidence of the plaintiff should be approached cautiously. More specifically, the defendant submits the plaintiff minimized his pre-accident conditions, exaggerated the force of the collision, exaggerated the nature and effects of his injuries and was not completely forthright to medical professionals.

[4] The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, aff'd 2012 BCCA 296, where it was stated that the overriding consideration is whether the evidence is consistent

with the probabilities affecting the case as a whole and shown to be in existence at the time:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; R. v. S.(R.D.), 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[5] Where there is little objective evidence of a plaintiff's self-reported symptoms, the plaintiff's evidence must be carefully scrutinized, in particular, injuries of subjective complaints: *Karim v. Li*, 2015 BCSC 498 at paras. 86–89; *Dhaliwal v. Greyhound Canada Transportation Corp*., 2015 BCSC 2147 at paras. 280–282, varied on other grounds at 2017 BCCA 260; *Edmonson v. Payer*, 2011 BCSC 118 at paras. 36–37, aff'd 2012 BCCA 114.

[6] If the plaintiff's account of his or her change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49-50.

[7] In my view, some of the submissions of the defendant regarding the credibility of the plaintiff's evidence are well founded. In particular, and as I address more fully below, the plaintiff has minimized his pre-existing conditions and has exaggerated some of the effects of the injuries suffered in the accident. Additionally, he was not always completely forthright with medical professionals regarding his pre-existing medical conditions and his post-accident functional limitations.

Evidence

[8] The plaintiff was 55 years of age at the time of the accident and was 59 at the time of the trial. He is now 60 years of age. He has a limited education. He left high school while in grade 9 and immediately entered the workforce.

Work History

[9] After leaving high school, the plaintiff worked as a farm labourer for three years and then in construction for 4 years. In 1978 he got his class 1 licence to drive trucks. He then drove long haul trucks for 10 years. In 1997 he began working as a cement mixer driver with Lehigh Hanson, also known as Rempel Brothers Concrete ("Lehigh/Rempel"). He continues to be technically employed by Lehigh/Rempel, although he has not worked since February 7, 2019.

[10] The plaintiff described in relative detail the tasks and duties he is required to perform as a cement mixer driver. His duties involved not simply driving a cement mixer but also keeping the truck clean and loading and unloading cement. He described the job as physically demanding with a lot of climbing and heavy lifting. His job also involved breaking apart concrete forms used to manufacture pre-cast interlocking concrete blocks and then re-assembling the forms. The witnesses referred to this work as making "octa-blocks".

[11] Erik Elout, the plaintiff's supervisor, also testified as to the employment duties of the plaintiff. He confirmed that the job is physically demanding with lots of bending, stooping, twisting and heavy lifting. He confirmed that a person must be reasonably fit to do the job. He also confirmed that within Lehigh/Rempel there are no part-time positions and no lighter duty jobs with the exception of a dispatcher, which is a non-union position.

[12] Mr. Elout also testified that he had always been satisfied with the plaintiff's job performance. This included the period from the date of the accident until February 2019.

[13] I accept the evidence of the plaintiff, as confirmed by Mr. Elout, that his job at Lehigh/Rempel was very physically demanding requiring climbing, bending, stooping, twisting and heavy lifting.

[14] The plaintiff's pre-accident employment income was relatively consistent although with some variations. HisT4 earnings in the three years before the accident were approximately: $50,400 in 2013; $51,900 in 2014; and $61,000 in 2015. In 2016, the year of the accident, his T4 earnings were $32,900. In 2017 and 2018 his T4 earnings were $39,300 and 63,400 respectively.

Pre-accident Medical History and Condition

[15] The plaintiff's pre-accident medical condition was challenged. The plaintiff testified to having been involved in a prior motor vehicle accident in 2013 and to having had orthoscopic surgery on both knees to remove cartilage in 2011. He further testified that prior to the accident he had gout and kidney stones, which had been corrected with dietary changes and there was evidence that he suffered from hypertension.

[16] In respect of orthoscopic surgery on his knees, the plaintiff testified that this was to remove cartilage and that his knees were "pretty good" after the surgery. However, he also testified that to ease the pressure on his knees, he was given a truck with an automatic gear shift and his work schedule was changed from five, eight hour days per week to four, ten hour days per week. He testified that this was so he could have three days to recover between work shifts.

[17] In respect of the prior motor vehicle accident, the plaintiff testified in chief that he suffered a minor whiplash injury to his neck that required chiropractic treatments. He testified that he was back to normal within a month or so after that accident and that there were no lasting injuries from the accident. However, in cross-examination two reports from his chiropractor, Dr. Palmer, dated February 15 and March 4, 2016 were put to him. In the February 15, 2016 note Dr. Palmer wrote that the plaintiff complained of discomfort at the base of the skull and mid-back associated with driving. The plaintiff admitted this was true. In the March 4, 2016 note Dr. Palmer

recorded that the “MVA case reported settled” and recommended an ongoing maintenance schedule to combat “postural deficit and mitigate pain from work demands”. In cross-examination it was suggested to the plaintiff that he was on an ongoing care plan for the injuries suffered in the 2013 motor vehicle accident. The plaintiff responded that his chiropractic attendances were “just for adjustments”.

[18] In addition to the notes of Dr. Palmer, several other clinical notes were put to the plaintiff in cross-examination suggesting that before the accident he had been experiencing neck and back pain, headaches, and some sleeplessness. The plaintiff acknowledged having neck and back pain before the accident but stated that the pain was due to having done a hard day’s work and that the work demands caused everyone pain.

[19] Between May 30, 2014 and March 4, 2016, the plaintiff attended 14 chiropractic visits. He was treated for neck or cervical pain and headaches.

[20] The medical records also show that before the accident the plaintiff had been prescribed multiple medications including: Tylenol T3, Altace, Colchicine, Hydrocholorothiazide, Tecta, and Voltaren Rapide. The plaintiff also had a CPAP machine for sleep apnea, which Dr. MacInnes notes he used 100% of the time.

[21] Additionally, the defendant, who had been a friend of the plaintiff up to the time of the accident, testified that prior to the accident the plaintiff complained to him of having a bad back and bad knees.

[22] I do not accept the plaintiff’s evidence that the injuries suffered in the earlier motor vehicle accident had completely resolved by the time of the subject accident. Nor do I accept the plaintiff’s evidence that his knees were “pretty good” before the accident. In my view, it is clear that the plaintiff was still experiencing residual neck and back pain and headaches from the earlier accident for which he was seeking periodic treatment. He was also experiencing ongoing problems with his knees. He complained of these issues to medical providers and to the defendant. Most

importantly, these issues required that he adjust his work schedule and limit his driving to a truck with an automatic transmission.

[23] Concerning the sleep issues, I am satisfied that the only sleep problems the plaintiff had before the accident were related to sleep apnea, not ongoing pain and headaches, and that the sleep apnea was addressed by the plaintiff's use of a CPAP machine.

[24] In his examination in chief, the plaintiff also testified that he had never had tinnitus before the accident although he had a slight hearing loss. There is a suggestion in the medical expert reports that the plaintiff suffered some tinnitus before the accident. In particular, Dr. MacInnes referenced a consultation report dated June 5, 2017 by Dr. Abdalkhani, otolaryngologist, in which it was reported "his tinnitus was worsened by the motor vehicle accident". However, as the plaintiff was not cross-examined on any pre-existing tinnitus, I accept his evidence that there was no tinnitus before the accident or that it was minimal.

[25] I find that the plaintiff was not symptom free before the accident. In addition to suffering from gout, kidney stones, hypertension and sleep apnea, all of which were controlled, the plaintiff suffered from the following symptoms or conditions prior to the accident:

a) Occasional neck and back pain for which he was seeking periodic chiropractic treatments;

b) Occasional headaches; and

c) Ongoing knee pain.

[26] I further find that the plaintiff's pre-existing neck and back pain, headaches and knee problems, imposed some limitations on his functioning and his ability to work. In particular, he required a truck with an automatic transmission and a modified work schedule so that he would have three days to recover after four days of working.

Accident of May 29, 2016

[27] On May 29, 2016, the plaintiff and the defendant were riding their respective motorcycles southbound on 204th street. It was a sunny clear day and the road was dry. The plaintiff was in the front and the defendant was behind him. They were both travelling at 50 km per hour, which was the posted speed limit. There is a horse crossing on 204th street which is marked with a traffic sign. As the plaintiff approached the horse crossing he noticed that there were four or five horse about to cross the road. He stopped his motorcycle about 50 feet from the horse crossing to permit the horses to cross and to avoid "spooking" them. He had one foot on the ground and the other on the brake. His hands were on the hand grips. The defendant, who was looking into a field, did not notice that the plaintiff had stopped. The defendant applied his brakes when about six feet from the plaintiff's stopped motorcycle.

[28] The plaintiff testified that he heard a screeching of tires immediately before the collision. He testified that he knew he was going to be hit and "hung on with a death grip". The front tire and fender of the defendant's motorcycle contacted the rear fender and tire of the plaintiff's motorcycle. The plaintiff testified that it was a violent impact. He said his motorcycle "shot forward" by 20 or 30 feet, that his knees went up around his ears and that his body was violently shaken.

[29] The defendant's version of the accident is somewhat different from that of the plaintiff. The defendant testified that he "clipped" the back of the plaintiff's motorcycle, that it was just a tap. He testified that the plaintiff's motorcycle was not pushed forward and that the plaintiff did not move. He specifically testified the plaintiff's feet did not come off the ground. He also testified that he was going approximately 5 to 10 kilometres per hour when the collision occurred. In cross-examination, the defendant admitted that the plaintiff might have been pushed forward in the accident.

[30] Both motorcycles were damaged in the accident but the damages were relatively minor and limited to the fenders. I note the plaintiff suggested there was

additional damage found to his motorcycle when it was disassembled for repair and that the cost of repairs was $2,500 to $3,500 but the repair invoices were not in evidence and he clearly had no personal knowledge of this.

[31] The defendant submits that the accident was not near as severe as the plaintiff testified. The defendant points to the minimal damage caused to the motorcycles and to his own testimony.

[32] I find as a fact that the accident involved a significant impact. It is agreed that the defendant was driving approximately fifty kilometres per hour and that he applied his brakes when he was approximately six feet from the plaintiff. Given the speed and the short stopping distance, the impact would have been significant and much more than the “tap” testified to by the defendant. Further, the defendant’s front tire impacted the rear tire of the plaintiff’s motorcycle, which would account for the minimal damage to the respective motorcycles. I agree that the plaintiff’s descriptions of his motorcycle being shot forward by 20 or 30 feet and of his knees coming up to the level of his ears legs are a bit exaggerated and fanciful but it was nevertheless a fairly significant impact.

[33] The plaintiff testified that following the accident he felt pain in his neck, a burning in his back and a headache coming on. He drove home and, by the time he arrived at his home, he had pain throughout his back and a bad headache. He attended to see his family doctor the next day. He was given medications for pain and muscle spasms and was told to take time off work.

Injuries

[34] The plaintiff testified to the following injuries or symptoms:

a) Headaches - He described the headaches as going from the back of his head around the right side and to the back of the right eye. He stated that the headaches were extreme and constant, although he later stated that the intensity varied according to the degree of aggravation of his neck and back. He said almost any physical activity aggravates the headaches. He

specifically mentioned sitting, standing, walking and lying in one position for too long aggravate the headaches. He takes headache medication as needed, including Tylenol T3;

b) Neck pain - He testified the neck pain was constant but varied in intensity. He testified his neck was stiff and movement was restricted. He said he could not move his neck backwards or side to side too far without pain. He described it as a burning, aching, sharp pain.

c) Lower back pain - He described lower back pain as constant and as a burning and aching sensation;

d) Mid back pain;

e) Upper back pain - He described upper back pain as constant and as aches and burns that radiate down his left arm;

f) Shoulder pain - He described shoulder pain that was connected to his upper back pain;

g) Tinnitus - He described tinnitus as a constant high pitch ringing in his ears, the intensity of which varies, especially with headaches;

h) Sleep problems - He testified to tossing and turning a lot and to getting six to eight hours of broken sleep per night whereas, before the accident, he got a solid eight hours;

i) Dizziness and light headedness - He described that dizziness and light headedness were related to the headaches and caused him to fall down a set of stairs in August 2016. He testified that by the time of the trial he no longer had severe dizziness; and

j) Depression and anxiety - He testified to being always depressed and worried. He testified that he was active before the accident and worked hard but said that he can’t do that now. He described being worried about

> what the future holds for him. He said he did not know how he could look after himself or retire. He testified to having had suicidal thoughts because his future looks bleak.

[35] The plaintiff also testified to gaining weight after the accident. He said that before the accident he weighed approximately 250 pounds whereas at trial his weight was 290 pounds.

[36] I will set out my findings as to the injuries suffered by the plaintiff in the section of these reasons related to causation.

Treatments

[37] The plaintiff has attended for various treatments since the accident. The treatments included chiropractic sessions, physiotherapy, massage therapy, kinesiology and acupuncture. The plaintiff testified that the physiotherapy and massage therapy provide him with short term relief from his symptoms and that the kinesiology treatments kept his symptoms from getting worse. He testified that the chiropractic treatments did not help him and that he stopped such treatments after three or four months. He further testified to receiving needling treatments, trigger point injections and an MRI scan. He testified that the needling and trigger point injections did not help him much.

[38] The plaintiff started seeing a counsellor for his mood issues about one year prior to the trial. He testified that he was not able to see a psychiatrist or psychologist because he could not afford it.

[39] The medications the plaintiff has been prescribed include: pain killers; muscle spasm medications; headache medications; and medications for anxiety and depression.

Effects of the Accident

On Employment

[40] From the date of the accident until May 1, 2017, the plaintiff was off work due to the injuries suffered in the accident. During this time period he received disability benefits from Sun Life.

[41] The plaintiff returned to his employment as a cement truck driver with Lehigh/Rempel on May 1, 2017. He had a graduated return to work over a period of one month by the end of which he was again working four days per week, ten hours per day. He testified that he returned to working full time despite the advice of his doctor that he not do so.

[42] The plaintiff testified that every day at work was torture and that there were some things that he was not able to do. In particular, he testified that he was not able to do the work involved with making the pre-cast interlocking octa-blocks. Nevertheless, he continued working until February 7, 2019, at which point he determined that he simply could not do the work any longer and went back to receiving disability benefits from Sun Life. The plaintiff has not worked since February 7, 2019, although he technically remains an employee of Lehigh/Rempel.

On Other Pursuits

[43] The plaintiff testified that as a result of the accident he has difficulty sitting, standing or walking for long periods. He also has difficulty bending. He can now only lift light objects. He can only kneel with difficulty. He can squat and crouch but, again, with difficulty.

[44] The plaintiff testified that since the accident he is always depressed and is scared of what the future holds for him. He testified that he is not as pleasant as he was, he no longer socializes like he used to and he is not able to go to public functions. He blamed the accident for the ending of his relationship with his girlfriend.

[45] The plaintiff testified to an incident in August of 2016 when he fell down the outside stairs of his home. He testified that when leaving the house he became dizzy which caused him to miss the handrail and fall down the stairs. He was diagnosed with an undisplaced fracture to his foot and was put in a cast which he had to wear for one and a half to two months.

[46] The plaintiff testified that as a result of his injuries he is no longer able to keep his house clean or to do yard work. He testified that he was a neat freak before the accident but that he is now embarrassed at how his house looks. He says he is only able to do small cleaning jobs in increments. He similarly says he is only able to do yard work such as mowing the lawn or raking in small bits at a time. He particularly mentioned that he cannot get down on his hands and knees. He also testified that he was not able to cook as often.

[47] He testified that prior to the accident he did woodwork and craftwork and enjoyed repairing cars and motorcycles. That he engaged in such hobbies is not disputed and is well established by the evidence. He says that he has had to abandon those hobbies since the accident as he is completely unable to do them.

[48] He testified that he is no longer able to ride his motorcycle.

[49] He also testified that he no longer attends car club meetings but he had stopped doing so before the accident.

[50] Parminder Ghatarora, a friend of the plaintiff, also testified as to the effects of the plaintiff's injuries. She testified to having known the plaintiff for 11 years. She testified that before the accident the plaintiff's hobbies included wood working and car repair and detailing, both of which he was very good at. She also testified that the plaintiff kept an immaculate house that was beautifully maintained and that he was very active. She testified that following the accident the plaintiff was not the same person. She said he was not as active and social, had gained weight and was moody. She said that he has also neglected his house and yard. She said the house is not as clean and that he no longer plants flowers in his garden or mows his lawn.

[51] I accept Ms. Ghatarora's evidence as she was not cross-examined. However, it is not clear from her evidence what time frame she was referring to or how often she interacted with the plaintiff after the accident. At best, her evidence establishes that for some period or periods of time the plaintiff was less able to look after his house and garden and was less active and social than he was before the accident.

[52] Also relevant is the evidence of what the plaintiff told the medical experts about his ability to do housework, yard work and recreational pursuits. Drs. Perera, Farraday, MacInnes and Robert record that the plaintiff told them he was able to do housework and yard work but that it took longer as he needed to pace himself. Concerning the plaintiff's motorcycling hobby, Dr. Petrovic records that he was told the plaintiff could no longer ride his motorcycle but Drs. Perera, Faraday and Robert all report the plaintiff told them that he still rode his motorcycle but on shorter trips. In respect of other recreational pursuits: Dr. Petrovic records the plaintiff advising that he was not able to participate in recreational activities; Dr. Faraday records the plaintiff advising that he was able to do woodworking and home renovations to a limited extent; Dr. MacInnes records the plaintiff advising that he was no longer able to work on his car; and Dr. Perera recorded that in August 2020 the plaintiff advised he had completely ceased woodworking and fixing cars and motorcycles.

Surveillance Evidence

[53] Surveillance of the plaintiff was undertaken by the defendant over 20 days during the period from May 24, 2019 to October 20, 2020. There is no evidence before me of the length of time the plaintiff was under surveillance on any particular day. It is agreed, however, that the total surveillance time of the plaintiff was 1 hour 37 minutes, 50 seconds.

[54] A compilation of the video surveillance of the plaintiff was put to the plaintiff in the course of his cross-examination. The video shows the plaintiff driving, going for coffee, and meeting and laughing with friends. He is seen getting into and out of his car, standing and sitting, all without apparent discomfort. Most importantly, a significant section of the video is of the plaintiff putting up Christmas decorations on

December 6, 2019. In this video the plaintiff is repeatedly seen bending and squatting, leaning and stretching, kneeling and standing, stepping on to and off of ledges and straddling bushes. He does these things repeatedly with no hesitation or awkwardness and without any pain related behaviours whatsoever.

[55] The plaintiff agreed in his cross-examination that the surveillance video showed him repeatedly bending, kneeling and straddling things but did not agree that he was not in “stress”. He testified that he was not extending himself or putting strain on himself. He also testified that he paid for what he did the next day.

[56] In my view, the surveillance video of the plaintiff is a particularly important piece of evidence in two respects. First, it shows the plaintiff is capable of performing lighter tasks, even tasks that involve kneeling, bending, stooping and stretching. Second, it shows the plaintiff is more sociable than he testified to.

[57] I find that the surveillance video undermines the plaintiff’s evidence that he has difficulty bending, kneeling, squatting and crouching. He exhibited no such difficulties in the video. It further undermines his evidence of the difficulties associated with doing housework, yard work, woodworking, craft work and car and motorcycle repair. These tasks mostly involve lighter duty work of the sort he is seen doing in the video. Accordingly, I find that the plaintiff has exaggerated the functional limitations that his injuries have imposed on him.

[58] However, the surveillance video does not undermine the plaintiff’s evidence in relation to his inability to carry out his duties at Lehigh/Rempel. His work there was much more physically demanding than anything he is shown doing in the surveillance video.

Plaintiff’s Medical Experts

Dr. Sean Petrovic

[59] Dr. Sean Petrovic treated the plaintiff at various times and was qualified as an expert in general medicine. He prepared a report dated June 30, 2019 and testified at the trial.

[60] Dr. Petrovic saw the plaintiff the day after the accident, on May 30, 2016. He also saw the plaintiff on October 19, 2018 and June 4, 11 and 26, 2019. Dr. Petrovic was not the plaintiff's usual doctor. Rather, the plaintiff was a patient of Dr. Toma Timothy who worked in the same clinic. Dr. Petrovic explained that, at his clinic, it is not unusual to see patients of other doctors.

[61] During the visit on May 30, 2016, the plaintiff complained of headaches, neck pain, and lower back pain. Dr. Petrovic noted a severely restricted range of motion to the cervical spine, limited by pain and muscle spasm, and a full range of motion in the lumbar spine with pain elicited on forward flexion. He prescribed a muscle relaxant and anti-inflammatory medications and recommended physiotherapy.

[62] Dr. Petrovic did not see the plaintiff again until October 19, 2018. In the interim, the plaintiff was seen by other doctors at his clinic on various dates in 2016, 2017, and 2018. Dr. Petrovic's report summarizes the various visits. At the visit on October 19, 2018, the plaintiff again complained of headaches, neck pain and upper and lower back pain. Dr. Petrovic noted that the plaintiff was overweight and deconditioned. He found generalized palpatory tenderness throughout the spine. He gave referrals for physiotherapy and massage therapy.

[63] Dr. Petrovic saw the plaintiff again on June 4, 11, and 26, 2019. The previous complaints remained the same with the addition of bilateral leg radicular symptoms. The plaintiff also complained of difficulties sitting and driving, performing house and yard work, and entering or exiting his car. In addition, the plaintiff stated he was unable to ride his motorcycle or to participate in recreational activities. The plaintiff remained overweight and deconditioned. On examination, Dr. Petrovic found that there was a severely restricted range of motion to the cervical spine. He recommended continued massage and physiotherapy and further recommended an active rehabilitation program under a kinesiologist.

[64] On June 26, 2019, Dr. Petrovic stated that the symptoms now included anxiety, depressed mood and sleep disturbance.

[65] Dr. Petrovic opines that, as a direct result of the accident, the plaintiff suffered myofascial strain type injuries to his cervical, dorsal and lumbar spines with resulting tension headaches. He further opined that the plaintiff also developed emotional and psychological injuries and sleep disturbance which, in his opinion, met the DSM V criteria of a major depressive disorder. As well, he opined the plaintiff suffered from chronic pain syndrome.

[66] Dr. Petrovic stated:

a) The plaintiff was completely unemployable as a cement truck driver from May 29, 2016 to May 2017 and noted that the plaintiff's return to work after May 2017 was a struggle.

b) The injuries significantly impaired his activities of daily living including housework, yard work, carrying groceries, prolonged sitting, walking and driving and entering or exiting his vehicle; and

c) The psychological stress negatively affected his personal relationships.

[67] Dr. Petrovic attributed the cause of the plaintiff's injuries to the motorcycle accident. He stated both the mechanism of the injury, sudden acceleration/deceleration forces, and the timeline supported the motorcycle accident being the cause.

[68] Dr. Petrovic opined that the plaintiff's short term prognosis (less than 12 months) was poor and he predicted a protracted and difficult recovery. His longer term prognosis was uncertain. He recommended an MRI, a further year of physiotherapy and massage therapy on a bi-weekly basis, ongoing anti-inflammatory, muscle relaxant and sedatory medications for twelve months, and anti-depressant medication for one to two years. He further recommended cognitive behavioural therapy counselling and a one year gym program under a kinesiologist.

[69] In cross-examination Dr. Petrovic readily acknowledged that he had only seen the plaintiff on a limited number of occasions and that he had relied on the clinical

notes of other doctors. He further acknowledged that his opinion that the plaintiff had no pre-existing medical problems was based on what the plaintiff had told him. He specifically acknowledged that he had not consulted any medical records before April 2016. Concerning the plaintiff's employability, he testified in cross-examination that this was based on the opinions of other doctors.

[70] I have difficulty with several aspects of Dr. Petrovic's opinions. First, he assumed, based on what the plaintiff told him, that the plaintiff had no pre-existing medical issues. This was not accurate as the plaintiff did have pre-existing conditions. This assumption undermines Dr. Petrovic's opinions as to the cause of the plaintiff's injuries. Second, his opinion that the injuries significantly impaired the plaintiff's activities of daily living is similarly based on what the plaintiff told him. However, I have found the level of impairment has been exaggerated by the plaintiff. Finally, Dr. Petrovic is not a psychiatrist and I give limited weight to his opinions concerning the plaintiff suffering from a major depressive disorder or chronic pain syndrome.

Dr. Trent Faraday

[71] Dr. Faraday conducted an independent medical assessment of the plaintiff on July 10, 2019, prepared a report dated August 28, 2019 and testified at the trial. He was qualified as an expert in general medicine with a practice focusing on the treatment and management of musculoskeletal injuries.

[72] Dr. Faraday noted in his report that the plaintiff had pre-existing knee pain due to arthritis and gout. He also noted that the plaintiff's chiropractic records indicated he had suffered from pre-existing headaches and neck and upper back pain. Dr. Faraday was told by the plaintiff that these related to a mild whiplash injury suffered in a 2014 motor vehicle accident and that he had recovered from these injuries prior to 2016.

[73] The plaintiff's chief complaints to Dr. Faraday were: constant headaches; neck, upper back, lower back and mid back pain on a daily basis; tinnitus; depression due to pain, stress over work and a relationship breakup; and, decreased

physical ability. Dr. Faraday reported the plaintiff complained of pain with prolonged driving and was not sure if he could return to work as a truck driver.

[74] Additional complaints included: sleep disruption, fatigue because of poor sleep, depressed mood, poor concentration/memory, and decreased intimacy.

[75] Dr. Faraday records that the plaintiff told him that since the accident: he could only ride his motorcycle short distances; he has not been able to resume camping; he is still able to cook and clean but at a slower pace; he is able to do yard work but must spread it out; and, is able to do woodworking and home renovations but to a limited extent.

[76] Dr. Faraday's diagnosis was that the plaintiff had sustained the following injuries in the accident, none of which were due to the pre-existing arthritis:

a) musculoligamentous injuries to the neck, upper back and lower back, all with ongoing pain symptoms;

b) cervicogenic headaches with ongoing pain;

c) tinnitus; and

d) depressive symptoms.

[77] Dr. Faraday's prognosis was that the pain was likely to be persistent as was the tinnitus. Concerning the depressive symptoms, he was of the opinion that those symptoms had not been fully treated and that there was still the possibility of improvement. He was also of the view that the plaintiff would not develop later complications, would not require surgery and was not at risk for further injury.

[78] Concerning the plaintiff's employability, Dr. Faraday opined that the plaintiff was likely not able to return to his pre-accident work but was able to perform light to medium duty work tasks on a full time basis with limitations.

[79] Concerning further treatments, Dr. Faraday suggested that an occipital nerve block for headaches be considered and, if not successful, that a trial of botox injections be undertaken. He further suggested that the plaintiff be assessed by a psychologist and obtain psychological counselling. He recommended the plaintiff reduce his reliance on physiotherapy and massage therapy over the next three months and rely on techniques to self manage his pain. He recommended the plaintiff continue with a kinesiologist in an active exercise program until he can independently manage an exercise program. Finally, he recommended a vocational rehabilitation assessment be undertaken.

[80] Dr. Faraday concluded by noting the plaintiff could manage house work and yard work without assistance but stated that he would require assistance with home maintenance and renovations.

[81] There are several difficulties with Dr. Faraday's opinions. First, he appears to have accepted the plaintiff's statement that the symptoms from the 2014 accident had fully resolved by 2016, which I have found was not the case. Second, although aware of pre-existing knee problems, he does not analyze or consider what impact this problem had on the plaintiff's current limitations. Third, although he recognized that on testing the plaintiff tended to underestimate his physical abilities, he does not appear to have taken this into account in his assessment of the plaintiff's ability to work or do daily tasks.

[82] Given the above noted difficulties, I accept Dr. Faraday's opinions only to the extent that: the plaintiff suffered soft tissue injuries to the neck and back in the motorcycle accident; as a consequence of those injuries, the plaintiff suffers from ongoing pain, cervicogenic headaches, tinnitus and depression; and, because of the injuries the plaintiff was likely not able to return to his pre-accident work.

Dr. Aaron MacInnes

[83] Dr. MacInnes conducted an independent medical assessment of the plaintiff on July 25, 2019, prepared a report dated August 15, 2019 and testified at the trial. He was recognized as an expert in pain management and treatment.

[84] Dr. MacInnes reported the plaintiff's complaints as pain, sleep disruption, mood symptoms that developed over the years, not being able to work around his house, not being able to manage his employment duties, constant headaches, dizziness which had improved since the accident, constant aching and tightness in the neck, aching, tightness and burning sensation in the mid-back, constant aching and tightness in the low-back, and tinnitus. He noted that the headaches, neck and back symptoms were aggravated by activity.

[85] On examination Dr. MacInnes noted:

a) Range of motion of cervical spine and thoracic spine was within normal limits but pain was reported;

b) Range of motion of lumbar spine was within normal limits except for flexion and extension which were reduced and pain was reported;

c) Range of motion in bilateral shoulder and hips was within normal limits;

d) On palpation, tenderness was revealed in the midline and paravertebral C2-T8 and L4-S1 regions;

e) Tenderness was reported on palpation of the bilateral cervical, thoracic and lumbar paraspinous muscles; and

f) Spurlings and straight leg tests were negative bilaterally.

[86] A pain assessment test was administered which indicated moderate to high levels of self reported disability, moderate to high levels of depression, high levels of fear avoidance behaviour, moderate levels of pain catastrophizing, moderate to high levels of anxiety, and high levels of perceived injustice. He stated "central mechanisms may be a contributing factor to his pain symptomology and that neuropathic mechanisms were not likely contributing to … pain symptoms".

[87] In summary, Dr. MacInnes' diagnosis was that the plaintiff suffered from:

a) Chronic whiplash-associated disorder;

b) Chronic mechanical spine pain;

c) Cervicogenic headache;

d) Mood and anxiety symptoms; and

e) Sleep disturbance.

[88] Dr. MacInnes' opinion was that the plaintiff had suffered soft tissue injuries in the May 29, 2016 accident and that these soft tissue injuries were the cause of his symptoms.

[89] Concerning prognosis, Dr. MacInnes was of the opinion that the symptoms were unlikely to resolve and that the plaintiff would have daily ongoing pain symptoms, and headaches. He thought it very likely that there would be flares of pain in the future, which he clarified in his testimony meant the plaintiff would have periods of increased pain and periods of decreased pain. Dr. MacInnes was of the view there could be some improvement in the sleep disturbance symptoms if there was improvement and progress with the physical symptoms.

[90] Dr. MacInnes further opined that it was reasonable for the plaintiff to have "transitioned off of work … given his ongoing physical and psychological symptoms". However, with further treatment and assistance, he was of the view that the plaintiff would be able to undertake sedentary to light work.

[91] Dr. MacInnes did not expect the plaintiff to be able to return to his pre-accident recreational activities with the same levels of intensity and duration as before the accident. He also stated he was hopeful the plaintiff would be able to increase his household activities over time but that it was likely the plaintiff would require ongoing assistance with heavier housework.

[92] For further treatment, Dr. MacInnes recommended physical activity and conditioning and multimodal management of pain symptoms. He suggested that the

plaintiff take a pain self management program, undergo treatment by a pain psychologist, participate in an active rehabilitation and exercise program for eight weeks at three sessions per week, and have access to a fitness facility with five sessions per year with a physiotherapist or kinesiologist . He also recommended the plaintiff continue with passive physiotherapy and massage therapy two times per month. Finally, if the plaintiff's limitations continued, he recommended a referral to an interventional pain physician.

[93] In cross-examination, Dr. MacInnes was questioned in relation to his review of the plaintiff's chiropractic records for the period from May 2014 to March 2016 which reported that the visits were for treatment of headaches and pain. He was asked whether these reports were inconsistent with the plaintiff's statement to him denying any neck or back pain before the accident. Dr. MacInnes responded that he typically asks his patients of medical issues they had in the few months immediately before the accident and that based on what the plaintiff had told him he assumed the headaches and pain issues recorded in the chiropractic reports had resolved before the accident. He also testified in cross-examination that he accepted what the plaintiff had told him at face value.

[94] I accept Dr. MacInnes' opinions concerning the injuries suffered by the plaintiff and the effects of those injuries on his ability to work. However, his opinion concerning the plaintiff's ability to do house work and yard work and to enjoy his pre-accident recreational activities is undermined by the fact that the plaintiff was exaggerating his limitations.

Dr. Gihan Perera

[95] Dr. Perera is a physiatrist retained by the plaintiff. He assessed the plaintiff on February 1, 2019 and August 3, 2020 and prepared two reports dated March 7, 2019 and August 21, 2020. He testified at the trial and was subject to cross-examination.

[96] In his first report, Dr. Perera detailed the plaintiff's complaints as: neck pain that increases in severity with physical activity; headaches with associated nausea, dizziness and light and noise sensitivity; back stiffness and pain that is exacerbated

by lifting and prolonged sitting, standing, walking and bending; depressed mood; sleep problems which cause fatigue and cognitive issues such as short-term memory and divided attention.

[97] Concerning the plaintiff's reported functional abilities, Dr. Perera noted that he was told the plaintiff was capable of performing housekeeping and home maintenance duties with pacing and task splitting strategies and that he was capable of riding his motorcycle, although on shorter trips. Dr. Perera also noted that he was told the plaintiff was working 14 hour days, four days per week and experienced increased levels of pain and exhaustion at the end of the work day. It is noteworthy that, in cross-examination, Dr. Perera testified he was unaware the plaintiff had requested accommodations at work before the accident.

[98] On examination, Dr. Perera found the plaintiff to have some restricted cervical and lumbar ranges of motion with muscle spasm and trigger points.

[99] Dr. Perera diagnosed the plaintiff as having: chronic myofascial pain syndrome affecting the paracervical and upper scapular girdle musculature; chronic post-traumatic headaches and dizziness with clinical findings suggestive of occipital neuralgia and migraine features; chronic mechanical low back pain; and chronic pain syndrome with depressive symptomatology.

[100] Dr. Perera opined that the plaintiff's injuries were directly related to the motorcycle accident, placed the plaintiff at a competitive disadvantage in the workplace and rendered him disabled with respect to heavier housekeeping and home maintenance activities.

[101] Dr. Perera's long term prognosis was "guarded". He considered that the plaintiff had reached maximal medical recovery and did not anticipate any substantial improvement in the plaintiff's chronic pain. He also noted that there was a low probability the plaintiff would develop a significant degenerative disc disease as a result of the accident.

[102] Concerning further treatment, Dr. Pererea suggested that the plaintiff might be a candidate for botox injections for treatment of headaches and neck pain. He also suggested that Amitriptyline may be helpful for headaches. He recommended that the plaintiff engage in regular aerobic exercise with the support of a kinesiologist and that he continue with massage therapy on an as needed basis. He further recommended an in home occupational therapy assessment.

[103] Dr. Perera's second report details the changes in the plaintiff's condition since he was first assessed. Specifically, the plaintiff reported that he began experiencing worsening neck pain and paresthesias radiating into the left posterior arm. MRIs dated April 12 and June 28, 2019 also revealed a disc protrusion at C5-6 and multilevel lumbar spondylosis maximal at L4/5 with compression of the exiting right L4 nerve root. With respect to migraine headaches, it was noted that the frequency of those had reduced to one per month. The plaintiff's other complaints remained relatively unchanged.

[104] During his second assessment, the plaintiff reported to Dr. Perera that he continued to manage his housekeeping chores, with pacing and continued to mow his lawn, although it took much longer. He also continued to ride his motorcycle on a limited basis. However, the plaintiff reported that he had completely ceased his hobbies of wood working and fixing cars and motorcycles because of ongoing pain.

[105] On physical examination Dr. Perera noted that the plaintiff's weight had increased from 270 to 280 pounds. His cervical range of motion was unchanged but there was some increased limitation when rotating to the left. The plaintiff had a positive Spurling's test on the left producing paresthesias down the left upper extremity.

[106] In the second report Dr. Perera opined that as a result of the motorcycle accident the plaintiff sustained musculoligamentous strain/sprain (soft tissue) injuries to his cervical, thoracic and lumbosacral spine. He further stated that the plaintiff continued to suffer from: chronic myofascial neck pain; chronic post-traumatic cervicogenci/myofascial headaches with associated nausea, dizziness and light and

noise sensitivity; and, chronic mechanical mid to low back pain. He noted that the plaintiff complained of hopelessness, anxiety, irritability, low mood, sleep impairment, cognitive problems and daytime fatigue. He stated that it appeared the chronic pain was contributing to a mood impairment.

[107] Concerning the recently reported left upper extremity paresthesias and the MRI results, Dr. Perera opined that these were likely due to age related degenerative changes.

[108] Dr. Perera further opined that the plaintiff's injuries and symptoms will continue to impact the plaintiff's housekeeping, recreational and vocational activities by requiring him to engage in proper pacing and task splitting strategies. He stated that the plaintiff was partially disabled in respect of such activities.

[109] Dr. Perera further opined that, given the plaintiff's age, education, training and ongoing disability, it was unlikely the plaintiff would return to competitive employment.

[110] The ongoing treatment recommendations made by Dr. Perera were: participation in an active rehabilitation program; ongoing physiotherapy and kinesiology; and ongoing massage therapy. He additionally recommended that the plaintiff receive psychological treatment and attend at a chronic pain clinic. Finally, he believed the plaintiff would require housekeeping and yard maintenance services.

[111] I accept Dr. Perera's opinions that the plaintiff suffered soft tissue injuries to the neck and back in the motorcycle accident and developed chronic pain and headaches as a consequence. His opinions in this regard were relatively unchallenged during his cross-examination. I also accept his opinion that it was unlikely the plaintiff would return to competitive employment, although I note that he was misled by the plaintiff as to the number of hours worked per day and he was not told of the accommodations that had been given by the plaintiff's employer.

[112] I have some difficulty with Dr. Perera's opinions concerning the functional limitations associated with the injuries sustained in the accident and with his prognosis. My reservations are because:

a) First, he assumed the plaintiff was healthy before the accident whereas the plaintiff was clearly not. He was aware the plaintiff had several pre-existing health conditions, namely, hypertension, sleep apnea, bad knees and gout, but he failed to address the implications of these pre-existing conditions in his reports;

b) Second, he assumed the plaintiff's injuries from the prior motor vehicle accident had fully resolved, whereas they had not; and

c) Third, he found that the plaintiff had age related degenerative changes to the spine but did not address how those changes affected the plaintiff's functional abilities.

Jo-Anne Chisholm (Costs of Future Care)

[113] Jo-Anne Chisholm was recognized as an expert in occupational therapy. She was retained to evaluate the plaintiff's functional abilities and to provide a costs of future care assessment. She assessed the plaintiff on September 6, 2019 at his home and prepared a report dated October 3, 2019. She testified at the trial.

[114] I will address Ms. Chisholm's reports and evidence in two parts. Here I deal her assessment of the plaintiff's functional abilities. I will address her opinions concerning the costs of future care in the section of these Reasons entitled Costs of Future Care.

[115] Ms. Chisholm found that the plaintiff participated in her functional tests with "high effort" and concluded that the testing results were accurate. However, she also opined that his perceptions of his abilities were generally less than his actual functional limitations. In other words, he thought he was more disabled than the testing showed him to be.

[116] She noted that the plaintiff's reports of pain were consistent and rose steadily throughout the day of testing. She noted that after vacuuming, and following five hours of testing, the plaintiff asked to stop, sat completely still with his back supported, closed his eyes and appeared close to tears.

[117] As a result of her testing she found the plaintiff:

a) had decreased active range of motion with pain;

b) was deconditioned and unable to complete a fitness test. He was short of breath after three minutes of a step test and his heart rate rose to 130, close to his maximum of 138;

c) had normal grip strength and used his hands with normal unilateral and bilateral dexterity;

d) had limitations in above shoulder reaching and repetitive reaching due to neck and upper back pain. Otherwise, his functional reach was within normal limits;

e) had balance limitations but could walk indoors without difficulty and walked outdoors on the sidewalk and roadway for ten minutes with an even stride and no asymmetry although with pain reported;

f) appeared to kneel to avoid bending down but his ability to squat and crouch was not tested due to symptom aggravation;

g) displayed no restrictions for sitting so long as he could shift occasionally; and

h) had mild restrictions for dynamic standing, moderate restrictions for stooping and moderate to severe restrictions for sustained neck positioning.

[118] Ms. Chisholm opined that the plaintiff was not able to return to his work. In reaching this conclusion she noted that he was unsuccessful in his previous attempt to return to work “despite significantly reduced schedule and duties”. Her statements that he was unsuccessful in his previous attempt to return to work and that this attempt was accompanied with significantly reduced schedule and duties, is not accurate. He was able to return to work successfully and worked for 21 months. Accordingly, I find her opinion as to the plaintiff’s ability to carry out his work duties to be significantly undermined and I do not rely on it.

[119] She also opined that the plaintiff would not be able to return to work as a long-haul truck driver. It was her view that he did not meet the positional and forward reaching demands of a truck driver and would not be able to perform the loading and vehicle maintenance required of a truck driver.

[120] Concerning the impact of the plaintiff’s disabilities on his daily living, Ms. Chisholm opined:

a) He is no longer able to go on long multi-day motorcycle rides;

b) He now sees friends only in the evenings;

c) He no longer goes for walks around the trailer park;

d) He has poor sleep hygiene;

e) He keeps his home tidy and does his own laundry but cannot do serious cleaning such as scrubbing floors or cleaning carpets;

f) He no longer does any gardening but can mow his lawn with some pain; and

g) He can no longer do routine home maintenance such as gutters, pressure washing, roof cleaning and everyday repairs.

[121] I do not accept Ms. Chisholm's opinions relating to the impacts of the plaintiff's disabilities on his daily living. Her opinions suffer from the same problem as those of the other medical experts, namely, she relied on what the plaintiff told her during the interview or reported to her during the assessment. However, the plaintiff has repeatedly exaggerated his level of impairment. I note in particular that for many of the movements/tasks she recorded as presenting problems for the plaintiff (such as reaching, kneeling, stooping, trunk flexion and rotation, retrieving items from the cupboard or refrigerator and cleaning the refrigerator), the plaintiff performed similar movements/tasks in the surveillance video without apparent difficulty or pain. I also note that Ms. Chisholm identified that the plaintiff perceived his abilities to be less than his actual functional limitations, or that he thought he was more disabled than was.

Defendant's Medical Expert

Dr. Paul F. Robert

[122] Dr. Robert is an orthopaedic surgeon who assessed the plaintiff on September 25, 2019 and prepared a report, on behalf of the defendant, dated October 17, 2019. It was intended that he would testify at the trial and he did commence his testimony via video link, however, because of technical difficulties his evidence was interrupted. The parties then agreed to admit his report without further *viva voce* evidence but subject to the following admissions:

> 1) The Plaintiff had a soft tissue injury as a result of the motor vehicle accident.
>
> 2) 10% of patients who have a soft tissue injury like the Plaintiff go on to have chronic pain.
>
> 3) Chronic pain can exist without objective findings.
>
> 4) Headaches, depression, concentration problems and tinnitus commonly occur in those who have soft tissue injuries like the Plaintiff.
>
> 5) Pain is a subjective experience for the person who has it.
>
> 6) Pain can be disabling without there being objective signs.
>
> 7) Prolonged exposure to pain can create hypersensitivity.
>
> 8) Pain can impact mood and trigger depression which in turn can increase the perception and sensation of pain.

> 9) If the court finds that the Plaintiff did not have the pain he presents with now before the accident, and that it arose after the accident and has persisted since the accident, then the accident would probably be a cause of the pain along with pre-existing disc disease.
>
> 10) The Plaintiff's pain could be subjectively disabling to him.

[123] According to Dr. Robert's report, the plaintiff complained of constant neck and back pain, headaches and tinnitus. The plaintiff further told Dr. Robert:

a) that he was capable of doing his personal care, household chores and yard work but had to do such tasks slowly;

b) that his recreational interests such as motorcycling had been reduced; and

c) that he had to stop working in February 2019 due to increasing pain.

[124] Concerning his past medical history, the plaintiff advised Dr. Robert of his whiplash injury in the previous motor vehicle accident but stated that his neck and back symptoms had fully resolved. The plaintiff additionally advised Dr. Robert of having arthroscopic surgery to both knees and of having a history of hypertension, gout and renal stones.

[125] On examination Dr. Robert found that there was a limited range of motion of the cervical spine with tenderness on tactile stimulation and a positive painful response on simulated axial compression and distraction. The plaintiff had a full range of motion of the upper and lower extremities but straight leg raising resulted in low back pain at 30 degrees bilaterally.

[126] Dr. Robert opined that, based on the plaintiff's physique, there was almost certainly an age related underlying cervical and degenerative disc disease of the lumbar spine. He later in his report stated that there was "suspected" degenerative disc disease. However, he was not able to confirm this as there were no x-rays. He further opined that any soft tissue injury from the motorcycle accident would have long since resolved and was not evident on his examination. He stated that the

plaintiff's complaints could not be confirmed with objective physical findings as the presentation was non-organic in nature.

[127] Dr. Robert was unable to substantiate any ongoing disability and wrote that the plaintiff was capable of performing his pre-accident employment. He had no recommendations to make and his prognosis was that the plaintiff's condition was stable with no residual sequelae as result of the motorcycle accident.

[128] I find Dr. Robert's report and his opinions to be less than compelling, especially in view of the admissions that have been made. His report contains a minimal amount of information. It does not address the plaintiff's complaints of pain, headaches or tinnitus other than to say they are non-organic. His statement that the plaintiff's presentation was non-organic is meaningless given the admissions that there can be chronic pain without objective findings, that chronic pain can be disabling, and that chronic pain can trigger depressive type symptoms.

[129] Accordingly, I reject the opinions of Dr. Robert with the exception of the existence of degenerative disc disease. This suspicion is consistent with and somewhat verified by the evidence of Dr. Perera who testified the plaintiff had a C5 disc protusion that was age related and not trauma induced.

Vocational Rehabilitation Experts

Derek Nordin

[130] Derek Nordin was qualified as an expert in vocational rehabilitation. He conducted a vocational assessment of the plaintiff on October 1, 2019 and prepared a report dated October 21, 2019. He testified at the trial.

[131] Mr. Nordin's opinions were based upon a battery of tests he administered as well as an interview of the plaintiff, and a review of the medical-legal reports of Drs. Perera, Petrovic, Faraday, and MacInnes.

[132] The tests administered by Mr. Nordin were: a test of academic achievement; a questionnaire of vocational interest, called the Career Assessment Inventory; the

Beck anxiety inventory; and the Beck depression inventory. The academic achievement test suggested that the plaintiff was capable of further training but, given his age, Mr. Nordin did not see that as a realistic possibility. The Career Assessment Inventory suggested that the plaintiff had an interest in mechanical/fixing occupations. The plaintiff's responses to the Beck anxiety inventory and the Beck depression inventory indicated the plaintiff's self-reported feelings of anxiety were in the severe range and that his self-reported feelings of depression were in the moderate range.

[133] Mr. Nordin's opinions were as follows:

a) The plaintiff was not competitively employable as a cement truck driver or a block production worker (which is a reference to the manufacturing of octa-blocks) or for other occupations with similar physical demands;

b) That mood issues can, and often do, negatively impact on competitive employment;

c) The plaintiff is only qualified for entry level occupations that accommodate for his symptoms such as cashiers, retail customer service and food counter attendants. However, given the plaintiff's age, limited education and physical limitations, Mr. Nordin did not consider the plaintiff had any realistic chance of obtaining such a job; and

d) The plaintiff will not make a successful return to the workforce in any capacity.

[134] In cross-examination Mr. Nordin acknowledged that approximately 90% of jobs have medium and light strength requirements and also acknowledged that the plaintiff's knee problems probably rendered him less employable as a concrete mixer driver. He further stated that he was not aware the plaintiff had pre-existing back and neck pain or that he had been attending a chiropractor for such pain. However, he stated that any such issues did not prevent the plaintiff from doing his job.

[135] Although Mr. Nordin was unaware of the plaintiff's pre-existing medical-conditions, I accept his opinion that the plaintiff is not competitively employable as a cement mixer driver. I further accept his opinion that the plaintiff has no realistic chance of obtaining employment, given his age, limited education and physical limitations.

Diana Cameron

[136] Diana Cameron is an expert in clinical counselling and vocational rehabilitation. She was retained by the defendant but did not testify at the trial. It was agreed by the parties that a heavily redacted version of her report dated December 5, 2019 could be admitted. The purpose of her report was to comment on the report of Mr. Nordin, the plaintiff's vocational rehabilitation expert.

[137] As did Mr. Nordin, Ms. Cameron reviewed the medical-legal reports of Drs. Perera, Petrovic, Faraday, and MacInnes. She additionally reviewed the report of Dr. Robert.

[138] Ms. Cameron's opinions were as follows:

a) The plaintiff's need for accommodations at work prior to the motorcycle accident would likely have rendered him less competitive for many truck driving jobs in the absence of the accident. She deferred to the medical experts as to whether the plaintiff's pre-existing knee problems would have resulted in increased functional limitations as he aged. She also deferred to the medical experts as to whether the plaintiff would have retained the ability to perform heavy strength work up to the time of retirement in the absence of the accident;

b) She agreed with Mr. Nordin that neither a return to school nor a prolonged retraining program was an option for the plaintiff;

c) Skills upgrading would improve the plaintiff's competitiveness; and

d) She disagreed that the plaintiff was unemployable because of his age.

[139] Ms. Cameron further appeared to be of the view that the plaintiff could obtain work as a cashier, customer service clerk or food counter attendants or as a Dispatcher or receptionist at a trucking company. However, due to the heavily redacted nature of her report, her opinions in this regard are too unclear to give them any weight.

[140] I prefer the opinions of Mr. Nordin over those of Ms. Cameron. His opinions were much more detailed and reasoned. Moreover, Mr. Nordin's assessment of the plaintiff's ability or inability to obtain employment is much more realistic.

Analysis

[141] Given the defendants have admitted liability for the accident, it is only necessary to determine what injuries were caused by the accident and to assess the damages.

Causation

Legal Principles

[142] The plaintiff refers me to *Midgley v. Nguyen*, 2013 BCSC 693, where Justice Dardi summarized the principles applicable to causation at paras. 167-170.

> [167] Whether a defendant is liable to a plaintiff for an injury is a matter of causation. It is crucial to keep in mind the analytical distinction between determining causation and assessing damages, since different principles govern the two questions: T.W.N.A. v. Canada (Ministry of Indian Affairs), 2003 BCCA 670 at para. 16; Drodge v. Kozak, 2011 BCSC 1316 at para. 79; Moore v. Kyba, 2012 BCCA 361 at paras. 35-36. I will return to the principles which govern the assessment of damages later in these reasons in the section on damages.
>
> [168] The primary test to be applied in determining causation is commonly articulated as the "but for" test. The plaintiff bears the burden of showing that "but for" the negligent act or omission of the defendant, the plaintiff's injury would not have occurred.
>
> [169] The "but for" test need not be determined with scientific precision. Rather, causation is a practical question of fact which can be best answered by ordinary common sense: Snell v. Farrell, 1990 CanLII 70 (SCC), [1990] 2 S.C.R. 311 at 328.
>
> [170] A plaintiff need not establish that a defendant's tortious conduct is the sole cause of the injury. A defendant will be fully liable for the harm suffered by a plaintiff, even if other causal factors for which he is not responsible were

> at play in producing the harm, as long as the plaintiff establishes a substantial connection between the injuries and the defendant's negligence beyond the "de minimus" range: Farrant v. Laktin, 2011 BCCA 336 at paras. 9 and 11; Athey v. Leonati, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458; Resurface Corp v. Hanke, 2007 SCC 7; Clements v. Clements, 2012 SCC 32; Hunt v. Ugre, 2012 BCSC 1704 at para. 120.

[143] These are the principles that I apply.

Submissions

[144] The plaintiff submits that his injuries consist of headaches, neck pain, upper and lower back pain, tinnitus, dizziness, depression, anxiety and sleep problems. The plaintiff submits that all of these injuries were caused by the motorcycle accident. The plaintiff further submits that any injuries he suffered in the 2013 collision had resolved prior to the motorcycle accident and that his pre-existing knee problems and other pre-existing medical issues were insignificant and never prevented him from working or from enjoying his recreational and other pursuits.

[145] The defendant does not contest that the plaintiff suffered injuries as a result of the accident. The defendant now concedes that the plaintiff suffered soft tissue injuries to his neck and back and headaches and that the bulk of the medical opinion is that the plaintiff developed a chronic pain condition. However, the defendant submits that the plaintiff suffered from pre-existing medical issues, namely, knee problems, residual neck and back problems from a prior collision in 2013, and a variety of other ailments including gout, sleep apnea, hypertension and obesity.

Discussion and Findings

[146] As I have indicated above, I find that the plaintiff was not symptom free before the accident. More specifically, the evidence before me establishes that at the time of the motorcycle accident the plaintiff suffered from occasional neck and back pain for which he was seeking periodic chiropractic treatments, occasional headaches, and ongoing knee pain. He also suffered from sleep apnea, gout, hypertension and kidney stones.

[147] The plaintiff's pre-existing sleep apnea, gout and kidney stones were controlled prior to the accident and did not affect the plaintiff's ability to work or to participate in recreational and other activities. Similarly, there is nothing in the evidence to suggest that the occasional headaches the plaintiff experienced prior to the accident interfered with his ability to work or his enjoyment of other pursuits. The same cannot be said for the plaintiff's pre-existing knee problems and neck and back pain. Although the plaintiff attempted to minimize the effects of these pre-existing issues, I find that these ailments imposed some limitations on his overall functioning and his ability to work, in particular. The evidence is undisputed that the plaintiff required a truck with an automatic transmission following the arthroscopic surgery to his knees. Additionally, due to a combination of the knee problems and neck and back pain, he required a modified work schedule so that he would have three days to recover between his weekly four day work shifts. Thus, the knee problems and neck and back pain were pre-existing issues of some significance.

[148] However, it is equally clear that the motorcycle accident of May 29, 2016, which I have found involved a significant impact, substantially aggravated the pre-existing headaches and pain and caused additional symptoms.

[149] I find that the plaintiff has suffered the following injuries, all of which were caused or substantially contributed to by the motorcycle accident of May 29, 2016:

a) Myofascial or soft tissue injuries to his neck and upper and lower back. This was the evidence of the plaintiff and is corroborated by the expert evidence of Drs. Petrovic, Faraday, MacInnes, Perera and Robert;

b) Chronic headaches that vary in intensity. This was the evidence of the plaintiff and is corroborated by the expert evidence of Drs. Petrovic, Faraday, MacInnes, and Perera;

c) Ongoing or chronic pain related to the soft tissue injuries. This was the evidence of the plaintiff and is corroborated by the expert evidence of Drs. Petrovic, Faraday, MacInnes, and Perera;

d) Mild Depressive symptoms, although not a major depressive disorder, associated with being worried about what the future will bring. The plaintiff testified to such depressive symptoms and Drs. Petrovic, Faraday, MacInnes, and Perera all acknowledged the existence of depressive symptoms. Dr. Petrovic diagnosed the plaintiff as having a major depressive disorder but he is not a psychiatrist and I prefer the evidence of Drs. Petrovic, Faraday and MacInnes as to the existence of depressive symptoms but not a major depressive disorder;

e) Tinnitus. This was the evidence of the plaintiff and the expert evidence of Dr. Faraday, which was not challenged;

f) Sleep problems. This was the evidence of the plaintiff and the expert evidence of Drs. Petrovic and MacInnes. Dr. Perera also acknowledged the existence of sleep impairment; and

g) Dizziness, which had resolved by the time of trial.

[150] I note that the plaintiff additionally alleges that anxiety is an injury suffered in the accident and Drs. Petrovic and MacInnes opined that he had anxiety. However, in his evidence the plaintiff lumped anxiety together with his depressive symptoms and did not describe any symptoms that, in my view, could be classified as anxiety symptoms. For example, he did not testify that he was anxious riding his motorcycle. Additionally, Drs. Petrovic and MacInnes did not adequately explain what anxiety symptoms the plaintiff had, as distinct from depressive symptoms. Moreover, the other medical experts who examined the plaintiff did not diagnose anxiety. Accordingly, I find that the plaintiff does not suffer from anxiety as a consequence of the accidents or otherwise.

[151] The plaintiff additionally suffers from age related degenerative changes to his spine which has resulted in parethesias in the left upper extremity, and which is not related to the accident. This was the opinion of Dr. Perera and of Dr. Robert. The plaintiff also suffers from arthritic knee problems which is not accident related.

Assessment of Damages

General Damages

Legal Principles

[152] The governing principle in the assessment of damages is that the plaintiff must be placed in the position he or she would have been in if not for the defendant's negligence, no better or worse. As McLachlin, C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

> Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: [*Athey v. Leonati*].

[153] Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey v. Leonati,* [1996] 3 S.C.R. 458 at paras. 32-35.

[154] The factors to be considered when assessing general damages for pain and suffering are set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

> [46] The inexhaustive list of common factors cited in Boyd [v. Harris (2004), 237 D.L.R. (4th) 193] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;

> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: Giang v. Clayton, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[155] The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

Findings

[156] The below paragraphs constitute my findings relevant to the *Stapley* factors and the assessment of general damages.

[157] The plaintiff was 55 years of age at the time of the accident and was 59 at the time of the trial.

[158] As a consequence of the accident, the plaintiff suffered soft tissues injuries to the neck and back and developed symptoms of chronic pain, chronic headaches, tinnitus, sleep problems, dizziness and depression. His symptoms, with the exception of dizziness, have been ongoing since the date of the accident.

[159] The plaintiff described the headaches as “extreme” and constant but later testified they varied in intensity. He described the neck and back pain as constant but varying in intensity. The majority of the medical experts accepted that the plaintiff had constant chronic pain and headaches. I find as a fact that the plaintiff has constant pain and headaches, both of which vary in intensity. Moreover, although I have found that the plaintiff suffered from pre-existing pain and headaches, the pre-existing pain and headaches were both intermittent and much less severe than what he has experienced since the accident.

[160] Subsequent to the accident the plaintiff was off work until May 1, 2017 because of the injuries suffered in the accident. He returned to work on May 1, 2017 and was able to perform his job duties until February 2019. He was able to perform

his job duties only with difficulties and pain and because his employer did not require that he perform the heavier work associated with the making of octa-blocks. Nevertheless, by February 7, 2019, the plaintiff could no longer do the work required and went on permanent disability.

[161] I accept the evidence of the plaintiff and the opinions of the majority of the medical experts that since February 7, 2019 the plaintiff has been unable to perform his job duties and continue his employment with Lehigh/Rempel. Further, I find that this is due to the injuries suffered in the accident and not due to the pre-existing injuries or health conditions. The pre-existing injuries and health conditions required the plaintiff to seek accommodations from his employer but, with such accommodations, he was able to perform his job duties to the satisfaction of his supervisor. Subsequent to the accident, and despite the plaintiff's stoic efforts, he was eventually no longer able to continue working. His decision to retire or go on disability was a reasonable one in the circumstances.

[162] I do not accept that the plaintiff's injuries have affected his ability to do housework and yard work or engage in recreational activities or hobbies to the degree testified by the plaintiff. The surveillance video satisfies me that the plaintiff has exaggerated his limitations in this regard. I find that he is able to do basic house work, gardening and yard work, although he may require more time to do such tasks. Similarly, I find that he is able to engage in his hobbies and recreational activities such as woodworking, walking and car and motorcycle repair, although with more breaks. I accept that his injuries have affected his ability to do heavier work, such as heavy housework or yard work. I also accept that his injuries have limited him to short motorcycle adventures and have impacted his ability to go on long walks.

[163] I do not accept that the plaintiff's injuries have affected his social activities to the degree he has testified. The surveillance video showed the plaintiff as being very sociable with friends and acquaintances. In addition, he told Ms. Chisholm he

frequently drives his motorcycle to White Rock in the evenings to have coffee with friends.

[164] I do not accept that the plaintiff's relationship with his girlfriend was impacted by the injuries suffered in the accident. He baldly testified that the accident ruined this relationship but provided no specifics whatsoever of the relationship or how the accident impacted it.

Comparable Cases

[165] The plaintiff refers me to various cases that establish a range of general damages awards from $150,000 to $175,000. The defendant refers me to cases that establish a range between $75,000 and $95,000.

[166] The cases to which the plaintiff has referred me are:

a) *Neufeldt v. Marcellus*, 2020 BCSC 427, which concerned a 40 year old plaintiff who suffered soft tissue injuries to his neck and back, chronic pain and headaches, a concussion, depression and anxiety. As a result of his injuries the plaintiff could no longer work as a police officer or engage in sports and his family relationships became strained. That plaintiff was awarded $200,000 in general damages;

b) *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111, where the 42 year old plaintiff, a lawyer, suffered a mild traumatic brain injury in a slip and fall accident that had a dramatic effect on her life. Specifically, the plaintiff had ongoing post-concussive symptoms including physical, cognitive and emotional difficulties and post-traumatic headaches. The plaintiff also developed a chronic pain disorder. The plaintiff also suffered soft tissue injuries in a subsequent motor vehicle accident. The plaintiff's injuries had a profound effect on her life and she was no longer able to pursue her career. She was awarded general damages of $185,000;

c) *Fancello v. Cupskey*, 2019 BCSC 1724, where the 35 year old plaintiff suffered a mild traumatic brain injury and soft tissue injuries in two motor vehicle accidents and developed chronic pain, dizziness, tinnitus, and cognitive difficulties. The plaintiff was diagnosed with somatic symptom disorder with predominant pain and with a major depressive disorder. The plaintiff was unable to partake in recreational activities and was unable to work in any occupation requiring physical exertion. She was awarded $175,000;

d) *Macie v. DeGuzman,* 2019 BCSC 1509, where the 31 year old plaintiff was diagnosed with a mild traumatic brain injury, post-concussion syndrome, major depressive disorder, panic disorder, somatic symptom disorder, generalized anxiety disorder, and post-traumatic stress disorder. She was awarded $170,000 in general damages;

e) *Niessen v. Emcon Services Inc.*, 2018 BCSC 1410, where the 52 year old plaintiff was found to have ongoing and chronic, headaches, depression, anxiety, sleep disruption, cognitive problems, tinnitus and PTSD. The plaintiff's symptoms had a significant impact on his social, recreational, and employment-related functioning, his emotional well-being, and his enjoyment of life. The plaintiff was awarded $170,000 in general damages;

f) *Ranahan v. Oceguera*, 2019 BCSC 228, where the 51 year old plaintiff sustained a mild traumatic brain injury, soft tissue injuries to her spine, chronic neck pain, upper back pain, post-concussion syndrome, cognitive problems with memory and focus, imbalance, tiredness, fatigue, tinnitus, eye strain, sleep disturbance and chronic headaches. She also suffered from ongoing mood symptoms including irritability, moodiness and a reduction in patience, and positivity. Her injuries were found to have significantly impacted her recreational and social pursuits, although she was able to participate in some of those activities. She was awarded $160,000 in general damages;

g) *Hauk v. Shatzko*, 2020 BCSC 344, where the 49 year old plaintiff sustained soft tissue injuries that developed into chronic pain in her neck, back and shoulders, chronic headaches, and problems sleeping. She was diagnosed with somatic symptom disorder, major depressive disorder, and anxiety. As a consequence of the injuries the plaintiff ceased working, was not as social and did not engage in the same pastimes and hobbies. She was awarded $150,000 in general damages; and

h) *Senner v. GE Canada Leasing Services Company*, 2017 BCSC 1939, where the 60 year old plaintiff had chronic pain, headaches, sleep problems, fatigue, inability to focus, depression and anxiety. His injuries prevented him from pursuing all work, recreational and family activities. He was awarded $150,000 in general damages, although the amount was reduced to take into account contributory negligence.

[167] In my opinion, the above cases are not comparable to this matter. With the exception of the plaintiff in *Senner*, all of the other cases involved plaintiffs who were younger, in some cases much younger, than the plaintiff in the instant case. In five of the above cases, the plaintiffs had suffered a traumatic brain injury. In five of the above cases the plaintiffs had a diagnosed psychological injury such as somatic symptom disorder, major depressive disorder or PTSD. In four of the above cases the plaintiffs had significant cognitive symptoms. In most of the above cases the injuries were found to have had a much more significant impact on the plaintiff's social life, family life or recreational activities than is the case here.

[168] The cases to which the defendant has referred me are:

a) *Wang v. Johal,* 2019 BCSC 1036, where the 56 year old plaintiff had ongoing leg and back pain and was awarded damages in the amount of $75,000;

b) *Elzinga v. Sharpe,* 2019 BCSC 314, where the 52 year old plaintiff had chronic neck and back pain and was awarded damages in the amount of $85,000;

c) *Harry v. Powar,* 2018 BCSC 845, where the 33 year old plaintiff had chronic pain, headaches and facet joint syndrome and the court awarded $85,000 in general damages;

d) *Grimm v. Young,* 2019 BCSC 1549, where the 33 year old plaintiff had chronic pain, chronic headaches which were intermittent as of the trial, and facet joint syndrome and the court awarded $90,000 in general damages;

e) *Oberholtzer v. Tocher,* 2018 BCSC 1089, where the 51 year old plaintiff had chronic pain syndrome and thoracic outlet syndrome and was awarded $95,000.

[169] As with the cases to which the plaintiff referred me, I similarly find that the defendant's cases are not comparable to this matter. The plaintiffs in the defendant's case are again younger than the plaintiff in this matter. More importantly, the injuries and symptoms in those cases are not as severe as in this matter.

Conclusions on General Damages

[170] In my view, if the plaintiff's pre-existing conditions and the effects of his post-accident degenerative disc disease are disregarded, an appropriate award of general damages would be approximately $120,000. However, it is not appropriate to disregard the pre-existing conditions and the effects of his post-accident degenerative disc disease. The plaintiff is to be put in the same position as he would been in if the accident had not occurred. If the accident had not occurred, the plaintiff would today suffer from intermittent neck and back pain, intermittent headaches, knee problems and paresthesia from degenerative disc disease. It is the difference between that position and his current condition that is the plaintiff's compensable loss: *Athey*, para. 32.

[171] Upon comparing the nature and effects of the plaintiff's current injuries with the position he would have been in had the accident not occurred, and upon comparing the nature and effects of the plaintiff's current injuries with those of the plaintiffs in the cases referred to me by the parties, I am of the view that a fair and reasonable assessment of the plaintiff's general damages is $100,000. This is the amount I award.

Past Loss of Income

Legal Principles

[172] The principles applicable to an assessment of loss of income claims, both past and future, are summarized by Justice Dardi in *Carrillo v. Deschutter*, 2018 BCSC 2134, as follows:

> [111] An award of damages for loss of earning capacity, whether past or future, is compensation for a pecuniary loss: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 175 [*Hardychuk*]. The purpose of such an award is to restore, as best as possible with a monetary award, an injured plaintiff to the position he or she would have been in had the negligence not occurred. The Court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 at para. 19.
>
> [112] The appellate authorities establish that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an "earnings approach" or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [*Perren*]. The earnings approach is more appropriate when the loss is more easily measurable: *Perren*. Under either approach, the plaintiff always must prove that there is a real and substantial possibility of hypothetical events leading to an income loss: *Perren*, at para. 33; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133 [*Pololos*]; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14 [*Rousta*].
>
> [113] The Court in *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45 [*Falati*], provided an instructive distillation of the principles which inform the assessment of loss of earning:
>
> > (i) The standard of proof is not the balance of probabilities. A plaintiff is entitled to compensation for real and substantial possibilities of loss, *Reilly v. Lynn*, 2003 BCCA 49 at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.

(ii) The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.) [*Milina*].

(iii) The court must assess damages for loss of earning capacity based on the evidence, taking into account all positive and negative contingencies. The task of the court is to assess the losses, not to calculate damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43.

(iv) The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

[114] To this list, I would add that evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": Graham v. Rourke (1990), 75 O.R. (2d) 622 at 636 (C.A.).

[115] A claim for "past loss of income" is properly characterized as a component of loss of earning capacity: *Falati*, at para. 39. It is subject to the same legal test as a claim for loss of future earning capacity. It is compensation for the impairment to the plaintiff's past earning capacity that was occasioned by his or her injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 [*Rowe*]; *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32.

[116] While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered in a damages assessment as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27. Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. She clarified that the same test applies regardless of whether the court is considering hypothetical events in the assessment of past or future loss of earning capacity. She expounded at para. 29:

> [29] … What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[117] In sum, the assessment of past or future loss of earning capacity requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events: *Grewal v. Naumann*, 2017 BCCA 178 at para. 49 [*Grewal*]. The test to be applied to hypothetical events, past and future, is whether there is a real and substantial possibility that the events in question would occur or would have occurred absent the defendant's negligence: *Rousta* at para. 14. In advancing a claim for the loss of income-earning capacity, whether past or future, the plaintiff must always prove a real and substantial possibility of an income loss, as opposed to a theoretical one. In other words, the award cannot be based on mere speculation; *Grewal* at para. 48; *Rousta* at para. 17. While the onus on the

> plaintiff is not a heavy one, it must nonetheless be met in order to justify a pecuniary award. *Kim v. Morier*, 2014 BCCA 63 at para. 7.

[173] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[174] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62. The trial judge has a discretion to determine what period or periods [of time] are appropriate for the determination of net income loss: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 181-186. In exercising this discretion, the trial judge should keep in mind that the plaintiff is to be put back in the position he or she would have been in had the accident not occurred (*Lines* at paras. 185-186).

[175] The burden of proof of actual past events is a balance of probabilities. However, an assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

Discussion

[176] The parties have agreed that the plaintiff was off work from May 29, 2016 until May 1, 2017 and from February 7, 2019 to the date of trial.

[177] The parties have further agreed that the amount of the plaintiff's loss of income net of taxes during these periods is $129,168. The plaintiff further concedes that a deduction from this amount of $11,030 must be made on account of disability

benefits paid to the plaintiff by ICBC. With this deduction, the net amount of the plaintiff's past loss of income is $118,138.

[178] The defendant submits that there must be a deduction to take into account the August 2016 incident where the plaintiff fell down the outside stairs of his home and broke his foot. The defendant submits two months income should be deducted due to the fact that following this incident the plaintiff was required to wear a cast and would not have been able to work. I do not agree. First, the plaintiff was already off work because of the injuries from the accident when this incident occurred and remained off work after his cast was removed. The fall and the wearing of the cast did not cause the plaintiff to lose any additional work. Second, the plaintiff testified that he fell because of the dizziness that he suffered as a consequence of the motorcycle accident. In other words, but for the motorcycle accident the plaintiff would not have been dizzy and would not have fallen.

[179] The plaintiff submits that he is additionally entitled to compensation for pension contributions that would have been made by his employer if he had been working. Such pension contributions are provided for in the collective agreement between the plaintiff's union and his employer. The plaintiff submits that the amount of the lost pension contributions is $22,923 and has provided detailed calculations in support. The defendant did not challenge the plaintiff's right to compensation for lost pension contributions. In submissions the defendant conceded that if the plaintiff lost work as a result of the accident then he is entitled to the amount as calculated by the plaintiff. In view of the defendant's concession, I allow an additional $22,923 for loss of pension contributions.

[180] I therefore award the plaintiff $141,061 ($118,138 + $22,923) for past loss of income and pension contributions.

Future Loss of Earning Capacity

Legal Principles

[181] The legal principles applicable to a claim for loss of earning capacity are summarized by Justice Voith (as he then was) in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, at para. 133:

> [133] The relevant legal principles are well-established:
>
> a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
>
> b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
>
> c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
>
> d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
>
> e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
>
> f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
>
> g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[182] As is apparent from the foregoing, the plaintiff must prove that there is a real and substantial possibility of a future event leading to an income loss. Some of the factors to take into account in assessing this possibility are set out in *Miller v. Lawlor*, 2012 BCSC 387, at para. 114:

> [114] In determining whether the plaintiff has established a real and substantial possibility of a loss of future earning capacity, I need to refer to the four factors noted by Finch J. (as he then was) in *Brown*. They include whether:
>
> > 1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
> >
> > 2) The plaintiff is less marketable or attractive as an employee to potential employers;
> >
> > 3) The plaintiff has lost the ability to take advantage of all job opportunities which otherwise might have been open to him had he not been injured; and
> >
> > 4) The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[183] I note that I must consider all types of employment and not just the employment of the plaintiff immediately before the accident. Thus, I need to consider whether the plaintiff has established a real and substantial possibility of a future event leading to an income loss from all types of employment. I note that this need not be proved on a balance of probabilities.

[184] Once the plaintiff has established that there is a real and substantial possibility of an income loss, the amount of the award is to be determined based on the possibility or likelihood of the loss occurring. This involves an assessment and comparison of what the plaintiff would have earned if the accident had not occurred and of what the plaintiff is likely to earn in his injured condition. Allowance must be made for positive and negative contingencies and the overall fairness and reasonableness of the award must be considered.

Submissions

[185] The plaintiff submits that he is completely disabled from any type of work as a consequence of the injuries suffered in the motorcycle accident and will not return to the workforce in any capacity. The plaintiff calculates his future loss of income using the pay rates established in the Lehigh/Rempel union agreements. The plaintiff submits that the present value of his loss of future income calculated to a retirement age of 67 is $565,456 and if calculated to a retirement age of 68 is $649,186. In

addition, the plaintiff seeks an award for loss of future pension contributions which he calculates at $59,320 or $66,624 depending on the age or retirement.

[186] The defendant submits that the plaintiff is not completely disabled and that he may be able to obtain employment in the future. The defendant further submits that any income loss should be calculated to a retirement age of 62 or 65. Finally, the defendant submits that negative contingencies must be applied to any award to take into account the plaintiff's pre-existing conditions and post-accident diagnosis of degenerative disc disease. The defendant finally submits that an appropriate award would be between $94,000 and $235,000 depending on the age of retirement.

Discussion

[187] I have found as a fact that, due to the injuries suffered in the motorcycle accident, the plaintiff is completely disabled from performing his job duties as a cement mixer driver. It follows that the plaintiff has established a real and substantial possibility of a future income loss. In fact, the defendant did not challenge this.

[188] If the plaintiff had continued working for Lehigh/Rempel he would have been remunerated in accordance with the union agreements negotiated between the union and the company. Those agreements do not extend beyond December 31, 2021. However, historically the hourly rates paid to employees increased annually by approximately 2%. Using a 2% annual increase in salary, the plaintiff calculated the full time income plus vacation pay that he would have received in each of 2020 through 2029 as follows:

Year	Age	Hours	Rate	Annual Income	Vac Pay	Total
2020	59	220	$37.01	$8,142	10%	$8,956
2021	60	1760	$37.75	$66,440	10%	$73,084
2022	61	1760	(add 2%)	$67,768	10%	$74,544
2023	62	1760	(add 2%)	$69,124	12%	$77,418
2024	63	1760	(add 2%)	$70,506	12%	$78,966
2025	64	1760	(add 2%)	$71,916	12%	$80,545

2026	65	1760	(add 2%)	$73,355	12%	$82,157
2027	66	1760	(add 2%)	$74,822	12%	$83,800
2028	67	1760	(add 2%)	$76,311	12%	$85,468
2029	68	1760	(add 2%)	$77,845	12%	$87,186

[189] I accept the foregoing calculations as indicative of the income the plaintiff would have earned had he continued working for Lehigh/Rempel. I note that the defendant's calculations were not dramatically different. The present value of the plaintiff's calculations, to age 65, is $332,217. The defendant calculated the plaintiff would have earned $310,000 up to age 65. The difference is because the defendant assumed the plaintiff would consistently earn $62,000 per year and did not take into account vacation pay or annual increases in pay.

[190] The main points of contention between the parties relate to the plaintiff's likely age of retirement had the accident not occurred and to whether the plaintiff is likely to obtain alternate employment in the future. These are both hypothetical events that are to be evaluated on the basis of probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.

[191] Dealing first with the plaintiff's age of retirement, the plaintiff testified that he had hoped to retire at age 65 but, because of his financial circumstances, he considered that unlikely and thought that it was more likely he would have retired closer to age 70, maybe age 67. I do not accept any implication from the plaintiff's evidence that he would have worked beyond age 65 for the following reasons:

a) The plaintiff's evidence that he would have worked to age 67 or 70 is not consistent with what he told Dr. Perera and Mr. Nordin. He told Dr. Perera that he wanted to "push through" until age 65 when his pension goes into

effect. He told Derek Nordin that he planned to remain with Lehigh/Rempel until retirement at 65;

b) The plaintiff could draw on his pension at age 65;

c) The plaintiff's job was particularly physically demanding and relatively few drivers worked past 65. Mr. Elout, the plaintiff's supervisor, testified that only four of over 100 drivers were past the age of 65;

d) The plaintiff's pre-existing medical issues had already begun to impact his ability to carry out his employment duties and necessitated accommodations from his employer; and

e) The plaintiff's subsequent diagnosis of degenerative disc disease and paresthesias would have further negatively impacted his ability to carry out his employment duties.

[192] Considering all of the above, I am of the view that, if the accident had not occurred, it is a near certainty the plaintiff would not have worked beyond the age of 65. Further, because of the plaintiff's non-accident related injuries and conditions, I am of the view that it is possible the plaintiff would have retired earlier than 65. I assess this possibility at 20%.

[193] The defendant also submits that a contingency should be applied to address the fact the plaintiff is capable of alternative employment and may obtain such employment in the future. This submission is supported somewhat by the expert opinions of Drs. Faraday and MacInnes. Dr. Faraday stated that the plaintiff was able to perform light to medium duty work tasks on a full time basis with limitations. Dr. MacInnes stated that with further treatment and assistance he was of the view that the plaintiff would be able to undertake sedentary to light work. However, Dr. Perera stated that given the plaintiff's age, education, training and ongoing disability, that it was unlikely the plaintiff would return to competitive employment. Mr. Nordin was of a similar opinion.

[194] I prefer the evidence of Dr. Perera and Mr. Nordin over those of Drs. Faraday and MacInnes in relation to the plaintiff's ability to engage in alternative employment. I prefer Dr. Perera's opinion because, in my view, he takes a more appropriate holistic approach to the plaintiff's employability. Drs. Faraday and MacInnes appear to focus solely on the plaintiff's functional limitations whereas Dr. Perera has taken into account other relevant factors, namely, the plaintiff's age, education and training. These other factors are, in my view, highly relevant to the plaintiff's employability. The plaintiff is now 60 years of age. He has done nothing but drive transport trucks or cement mixers for over 40 years. He has minimal education and has no training in any other type of employment. In my view, given his age, his lack of education and training and his injuries, there is no realistic possibility of the plaintiff obtaining alternative employment in the future. Accordingly, I decline to apply a negative contingency to address the possibility of future employment.

[195] Considering all of the above, and bearing in mind that the award must be fair and reasonable, I assess the plaintiff's loss of future earning capacity at $270,000.

[196] The plaintiff submits that he is additionally entitled to compensation for the loss of future pension contributions his employer would have made had he continued working. The defendant did not provide submissions on the plaintiff's entitlement to an award for loss of future pension contributions by his employer. On principle, I see no basis for refusing such an award, especially given the defendant's concession that loss of past pension contributions were recoverable.

[197] The annual amount of the employer's contribution to the plaintiff's pension would be $8,800 based on 1,760 hours worked and a $5 contribution per hour worked. The contribution of $5 per hour is set by the collective agreement. The plaintiff calculates the present value of such contributions at $58,220 to the age of 67 and $65,524 to the age of 68. Regrettably, the plaintiff did not provide present value calculations to the age of 65. However, by my calculation, the present value of such contributions to the age of 65 would be $51,517.

[198] Any award for loss of future pension contributions by the employer is subject to the same contingencies as loss of future earnings. Accordingly the calculated amount of $51,517 must be reduced to take into account the possibility that the plaintiff might have retired earlier than 65. When this contingency adjustment is made, the award for loss of future pension contributions is $41,000.

[199] The plaintiff is therefore awarded a total of $311,000 ($270,000 + $41,000) for loss of future earning capacity and loss of future pension contributions.

Special Damages

[200] The parties have agreed on the amount of the plaintiff's special damages with one exception. The amount agreed upon is $11,799. The disputed amount is $1,125 for the costs of an MRI. The amount of the MRI is disputed because it was obtained privately. The defendant submits that the MRI could have been obtained through the publicly funded health care system.

[201] I have been provided with no explanation as to why the MRI was obtained from a private company. In the absence of any explanation, I do not allow it.

[202] Therefore, the plaintiff is awarded special damages in the amount of $11,799.

Costs of Future Care

Legal principles

[203] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him or her to their pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

[204] There must be both medical justification for the costs and the award must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

[205] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, and 68-70.

[206] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[207] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

Submissions

[208] The plaintiff requests an award for costs of future care in the amount of approximately $179,000. The amount requested is based primarily on the Costs of Future Care report of Ms. Chisholm dated October 3, 2019.

[209] The defendant submits that the care plan as set out in Ms. Chisholm's report is more than is reasonably necessary to preserve and promote the plaintiff's mental and physical health. However, the defendant concedes that the plaintiff is entitled to further physiotherapy, kinesiology and counselling. The defendant submits that an award in the amount of approximately $20,000 is appropriate.

Discussion

[210] Before addressing the particular cost items identified in Ms. Chisholm's report, I have several overarching comments to make:

a) First, her report is based on an assessment of the plaintiff's abilities that is more limiting than I have found to be the case. I have rejected the opinions of Ms. Chisholm as well as those of most of the other experts, in relation to the plaintiff's abilities to perform tasks of daily living and recreational activities;

b) Second, although Ms. Chisholm was aware of some of the plaintiff's pre-existing medical conditions, she testified that she did not take those into account when preparing her recommendations. Accordingly, although her report purports to make recommendations to bring the plaintiff to his pre-accident state, it does not do so. This was further illustrated during her cross-examination when it was put to her that her report was "gold plated". She replied that it was a comprehensive treatment plan for the plaintiff to return to function; and

c) Third, Ms. Chisholm gave no consideration to the age of the plaintiff in making the recommendations in her report. During her cross-examination it was put to her that in the absence of the accident, given the plaintiff's size and age, he should not be doing home maintenance chores. She replied that at some point the plaintiff should not be on a ladder. It was further put to her that as people age home maintenance items are referred out. She agreed this was the case, especially for outdoor maintenance. However, she did not make allowances for this in her recommendations.

[211] In view of the foregoing comments, Ms. Chisholm's recommendations as to the future care needs of the plaintiff are seriously undermined. In particular, her recommendations overestimate the future care needs required to return the plaintiff to his pre-accident state.

[212] I now turn to the individual categories of costs identified by Ms. Chisholm. I do not address Ms. Chisholm's recommendations in relation to vocational counseling as the plaintiff has abandoned any such claims.

Occupational Therapy and Adaptive Equipment

[213] Ms. Chisholm made several recommendations in relation to occupational therapy.

[214] First, she recommended an initial home assessment to be followed by an additional assessment for adaptive equipment and then two or three follow up sessions for "fine tuning". The total estimated costs of these sessions was between $1,800 and $2,300. She further recommended one or two "episodic boosts" of four sessions each, with each session being four to five hours. These "episodic boosts" were to address changes in residence. The costs of the "episodic boost" were estimated to be between $1,800 and $4,700.

[215] Second, she recommended immediate occupational therapy treatments over a 12 month period beginning at a frequency of twice per week for six months and then continuing for another six months at a frequency of once per week. She estimated the costs of these sessions at approximately $46,000. She further recommended episodic treatments, related to changes in the plaintiff's work or living situation or exacerbation of pain. The costs of these episodic treatments were estimated to be between $5,600 and $9,400.

[216] In addition to the occupational therapy sessions, Ms. Chisholm recommended various items of adaptive equipment including: a computer workstation; an ergonomic chair; noise cancelling headphones; ergonomic keyboard and mouse; anti-fatigue mat and light sensitivity glasses. The estimated cost of this equipment was approximately $2,700.

[217] Ms. Chisholm's occupational therapy recommendations are an example of her recommending at "gold plated" treatment plan that is completely divorced from the plaintiff's needs and requirements. She began the section of her report related to

occupational therapy by stating that both Dr. Perera and Dr. Faraday recommended an occupational therapy assessment and treatment as necessary. However, this was not entirely accurate. Drs. Perera and Faraday simply recommended that the plaintiff undergo an in home occupational therapy assessment. Neither of them made any recommendations for a course of occupational therapy assessments and treatments such as Ms. Chisholm has included in her report.

[218] In any event, the plaintiff's functional limitations, as I have found them to be, do not justify a need for occupational therapy.

[219] Accordingly, I allow none of the costs of occupational therapy and adaptive equipment.

Physiotherapy

[220] Ms. Chisholm recommended that the plaintiff attend for an initial physiotherapy assessment and then attend physiotherapy sessions once per week for six months and then once per month for six months. She estimated the cost of the initial assessment and sessions at approximately $2,100.

[221] Ms. Chisholm further noted that episodic physiotherapy was available in the event of symptom exacerbation, however, she stopped short of recommending episodic physiotherapy.

[222] Drs. Perera, Faraday and MacInnes all recommended physiotherapy for the plaintiff, although it is to be noted that Dr. Faraday also expressly recommended that the plaintiff reduce his reliance on physiotherapy and massage therapy.

[223] I note that the defendant also concedes that an award for physiotherapy is reasonable.

[224] I allow $2,100 for physiotherapy treatments.

Kinesiology

[225] Ms. Chisholm recommended that the plaintiff meet with a kinesiologist three times per week for a 12 month period. She recommended that one session per week be in the plaintiff's home to help him implement strategies taught to him by the occupational therapist. The other two sessions were to be at a pool or gym. She estimated the total cost at $24,336.

[226] The defendant has conceded that the plaintiff is entitled to an award for kinesiololgy sessions but submits the sessions should be for six months at a total cost of approximately $12,000.

[227] Drs. Perera, Faraday and MacInnes all recommended that the plaintiff see a kinesiologist. Dr. Pererea recommended that the plaintiff engage in regular aerobic exercise with the support of a kinesiologist. Dr. Faraday recommended the plaintiff continue with a kinesiologist in an active exercise program until he can independently manage an exercise program. Dr. MacInnes recommended that the plaintiff participate in an active rehabilitation and exercise program for eight weeks at three sessions per week, and have access to a fitness facility with five sessions per year with a physiotherapist or kinesiologist.

[228] In my view, the defendant's submission that six months of kinesiology sessions will be sufficient is not supported by the evidence. None of the experts have opined that six months would be sufficient. I accept Ms. Chisholm's recommendation that the plaintiff see a kinesiologist for 12 months. However, I do not accept her recommendation that there be one session per week at the plaintiff's home to help him implement strategies taught to him by the occupational therapist. I have rejected the need for an occupation therapist at home. Accordingly, I allow two sessions of kinesiology per week for 12 months at a total cost of $16,000.

[229] I note that Ms. Chisholm also recommended a gym pass/membership at a cost of $372 per year. I decline to make such an award. The plaintiff has never had a gym pass or fitness club membership and I am not satisfied that he will, in fact, obtain or use such a pass.

Counselling

[230] Ms. Chisholm recommended that the plaintiff attend weekly counseling sessions with a psychologist for one year at a costs of $225 per session. She also provided for three to four episodic periods of counseling during the plaintiff's lifetime with each period to include 12 sessions.

[231] The defendant accepts that additional counseling is a recoverable future expense but submits that six months of additional counseling, or 26 sessions, at a total cost of $5,850 is sufficient.

[232] Ms. Chisholm based her recommendations, in part, on the reports of Drs. Petrovic, Faraday and MacInnes. Dr. Petrovic recommended cognitive behavioural counseling for a period of one year. Dr. Faraday suggested that the plaintiff be assessed by a psychologist and obtain psychological counselling. He anticipated that the plaintiff would require at least eight sessions. Dr. MacInnes recommended the plaintiff undergo treatment with a pain psychologist, but did not specify a period of time.

[233] In my view, Ms. Chisholm's recommendation that the plaintiff attend 52 initial sessions of counseling to be followed by three or four periods of additional counseling of 12 sessions each, is not supported by the medical experts. Her initial 52 sessions is 6.5 times more than the minimum amount recommended by Dr. Faraday. The defendant's submission that 26 sessions is appropriate is much more in line with the evidence of the experts.

[234] Accordingly, I allow $5,850 for counseling.

Massage Therapy

[235] Ms. Chisholm recommended massage therapy on a bi-weekly basis for one year at a cost of $120 per session and episodic future treatments. In doing so she purported to rely on recommendations made by Drs. Drs. Perera, Petrovic, Faraday and MacInnes. However, only Drs. MacInnes and Perera recommended the plaintiff continue with massage therapy on an ongoing basis. Dr. Petrovic recommended

only a further year of massage therapy from June 30, 2019, which period has now passed. Dr. Faraday specifically recommended that the plaintiff reduce his reliance on massage therapy.

[236] I prefer the evidence of Drs. Petrovic and Faraday over that of Drs. MacInnes and Perera in relation to the need for massage therapy. Such therapy has not proven to be beneficial to the plaintiff, other than in offering short term relief.

[237] Accordingly, I decline to award any amount for massage therapy.

Medications/Injections

[238] Ms. Chisholm noted that the plaintiff's medications consisted of Quetiapine for sleep, Venlafaixine for anxiety and depression, acetaminophen, and ibuprofen. She determined the annual costs of these medications, including dispensing fees, to be between $612.36 and $738.36 per year, depending on how frequently the prescriptions were refilled.

[239] In making her recommendations concerning medications, Ms. Chisholm did not take into account that the plaintiff had pre-existing pain and headaches and took medications, such as Tylenol T3 and Voltaren Rapide to address these issues. She also failed to take into account the plaintiff's degenerative disc disease and what medications were required to address this non-accident related condition. To take into account the plaintiff's pre-existing use of medications and his post-accident onset of degenerative disc disease, I apply a 50% contingency to Ms. Chisholm's cost estimate and allow medications at $300 per year for 24 years. The present value of this amount, using the multipliers in Mr. Pivnenko's report, is $5,570.00.

[240] Ms. Chisholm additionally provided an estimate of the cost for Botox injections every three months. She estimated the annual cost of such injections at $1,200 to $2,400 ($400 to $600 per injection).

[241] Botox injections were recommended by Dr. Faraday on a trial basis if an occipital nerve block was not successful. Dr. Perera made a similar

recommendation. However, neither Dr. Faraday nor Dr. Perera recommended ongoing injections as it was not clear whether the plaintiff's headaches would respond. Dr. Faraday testified that botox injections only help with some headaches. In view of this uncertainty, I discount the cost of botox injections by 2/3 and allow $300 per year. The present value of this amount, using the multipliers in Mr. Pivnenko's report, is $5,560.00.

[242] Therefore, the total I allow for medications and injections is $11,130.

Housekeeping/Yardwork

[243] Ms. Chisholm recommended that deep cleaning housekeeping services be provided to the plaintiff twice per year at an annual cost of $514. She also recommended annual gutter cleaning, pressure washing and yard cleaning at a total annual cost of $550.

[244] I have found that the plaintiff's injuries have not affected his ability to do basic house work, gardening and yard work, although he may require more time for such activities. I have additionally, found that his injuries have affected his ability to do heavier work, such as heavy housework or yard work. In my view, the housekeeping and yard work services recommended by Ms. Chisholm are heavier activities that the plaintiff is no longer able to do because of the accident. Hence, I allow $1,050 per year for such services.

[245] However, in respect of both deep cleaning housekeeping services and heavier yard work, I allow such costs for only 10 years as, given the plaintiff's age and non-accident related conditions, it is likely that he would have eventually required such services in the absence of the accident.

[246] I therefore allow $1,600 per year for ten years for deep cleaning housekeeping services and heavier yard work. The present value of this amount, using the multipliers in Mr. Pivnenko's report, is $15,000.

[247] The total amount allowed for the costs of future care is $36,580, as follows:

Item	Amount
Occupational Therapy/Adaptive Equipment	$0
Physiotherapy	$2,100
Kinesiology	$16,000
Counseling	$5,850
Massage Therapy	$0
Medications/Injections	$11,130
Housekeeping/Yardwork	$1500
Total	**$36,580**

Orders

[248] The plaintiff is awarded the following damages:

a) General damages in the amount of $100,000;

b) Damages for past loss of income or earning capacity and past loss of pension contributions in the amount of $141,061;

c) Damages for future loss of earning capacity and loss of future pension contributions in the amount of $311,000;

d) Special damages in the amount of $11,799; and

e) Damages in respect of the costs of future care in the amount of $36,580.

[249] The parties are at liberty to speak to me in respect of costs and, if they deem it necessary, to address management fees and a tax gross-up.

"Giaschi, J."