IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Larson v. Bahrami,*
2017 BCSC 2308

Date: 20171214
Docket: M156547
Registry: Vancouver

Between:

Joshawa Wesley Larson

Plaintiff

And:

Mehdi Bahrami and Future Auto Sales Ltd.

Defendants

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the Plaintiff:	P.R. Bisbicis R. Bisbicis, Articled Student
Counsel for the Defendants:	K.C. Finn
Place and Date of Trial:	Vancouver, B.C. August 15-18, 21-22, 2017
Place and Date of Judgment:	Vancouver, B.C. December 14, 2017

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1. Introduction

[1] On June 15, 2014, the plaintiff, Joshawa Larson, was stopped at a stop light at an intersection in North Vancouver. Mr. Larson's vehicle was hit from behind by a vehicle driven by the defendant Mehdi Bahrami and owned by the defendant Future Auto Sales Ltd. The defendants have admitted liability for the accident.

[2] Mr. Larson asserts that, as a result of the accident, he suffered soft tissue and other injuries. Mr. Larson has "red seal" qualifications in a number of trades, and his work is physically demanding. Mr. Larson asserts that, as a result of the injuries he suffered in the accident, his ability to function both at work and outside of work has been significantly impaired. In addition to non-pecuniary damages, Mr. Larson seeks compensation for loss of earning capacity (both past and future), loss of housekeeping capacity, costs of future care and special damages.

[3] The defendants say that the central issues in the case concern the severity of the injuries suffered by Mr. Larson in the accident, and their impact on his ability to function.

[4] The defendants say that, as a result of the accident, Mr. Larson suffered mild to moderate soft tissue injuries to his neck and back, and they acknowledge that Mr. Larson continues to experience residual symptoms. However, the defendants say that these symptoms improved substantially in the months after the accident and do not currently significantly reduce Mr. Larson's ability to function. Rather, the primary factor affecting Mr. Larson is his very gruelling work schedule. The defendants say that Mr. Larson is entitled to a reasonable award for non-pecuniary damages, and that he is entitled to compensation for some past income loss and an agreed amount for special damages. The defendants say, however, that Mr. Larson has failed to show that he is entitled to any compensation for loss of future earning capacity, loss of housekeeping capacity or for costs of future care.

2. Background

[5] Mr. Larson was born in October 1976. He and Alison Marchant-Larson married in 2010 after living together for several years. The couple is close to Ms. Marchant-Larson's parents. Mr. Larson's father-in-law, John Marchant, testified at the trial.

[6] Mr. Larson is a highly skilled tradesperson. He holds interprovincial red seal tickets in four trades: iron worker, welder, millwright, and heavy duty mechanic. He obtained his ironworker and welder tickets through the Northern Institute of Technology in Edmonton, and obtained his millwright and heavy duty mechanic tickets though BCIT. For a number of years, Mr. Larson worked as a structural ironworker for several large oil and gas companies. He described the very physical nature of that work. The demands on a welder are also physical and exacting. A millwright can work in many trades, from very heavy work to egg handling. A heavy duty mechanic works on and maintains large, heavy duty machinery and equipment.

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It can often involve working in tight and cramped spaces and awkward positions, with bending, twisting and crouching.

[7] Before the accident, Mr. Larson was working “on the tools” as a heavy duty mechanic at the Deltaport Terminal and occasionally also for the Seaspan division of Vancouver Shipyards Co. Ltd. He worked out of two union locals, Local 502 and Local 514. Mr. Larson explained that, prior to the accident, he was what is termed a “casual” worker out of Local 502 at Deltaport. This required him to make a phone call on a Sunday, and, if there was work available, he had work for the coming week. As a casual worker, he had a great deal of flexibility in his schedule, and could choose whether or not to work. For example, the flexibility allowed him the time to undertake putting in new landscaping and a patio at the North Vancouver townhouse where he and Ms. Marchant-Larson were living. This was a substantial project that Mr. Larson completed on his own.

[8] Although he had a very physical job, Mr. Larson (often with his wife) enjoyed pursuing physical and sports activities outside of work. He was an avid cyclist and would cycle about 40 kilometres during the week and 100 kilometres or more on weekends. He enjoyed snowboarding at Cypress and Whistler in winter, and water-skiing in summer. He enjoyed fishing. Mr. Larson went to the gym two to three times a week, and also swam between 600 and 1,200 metres two to three times a week.

[9] Mr. Larson and Ms. Marchant-Larson shared chores around the home. Mr. Larson generally did the cooking, and Ms. Marchant-Larson did the cleaning. They worked together on gardening. Ms. Marchant-Larson described Mr. Larson before the accident as having no physical problems. She described him as an amazing handyman, and being able to do everything, including painting, landscaping, replacing fencing, electrical work and putting up crown molding. Her description was generally consistent with Mr. Larson’s own description of his activities around their home. He was a very skilled handyman, and enjoyed and took pride in doing that work.

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3. The Accident

[10] On June 15, 2014, Mr. Larson and Ms. Marchant-Larson were stopped at a stop light at the intersection of E. 3rd Street and St. Georges Avenue in North Vancouver. They were in a Subaru Outback that belonged to Mr. Marchant. Mr. Larson was in the driver's seat, and Ms. Marchant-Larson was in the front passenger seat. Mr. Larson recalled the vehicle being struck from behind, and feeling a force like a punch in the head. He recalled a "blue flash" and then falling unconscious. According to Mr. Larson, when he came to, he had ringing in his ears and was dizzy. He believed that his wife helped him out of the car and put him on the grass in front of a restaurant. He did not recall talking to Mr. Bahrami, the driver of the vehicle that hit the Subaru. Rather, as best he could recall, he and his wife left the scene and went home.

[11] For her part, Ms. Marchant-Larson recalled that their car was stopped at the stop light when she heard a loud bang. It was the sound of their car being rear-ended by Mr. Bahrami's vehicle. According to Ms. Marchant-Larson, Mr. Larson hit his head on the steering wheel, although on cross-examination she testified that she did not in fact see this happening. She believed that he was knocked unconscious for (she estimated) about 30 seconds. She recalled that when he regained consciousness, he was very foggy and did not know what had happened. Ms. Marchant-Larson confirmed that she did not call 911. As she recalled, Mr. Larson was able to get out of the car by himself. She also got out and exchanged information with Mr. Bahrami. As she recalled, both she and Mr. Larson were quite shaken up. Mr. Larson then drove them home.

[12] Mr. Bahrami was driving a Volvo 850 Sedan, travelling eastbound on 3rd Street. He was alone in the car, and on his way home. He recalled passing Lonsdale and slowing down. He recalled seeing the Subaru, and braking. According to Mr. Bahrami, he was trying to move over to the right to go to a restaurant to pick up some food. According to Mr. Bahrami, at this point, he was travelling between five and ten kilometres an hour (although there was some

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inconsistency in that respect with the evidence he gave on his examination for discovery). He recalled there being a very minor "bump" with the Subaru. He recalled that a man and woman were in the Subaru, and he recalled exchanging information with the woman. According to Mr. Bahrami, the man (Mr. Larson) complained about his head and about being hurt, and he told the man to go to hospital if he was hurt. He recalled that the man and woman left first, and that the man was driving. According to Mr. Bahrami, there was no damage to the Volvo, and only minor damage (a scratch on the right rear bumper) to the Subaru.

[13] Michael Mooney, who has worked as an estimator with ICBC for 30 years, was the estimator responsible for inspecting the Subaru after the accident. He testified that the vehicle damage cost $901.68 to repair and involved eight hours of labour.

4. Life after the accident

[14] According to Mr. Larson, when he got home the day of the accident, he just tried to rest and recover. He recalled in particular having a headache, and he was focussed mostly on that. As the week went by, he began noticing other symptoms. As he recalled, he had a great deal of stiffness in his neck and back, and he felt "pretty fuzzy." However, he thought that, with rest, he could just shake off the symptoms. At the time, he had been laid off at Seaspan, but was eligible to work as "casual" labour with Local 502 at Deltaport. As Mr. Larson recalled, he did not work the week after the accident. This was confirmed by the record of his hours and earnings (marked as Ex. 21).

[15] Mr. Larson saw his family doctor, Dr. Maureen Conly, on June 23, 2014. At that time, Mr. Larson complained of a stiff and sore neck and upper back, with slightly decreased movement of his neck and lower back. He reported to Dr. Conly that he hit his head in the collision and had a "blue flash" of light, and that, over a week later, he was still having a headache. According to Dr. Conly, Mr. Larson also reported slight dizziness and ringing in his ears. On examination, Dr. Conly noted decreased range of motion in Mr. Larson's neck. Lumbar range of motion was

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normal. Among other things, Dr. Conly diagnosed moderate soft-tissue injuries to Mr. Larson's cervical spine and mild soft-tissue injuries to his thoracic and lumbar spine. She referred Mr. Larson for physiotherapy.

[16] Mr. Larson returned to work at Deltaport later in June, and worked 56 hours for the seven days ending June 28, 2014. According to Mr. Larson, he found the long commute from North Vancouver to Deltaport terrible. He recalled feeling "super stiff" when he arrived at Deltaport, and things got worse during the work day. He recalled that his back was a great deal worse. He tried to make sure that he did some stretching, both when he arrived at work and then every hour or 90 minutes during the day. According to Mr. Larson, by the end of the day, he was much more tired and stiff than before the accident. He did stretching when he got home to try to manage his symptoms. He explained that he put himself on "lighter" work, and modified how he performed tasks (for example, using a forklift rather than hand-rigging) to avoid aggravating his symptoms. Where possible, he exchanged tasks with a co-worker. He explained that, since he was not injured on the job, he was unsure if he was eligible for a graduated return to work or some accommodation, and therefore he did not approach his employer for either.

[17] On July 3, 2014, Mr. Larson began seeing Jennifer Scott for physiotherapy, and he saw her regularly throughout the summer and into the fall of 2014. Mr. Larson worked hard at his therapy. He used tapes that Ms. Scott provided so that he could work at home. As he recalled, it took a long time before he felt that he was improving. This is consistent with Ms. Scott's evidence. For example, by mid-August, most things were somewhat worse, especially Mr. Larson's neck symptoms. Ms. Scott attributed Mr. Larson's lack of improvement to his heavy job and the long commute from North Vancouver to Deltaport. She recommended change, and that he take time off work to speed recovery. Ms. Marchant-Larson, who was concerned about the effect working at Deltaport was having on Mr. Larson and spoke to Ms. Scott about it, also told him that he needed to find work closer to home. As well, as Mr. Marchant recalled, he and his wife encouraged Mr. Larson to change jobs.

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[18] In August 2014, Mr. Larson changed from “casual” to a member of the regular workforce at Deltaport. As a member of the regular workforce, he now had a regular job. However, according to Mr. Larson, even as a full-time member of the regular workforce at Deltaport, he still had flexibility and was able to take days off when he wanted or needed to. Despite that, based on Ex. 21, Mr. Larson regularly worked more than 40 hours a week. He took some time off for vacation at the end of October and into the beginning of November.

[19] In December 2014, Mr. Larson was out snowboarding when he fell and sustained a concussion. However, as Mr. Larson recalled, after a few months, his concussion symptoms resolved. This is generally consistent with Dr. Conly’s evidence.

[20] Mr. Larson took Ms. Scott’s recommendation, and Ms. Marchant-Larson’s wish, that he look for work closer to where he was living and that was lighter, seriously. He explained that it took about five months to find another position, but he did. In March 2015, he began working out of Local 514 as a mechanical maintenance foreman at Neptune Bulk Terminals on the waterfront in North Vancouver. Neptune handles the export of coal and potash, and it relies on the smooth and reliable running of heavy equipment as an essential part of its business.

[21] According to Mr. Larson, as a foreman at Neptune, he instructs about 500 workers what to work on. Part of the job involves troubleshooting and diagnosing problems and equipment failures, and then delegating the work appropriately. When necessary, he must also demonstrate how the work needs to be done. As foreman, Mr. Larson is also responsible for heavy duty mechanical work that needs to be done during non-daytime shifts, or “off shifts.” Mr. Larson explained that supervising workers on the waterfront is challenging. A foreman cannot always pick the crews, and does not always get the people needed for the work. Mr. Larson explained that, when that happens, he – as foreman – must do some of the work. He explained, in his experience, this happens quite often, especially with equipment breakdowns. For example, if something happens at 1 a.m., coal still has to be loaded on the ship

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by 5 a.m. or the ship is left high and dry. In those circumstances, Mr. Larson himself has to undertake doing the heavy duty mechanical work that needs to be done.

[22] Mr. Larson explained that the day shift is considered to be from 7:00 a.m. to 4:30 p.m. The afternoon or night shift is 3:30 p.m. to 1:00 a.m. The graveyard shift is 1:00 a.m. to 8:00 a.m. The hourly rate of pay differs depending on the shift.

[23] According to Mr. Larson, during the day shift, there are three foremen covering a 100 acre site. For the off shifts, there is only one foreman. If Mr. Larson is working a day shift, and there is an equipment breakdown during that shift, he may be required to work the afternoon shift.

[24] Mr. Larson explained that, since he joined Neptune, he works in a one-month rotation. On this rotation, he works the graveyard shift for seven days, the day shift for five days and then he has two days off. He then works the day shift for seven days and then the afternoon shift for seven days. His required hours include what is called “structured overtime,” which is a condition of his employment. The structured overtime means that Mr. Larson must work a minimum of 45 hours a week, and then, in addition, cover hours during the off shifts. This schedule is in sharp contrast to the flexibility he had when working at Deltaport. At Neptune, Mr. Larson has often been required to work more than 45 hours a week. He has frequently worked 50 or 60 hours, and occasionally over 80 hours, in a week.

[25] Mr. Larson explained, and illustrated with photographs, that he is often required to work in tight or awkward spaces. The work often involves bending, twisting, crouching, climbing, and strenuous physical effort. However, unlike Deltaport, where he was “on the tools” 100% of the time, his time is now spent about 60% in the field and about 40% in the office.

[26] Mr. Larson found that, once he started at Neptune, the symptoms from his soft tissue injuries improved significantly as compared to when he was commuting and working at Deltaport. He began cycling to work. He stopped seeing Ms. Scott

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for physiotherapy in April 2015, and Ms. Scott noted at that time that Mr. Larson was greatly improved.

[27] However, as time passed, Mr. Larson came to feel that he had reached a plateau and his symptoms stopped improving. According to Mr. Larson, from time to time, he needed to take time off work to manage his symptoms. He was unable to participate to the same extent as before the accident in physical activities such as snowboarding and water skiing. He and his wife moved from their townhouse into a single-family home in North Vancouver in early 2016. However, according to Mr. Larson, because of pain and stiffness in his neck and back, he felt unable to perform the same level of handyman and household tasks that he had been used to doing before the accident. Ms. Marchant-Larson was doing more of the chores inside the house, and Mr. Larson hired people to do other work (such as landscaping and plumbing repairs) that, before the accident, he would have done himself.

[28] In the fall of 2016, Mr. Larson and Ms. Marchant-Larson participated in the cycling event known as the "GranFondo," which involves spending a Saturday cycling from Vancouver to Whistler. Mr. Larson took time off work to train and was accompanied on some training rides by a colleague from work, Andrea Unger, who was also participating in the event. Ms. Unger explained that, on the day of the GranFondo, she rode with Mr. Larson and Ms. Marchant-Larson for about half the time. However, because she wanted to finish the course and there was a cut-off time to complete the event, she then left them behind. Mr. Larson attributed his poor performance to the fact that, because of the injuries he suffered in the accident, he was not able to train enough.

[29] In May 2017, Mr. Larson went back for more physiotherapy with Ms. Scott, this time for back pain.

[30] In July 2017, Mr. Larson applied for the position of "stores foreman" at Neptune, in response to an internal job posting. According to Mr. Larson, the stores foreman is responsible for receiving all parts and materials coming onto the site, locating parts during breakdowns, and expediting for the millwrights. He explained

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that, in contrast to the structured overtime he must work as maintenance foreman, the stores foreman works 10 hours a day (with the last 2 hours at time and a half), Monday through Friday. Typically, the stores foreman works the day shift only, although if there is a breakdown, the stores foreman may be required to stay late. According to Mr. Larson, it is rare for the stores foreman to work weekends. The job involves very little crouching, bending or twisting. Although it is primarily sedentary, the ergonomics can be modified. Mr. Larson explained that he applied for the stores foreman position because he can no longer handle the twisting, bending and other physical demands, and the structured overtime, required in his current position.

[31] Mr. Larson was not successful in getting the stores foreman position with Neptune. He explained that, despite being unsuccessful, he is committed to trying to find a stores foreman position in one of the fourteen docks in the lower mainland. As Mr. Larson sees it, there is a huge advantage to a Monday to Friday schedule, which would allow him to get on a regular schedule for workouts and swimming. With his current schedule, he finds that his condition worsens during the period when he is working the off-shifts. In the meantime, Mr. Larson has enrolled in the stores foreman course offered at BCIT. He explained that, although completion of the course is not a job requirement, it may give him an edge. According to Mr. Larson, if he were to be hired into a stores foreman position, he would stand to lose between $40,000 and $50,000 annually in income (essentially because there is no structured overtime), compared with his current position. However, Mr. Larson testified that the loss in income did not matter to him. As he saw his situation, he has about 25 years of work left, and it is better to take a loss of income than earn a higher amount but have to stop work in five years. Mr. Larson explained that he now feels very “beat up” from work, and the structured overtime is very difficult. In the stores foreman position, he would cut about 10 hours off his work-week, and his weekends would be free.

[32] Two of Mr. Larson’s colleagues from Neptune testified at trial.

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[33] Ms. Unger is a longshoreman, and Mr. Larson is her foreman. According to Ms. Unger, she sees Mr. Larson daily, and their shifts coincide about half the time. She described Mr. Larson as a go-getter and a hard worker. However, according to Ms. Unger, Mr. Larson seems to be constantly struggling. She described his movements as awkward, and wobbling, and that his shoulders were stiff, like a penguin. According to Ms. Unger, Mr. Larson always seems to be stretching, more than most people, and she has seen him ask others for help. Ms. Unger confirmed that the work is hard and often requires awkward body positions. Mr. Larson, as the foreman, has to demonstrate the work that needs to be done.

[34] Kiefer Cairns, who has a red seal ticket in welding, had been working at Neptune for about seven or eight months as of trial. He explained that he worked with Mr. Larson, who is his foreman, about two or three weeks in a month. As Mr. Cairns recalled, he has seen Mr. Larson struggling, grimacing and stretching, and Mr. Larson has asked Mr. Cairns for help on occasion. He also confirmed that Mr. Larson sometimes must demonstrate the work that needs to be done.

[35] Mr. Marchant testified that he spends time with Mr. Larson at least every two weeks. Mr. Larson and Ms. Marchant-Larson lived with Mr. Marchant and his wife for two and a half months, from November 2015 into January 2016, and during that time, he saw Mr. Larson every day.

[36] According to Mr. Marchant, before the accident, Mr. Larson was a fit young man with many skills. He did not recall Mr. Larson ever complaining or taking medication before the accident. Among other things, they enjoyed fishing together. As Mr. Marchant recalled, he noticed that Mr. Larson had symptoms almost immediately after the accident. According to Mr. Marchant, since the accident, Mr. Larson still does not complain. However, Mr. Marchant described Mr. Larson as obviously in pain, which he recognized since he personally has suffered from back pain for 40 years. He described how, for example, Mr. Larson would lay down in the living room during dinner. Mr. Marchant now sees Mr. Larson taking pain

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medication. According to Mr. Marchant, since the accident, he and his wife have encouraged Mr. Larson to hire people to do work around the house.

[37] Ms. Marchant-Larson testified that she is now doing all of the housecleaning and more of the cooking. According to Ms. Marchant-Larson, when Mr. Larson gets off work and gets out of the car, he is wincing and stretching. She has observed him using a "roller" in their work-out room, and she commented that he now takes more baths. She described him before the accident as "a go-getter." However, now, from her perspective, he is "not himself." He sits on the couch and watches television. His activity level has dropped significantly. His handyman abilities are nil, and they have had to hire people to do work. She observed that she did not think that Mr. Larson had free time for recreation.

[38] According to Mr. Larson, he has back pain and a stiff neck both before and after work. He explained that, when he wakes up, his back is very stiff. As the day ramps up, his back stiffens up further and is painful. He explained that all parts of his body get and feel worse as the day goes on. He now gets tension headaches. Mr. Larson explained that, when he is having a bad day, he will take over-the-counter medication for pain, up to four or five times a day, every other day. Mr. Larson did not do this before the accident. Now, he uses heating pads and a cool compress to relieve stiffness.

[39] Mr. Larson explained that, as a result of the accident, he no longer enjoys driving, and wants to eliminate driving his vehicle altogether. Although Mr. Larson does not consider himself a depressed person, he is frustrated that he can no longer participate in activities such as water-skiing. Mr. Larson denied that he was looking for a different position at Neptune because he wanted more leisure time. Rather, he attributed the reduction in his pursuit of leisure activities, and hiring outside help to do work that (before the accident) he would have done himself, to the effects of the injuries he sustained in the accident, and his need to use time outside work to recover from and manage his symptoms. He described the impact of the accident on his day-to-day life as "huge" and "a living hell."

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5. The Medical Experts

[40] The plaintiff tendered opinion evidence from three physicians: Dr. Nairn Stewart, Dr. Gurdeep Parhar and Dr. Conly. The defendants tendered opinion evidence from one physician, Dr. Osama Gharsaa.

(a) Dr. Stewart

[41] Dr. Stewart is a medical doctor with a specialty in physical medicine and rehabilitation, and she was qualified as an expert in those areas.

[42] Dr. Stewart saw Mr. Larson on November 16, 2016 for an independent medical examination. Among other things, she was asked to address the injuries Mr. Larson sustained in the accident, and provide her diagnosis, treatment recommendations and prognosis, including any future disability. Her opinion is based on her interview with and examination of Mr. Larson, and her review of the records of Dr. Conly and Ms. Scott. Dr. Stewart's report is dated January 17, 2017.

[43] During Dr. Stewart's interview with Mr. Larson, he reported ongoing problems resulting from the accident, including neck pain, mid-back and low-back pain, although he also reported noticing an improvement in his symptoms over time. He reported that his headaches had resolved, the mobility in his neck had improved, and he experienced less pain in his neck and back than immediately after the accident. However, Mr. Larson also reported that maintenance, and keeping up with stretches and exercises, were important. According to Dr. Stewart, Mr. Larson reported work activities will result in flare-ups of neck pain. Mid-back and low-back pain was intermittent and activity-dependent. Stretching and attending to good body mechanics provided relief. However, where he had long shifts at work, with no time to stretch properly, Mr. Larson could have mid and low back pain for up to three to four days. Mr. Larson reported that, as of the assessment, he generally was sleeping well, but would have difficulty getting comfortable to sleep if he had a flare-up of back pain.

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[44] On cross-examination, Dr. Stewart agreed that Mr. Larson did not report being in constant pain. Rather, the neck, mid and low back pain was intermittent and would flare up with activity.

[45] Some of the information Dr. Stewart records as part of the history she was given by Mr. Larson is not accurate. For example, according to Dr. Stewart, Mr. Larson told her that he attended physiotherapy for 18 months. However, based on Ms. Scott's evidence, Mr. Larson attended physiotherapy from July 2014 to April 2015, and he then returned in 2017. On the other hand, Dr. Stewart has Ms. Scott's records, and was in a position to confirm the dates. Dr. Stewart says that Mr. Larson told her that after the accident he was off work for three weeks to a month. However, this is not consistent with the hours shown for June and July 2014 in Ex. 21. Mr. Larson testified that he took vacation between July 20 and 26, 2014.

[46] Dr. Stewart described the general physical examination of Mr. Larson as unremarkable. There was tenderness over the paraspinal muscles in the right upper back. Range of motion generally was normal. Dr. Stewart noted that Mr. Larson stood and moved around the office briefly two or three times during the one-hour interview, but displayed no other pain behaviour.

[47] In Dr. Stewart's opinion, based on the history provided to Dr. Conly following the accident, Mr. Larson sustained soft tissue injuries to his neck and back in the accident. Although Mr. Larson had described for her his memory of seeing a "blue flash" and that he sustained a brief loss of consciousness following the collision, and Dr. Stewart had Dr. Conly's records, Dr. Stewart did not diagnose a concussion. In Dr. Stewart's opinion, Mr. Larson had appropriate rehabilitation for the injuries he sustained, and he continued to take an appropriate approach to exercise. However, she stated that:

> Although he now does somewhat less physically demanding work his symptoms are probably still being aggravated by the physical demands of his job as well as by his long hours of work and insufficient time to rest or even, at times, to do regular stretching exercises.
>
> It has now been 2.5 years since the motor vehicle accident. . . . Given the duration of his symptoms, it is likely that Mr. Larson will continue to

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> experience all of his current symptoms and limitations resulting from the motor vehicle accident in the future.

[48] In her oral evidence, Dr. Stewart explained that, after a certain amount of time, pain incorporates itself into the nervous system. She said that she did not diagnose Mr. Larson with chronic pain, however, if pain lasts more than three months, there is chronic pain. In Mr. Larson's case, he has a demanding job and works more than full-time hours. She said that she would probably expect someone working in that kind of job to have musculoskeletal pain. But it would be time-limited, not chronic. In her opinion, it was not plausible that Mr. Larson's injuries from the accident had resolved and his current symptoms were being caused by his work. Rather, he was injured, the pain has persisted, and it is not pain that he had before he was injured.

[49] In Dr. Stewart's opinion, Mr. Larson did not suffer a concussion in the accident, and any knee symptoms are unrelated to the accident. She disagrees with Dr. Conly in this respect.

[50] Dr. Stewart recommended that Mr. Larson undergo a functional capacity evaluation since, in her opinion, it was likely that he did not fully meet the physical demands of his job. In her opinion:

> He would probably have significantly better control of his symptoms if he was not required to do physically demanding work, shift work, long work days and long stretches of work without a break.

[51] In her oral evidence, Dr. Stewart observed that Mr. Larson's shifts at Neptune interfered with his sleep, and such a schedule made it much more difficult for people (like Mr. Larson) with chronic pain. She recommended that Mr. Larson eliminate shift work, and not work long hours in a physically demanding job.

[52] In Dr. Stewart's opinion, since Mr. Larson obtained symptomatic relief from massage therapy every two weeks, it would be reasonable for him to continue to attend those treatments. Further, in Dr. Stewart's opinion, if Mr. Larson were to lose his supervisory position, it was unlikely that he would tolerate working "on the tools"

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as he had in the past, because of his injuries. In Dr. Stewart's opinion, it was likely that Mr. Larson would continue to be limited with regard to his home and leisure activities in the future, because of the injuries from the accident. On the other hand, in Dr. Stewart's opinion, Mr. Larson's injuries will not result in degenerative changes in his spine or joints in the future.

(b) Dr. Parhar

[53] Dr. Parhar is a medical doctor and has pursued additional courses and training in occupational medicine. He has also completed all of the training required of a WorkSafeBC Medical Advisor, and has since provided medical training to future medical advisors. Although he is not formally certified, Dr. Parhar has completed the Matheson Functional Capacity Evaluation Certification program as part of his general education in occupational medicine. Among other things, he has held a variety of positions in the Faculty of Medicine at the University of British Columbia, and in 2011 was awarded the Killam Teaching Prize.

[54] Dr. Parhar was qualified as an expert in family medicine, occupational medicine and disability medicine.

[55] Dr. Parhar carried out an independent medical examination of Mr. Larson on February 21, 2017. The opinions in his report dated March 7, 2017 are based on the history he obtained from Mr. Larson, Dr. Parhar's physical examination of Mr. Larson, and Dr. Parhar's review of records from Dr. Conly and Ms. Scott, and the report of Dr. Stewart.

[56] The day of the assessment, Dr. Parhar recorded a long list of complaints from Mr. Larson. They included neck pain, mid-back pain and lower-back pain. However, a number of the other symptoms (such as shoulder pain, elbow pain, wrist pain, knee pain, foot pain) were reported to have begun about a year after the accident.

[57] With respect to the physical examination, Dr. Parhar reported that Mr. Larson had normal posture and gait. There was tenderness to palpation in the left, midline and right region of the cervical, thoracic and lumbar spine, and also in the shoulders.

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Dr. Parhar reported that range of motion of the cervical spine "revealed tightness in all movements." Cervical flexion and extension were normal. However, there was decreased lateral flexion and rotation in the cervical spine. Range of motion of the thoracic spine was normal. Range of motion of the lumbar spine was also normal, although Dr. Parhar reported that it was associated with tightness in all movements. Range of motion of the shoulders was normal, and otherwise, the examination was normal and unremarkable.

[58] In Dr. Parhar's opinion, the "diagnoses that would best describe the conditions that would have resulted" from the accident "include": musculoligamentous injuries to the cervical, thoracic and lumbar spine; muscle tension headaches; depressed mood; anxiety; tinnitus; and sleep disturbance.

[59] Dr. Parhar explained that a musculoligamentous injury is a condition in which the muscles and ligaments are stretched beyond their usual capacity and micro-tearing has occurred to the tissue fibres. Dr. Parhar explained that it is generally thought that the majority of patients with musculoligamentous injuries will recover fully within six to nine months of the physical trauma having occurred, in the sense that they will no longer have pain symptoms, findings on examination or ongoing disability. However, he explained that there is a smaller group of patients that have long term sequelae from their musculoligamentous injuries, such that the pain symptoms, findings on examination and disability persist for many more months, some chronically and some permanently. In Dr. Parhar's opinion, given the passage of time since the accident and the treatments attempted unsuccessfully, Mr. Larson's situation suggested that his musculoligamentous injuries "have essentially reached a plateau (maximum medical improvement)." While future treatment in the form of ice, heat, rest, physiotherapy and acupuncture might offer some temporary pain control, in Dr. Parhar's opinion, "it is unlikely that any future treatment will significantly improve his musculoligamentous injuries." Therefore, in Dr. Parhar's opinion, the musculoligamentous injuries to Mr. Larson's cervical, thoracic and lumbar spine, and his muscle tension headaches have reached a plateau, will continue for the foreseeable future and are "more likely than not, permanent."

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[60] Dr. Parhar also expressed the opinion that Mr. Larson's depressed mood and anxiety conditions would continue "for the foreseeable future," absent counselling or (possibly) medication treatment. Finally, in Dr. Parhar's opinion, given the length of time the tinnitus had continued, it was likely to continue for the foreseeable future.

[61] In Dr. Parhar's opinion, Mr. Larson was at increased risk of intermittent exacerbations of neck pain, lower back pain and headaches, and more vulnerable to future injury (including psychological trauma).

[62] In Dr. Parhar's opinion, given his opinion concerning the musculoligamentous injuries to Mr. Larson's cervical, thoracic and lumbar spine, Mr. Larson should avoid work activities that require sustained postures of sitting and standing, heavy lifting, carrying, reaching, twisting, bending, squatting, kneeling, crawling and stooping. Activities involving prolonged walking would also be difficult.

[63] Dr. Parhar was asked to (and did) provide an opinion on the impact of the injuries on Mr. Larson's personal life. In my view, this was not a matter that required expert opinion evidence. Rather, I needed to hear the relevant facts from Mr. Larson and others in a position to testify about those facts. Then, I can draw my own conclusions. I have placed little weight on this part of Dr. Parhar's opinion.

[64] With respect to treatment recommendations, Dr. Parhar recommended that Mr. Larson discontinue massage therapy, other than for some temporary pain control when he experiences exacerbations. Dr. Parhar encouraged Mr. Larson to work with a kinesiologist for eight to ten sessions. Thereafter, Mr. Larson should be able to do the exercises on his own. Dr. Parhar also suggested that Mr. Larson consider attending yoga or aquafit classes (or both) one to two times a week. He recommended that Mr. Larson participate in a personal fitness program, with the goals of maintaining strength, range of motion and flexibility. Dr. Parhar also recommended some counselling (eight to ten sessions with a clinical counsellor) to address Mr. Larson's depressed mood and anxiety and to help Mr. Larson learn coping strategies.

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[65] Some of Dr. Parhar's recommendations concerning future aids and assistive devices appear to be based on a misunderstanding about the circumstances in which Mr. Larson and Ms. Marchant-Larson sold their townhouse and moved. It was not because Mr. Larson was unable to keep up with housekeeping and yard maintenance.

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(c) Dr. Conly

[66] Dr. Conly was qualified as an expert in family medicine. Her report is undated, but Dr. Conly testified that it was prepared in May 2017. The opinions expressed in her report are based on a review of her file for Mr. Larson and her interactions with him as his family doctor.

[67] In her report, Dr. Conly stated that "[a]fter the accident and [the] following time period," she diagnosed Mr. Larson with:

(a) musculo-ligamentous injury to the cervical spine to a moderate degree;

(b) mild musculo-ligamentous injury to the thoracic and lumbar areas;

(c) concussion, based on Mr. Larson's "ongoing headache, dizziness and tinnitus";

(d) reactive depression "from his immobility, work stress and alcohol and drug use increasing";

(e) knee pain – patellar femoral pain syndrome, and possible meniscal disruption, left more than right, "possibly set up by the accident, and worsened by cycling."

[68] I note that neither Mr. Larson nor any other fact witness testified about his alcohol or drug use (apart from his use of over-the-counter medication for pain).

[69] In contrast to Dr. Parhar, Dr. Conly reported that, as of the date of her report, Mr. Larson no longer had tinnitus. In her opinion, the concussion sustained by Mr. Larson in December 2014 was more severe than what he sustained in the accident.

[70] Like Dr. Parhar, Dr. Conly was asked to, and did, provide her opinion on the effect of Mr. Larson's injuries on his daily life. However, in my view, this was not an issue that required expert opinion evidence from a medical doctor. I place little weight on this part of Dr. Conly's report.

[71] In terms of prognosis and treatment, Dr. Conly mentioned that Mr. Larson's knee pain "may prove to require arthroscopic repair." However, I note that none of the other medical experts expressed the opinion that Mr. Larson's knee pain was associated in any way with the accident. Moreover, if some future surgical intervention was possible, I would have expected Dr. Gharsaa to mention it, which he did not. Dr. Conly mentioned that, in her opinion, Mr. Larson was at more risk if he were to suffer a repeat concussion. She recommended an "active low impact lifestyle with good sleep habits and not a lot of bending and crouching for his work, in order to maintain his level of ability." In Dr. Conly's opinion, the majority of housekeeping and homemaking tasks would be possible for Mr. Larson, although they "may take a little longer." Frequent bending and crouching for long periods might be a source of discomfort for Mr. Larson.

(d) Dr. Gharsaa

[72] Dr. Gharsaa is a medical doctor and orthopaedic surgeon. He specializes in trauma surgery and foot and ankle surgery, although he also performs general orthopedic surgery. Dr. Gharsaa was tendered and qualified as an expert in orthopaedic injuries. He authored two reports, the first dated May 9, 2017 and the second dated June 13, 2017.

[73] Dr. Gharsaa carried out an independent medical assessment of Mr. Larson on April 7, 2017 (a Friday). It was suggested to Dr. Gharsaa on cross-examination that Mr. Larson had been on vacation the week before the examination.

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Dr. Gharsaa said he was unaware of this. However, based on the information recorded in Ex. 21 concerning Mr. Larson's hours of work, I conclude that Mr. Larson was not in fact on vacation the week before the examination. Rather, Ex. 21 shows that he worked a total of 60.5 hours the week ending April 1, 2017, and a total of 75 hours the week ending April 8, 2017. Ex. 21 shows that Mr. Larson worked a total of 19.5 hours the week ending April 15, 2017.

[74] Dr. Gharsaa acknowledged in his direct examination that the paragraph in his first report under the heading "Qualifications" does not in fact describe his qualifications, but those of another physician. This lack of care in the preparation of the report was troubling. Dr. Gharsaa's qualifications are in fact described under the heading "Qualifications" in his second report, and in his CV marked as Ex. 5.

[75] Dr. Gharsaa's opinions in his first report were based on his examination of Mr. Larson (including the history provided by Mr. Larson), and Dr. Gharsaa's review of the records of Dr. Conly and Ms. Scott.

[76] According to Dr. Gharsaa, the symptoms Mr. Larson reported the day of the assessment were:

(a) intermittent middle and low back pain, without any radiating pain down the legs. That pain was increased by staying in one position for a long time and relieved by changing position and stretching;

(b) left knee pain, which Dr. Gharsaa reported Mr. Larson as describing as "not bad," and that mainly hurt during long bike or car rides;

(c) numbness and tingling in both upper extremities from the shoulders down to Mr. Larson's fingers on both sides. This occurred rarely, and mainly with heavy lifting and repetitive over-the-head activity.

[77] On examination, Dr. Gharsaa reported Mr. Larson's gait as normal. Mr. Larson reported no tenderness on palpation of his cervical spine and demonstrated full range of motion. There was some tenderness on palpation of the mid and lower

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back in the midline, but no paraspinal tenderness. Otherwise, the examination was unremarkable.

[78] In Dr. Gharsaa's opinion, based on the history and the documents, "All the signs and symptoms that [Mr. Larson] reports are that of soft tissue injuries which typically and physiologically resolve within three months." Dr. Gharsaa stated that the physical examination "failed to identify . . . any signs of any ongoing objective musculoskeletal traumatic-related impairment that could be attributed to" the accident. Dr. Gharsaa strongly recommended that Mr. Larson work on home exercises to help with his conditioning as well as a core-strengthening program to help with any residual back pain. In Dr. Gharsaa's opinion, Mr. Larson should also be encouraged to continue to resume all of his pre-accident activities, and that avoiding such activities would be more detrimental to his outcome. Further, in Dr. Gharsaa's opinion, Mr. Larson "should be educated about pain that hurts versus pain that harms." Dr. Gharsaa did not discount the fact that Mr. Larson continued to experience some residual pain, but said that Mr. Larson should be reassured that his current symptoms are not suggestive of any ongoing physical impairment or disability that could be attributed to the accident.

[79] Dr. Gharsaa diagnosed Mr. Larson as suffering from a whiplash-associated disorder, Grade 2 at his neck, and sprain and strain of his upper and lower back. These injuries were caused by the accident, in Dr. Gharsaa's opinion. Dr. Gharsaa's prognosis for Mr. Larson "from an orthopedic point of view" was "very good," as long as Mr. Larson worked on active home exercises and continued with a core-strengthening program. In Dr. Gharsaa's opinion, and with respect to Mr. Larson's present and future ability to work, from "the orthopedic point of view, no functional limitation or physical restriction would be required." In Dr. Gharsaa's opinion, no "facility based" treatment was medically necessary.

[80] Dr. Gharsaa was then asked to review the expert reports of Dr. Stewart, Dr. Conly, Dr. Parhar, Haley Tencha and Claudia Walker. In his second report, he

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stated that reviewing these documents did not change the opinions he expressed in his first report.

6. The Non-medical Experts

[81] In addition to the medical doctors, Mr. Larson tendered opinion evidence from Haley Tencha (an occupational therapist and functional capacity evaluator), Claudia Walker (also an occupational therapist) and Darren Benning (an economist). The defendants tendered opinion evidence from Margherita Bracken (an occupational therapist, responding to Ms. Tencha's opinion evidence) and Mark Gosling (an economist, responding to Mr. Benning's opinion evidence concerning future income loss multipliers). All of these experts also testified at trial.

[82] Ms. Tencha has a Master of Occupational Therapy degree from the University of Manitoba and has practiced as an occupational therapist since 2009. She is a member in good standing with the College of Occupational Therapists of British Columbia and the Canadian Association of Occupational Therapists. She became certified as a functional capacity evaluator in 2013.

[83] Ms. Tencha was qualified as an occupational therapist, qualified to give opinion evidence concerning Mr. Larson's functional capacity.

[84] Ms. Tencha carried out a functional and work capacity evaluation of Mr. Larson over the course of about seven and a half hours on January 10, 2017. Ms. Tencha noted that Mr. Larson's estimations of his capacities during the clinical interview were generally consistent with objective test results and findings. However, Mr. Larson overestimated his capacity with respect to sitting, and underestimated his capacities with respect to two-handed lifting and carrying. Given what Ms. Tencha described as the "mild variability" in Mr. Larson's estimation of his capacities, and while Ms. Tencha considered his subjective reports, she placed more emphasis on the objective test findings when identifying his abilities and restrictions within her assessment.

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[85] Ms. Tencha concluded, with respect to Mr. Larson's overall work capacity, that he is capable of both part-time and full-time work as a heavy duty mechanic foreman with limitations. However, in her opinion, he would not be well-suited to return to a non-supervisory position as a heavy duty mechanic. Ms. Tencha noted that clinical observations and test results indicated that Mr. Larson has the ability to perform that majority of the basic body positional demands required of this line of work. However, Ms. Tencha noted that Mr. Larson demonstrated mild limitations with performing tasks requiring prolonged kneeling and prolonged and repetitive horizontal reaching. He demonstrated mild to moderate limitations with performing tasks requiring prolonged and repetitive vertical reaching, sustained neck extension, sustained neck flexion and prolonged and repetitive squatting or crouching (or both). Mr. Larson demonstrated moderate limitations with performing tasks requiring prolonged and repetitive bending. In Ms. Tencha's opinion, Mr. Larson's demonstrated functional limitations in performing activities with these demands indicated that he will likely have difficulties managing such activities over time.

[86] Ms. Tencha noted further that Mr. Larson demonstrated moderate limitations with performing tasks requiring prolonged sitting, likely required for his current position as foreman. Ms. Tencha continued [**bold** in original]:

> Considering his limitations with the body positions required he did not demonstrate the capacity to perform the full spectrum of duties required of this line of work at a sustainable level. He is likely capable of continuing to perform his current position as a Foreman with limitations and accommodations. However, he will require the flexibility to take frequent breaks to change positions and stretch in order to manage his symptoms and remain productive. . . . He will have increased difficulties with performing the more physically demanding tasks in the field, such as demonstrating mechanical tasks to his staff and assisting with equipment repairs. He will need to pace himself with tasks requiring prolonged sitting, prolonged bending, prolonged crouching, prolonged and repetitive vertical reaching and forceful use of the upper extremities.
>
> Based on his demonstrated limitations with the body positions required, he would be better suited for working shorter shifts (e.g. approximately eight hours) and having at least one or two days off per week in order to allow time for his symptoms to recover and allow for a better balance between his vocational and avocational pursuits. As such, he is not well-suited for working overtime hours.

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> . . . I anticipate that he can continue to perform his work as a Foreman at a gainful level with the accommodations as described in this report. However, he is not competitively employable in this line of work considering his limitations and the accommodations he requires.
>
> . . .
>
> Overall, his residual physical abilities and limitations are incompatible with the complete demands required to perform [the Heavy Duty Mechanic] line of work.
>
> It is also my opinion that his overall capacity to compete for work in an open job market has also been reduced due to his ongoing difficulties related to pain in his neck, upper back, middle back, lower back and currently his left knee. . . . He is best suited for work that requires load handling from **Sedentary to Medium level functional strength**.

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[87] Ms. Tencha also made a number of recommendations concerning future care items or services, which included 16 to 24 sessions with a kinesiologist, a gym membership and massage therapy. She described her recommendations as "reasonable recommendations in an effort to maximize Mr. Larson's current functional and vocational capacity and to reduce the chances of a further deterioration of his capacity."

[88] Ms. Bracken received a Bachelor of Science in Occupational Therapy from the University of Alberta. She is a member in good standing with the College of Occupational Therapists of British Columbia, the Canadian Association of Occupational Therapists and the World Federation of Occupational Therapists. She has worked as an occupational therapist since 2004. Her work has included performing functional capacity evaluations and cost of future care assessments.

[89] Ms. Bracken was qualified as an occupational therapist, qualified to give opinion evidence in the field of functional capacity evaluation.

[90] Ms. Bracken was asked to review Ms. Tencha's report and provide a response. She never met with or performed her own evaluation of Mr. Larson. She provided no opinion concerning his ability to work as a heavy duty mechanic foreman, or in any other position. For her assignment, Ms. Bracken was given (in addition to a copy of Ms. Tencha's report) copies of the reports prepared by Dr.

Stewart, Dr. Conly, Dr. Parhar and Dr. Gharsaa, as well as Ms. Tencha's functional capacity testing data.

[91] Ms. Bracken's report contains a heading (on p. 4 of 14) "Section 2: Opinion regarding Ms. Tencha Report of May 9, 2016." Ms. Tencha's report is not dated May 9, 2016. Rather, her functional capacity evaluation of Mr. Larson was done on January 10, 2017 and her report is dated February 27, 2017. No mention was made of the error when Ms. Bracken testified at trial, nor was any attempt made to correct it. However, Appendix B of Ms. Bracken's report shows the correct date for Ms. Tencha's evaluation.

[92] Ms. Bracken says that she has identified "some areas of technical approach in which Ms. Tencha and I differ." She then sets out her criticisms of Ms. Tencha. A major difficulty from my perspective is that Ms. Bracken's criticisms were, generally speaking, not put to Ms. Tencha on cross-examination. For example, Ms. Tencha was not asked whether she agreed with Ms. Bracken's comments that it is difficult to achieve valid answers to both an evaluee's general physical capacity and the evaluee's capacity for a specific job within a one day assessment, and that in providing an opinion based on a single day of testing, Ms. Tencha "has at least partially confounded the specific work capacity results with the general physical capacity data." Ms. Tencha was not asked whether the approach Ms. Bracken describes as one "to fully understand Mr. Larson's capacity to work as a Heavy Duty Mechanic" would have been better, or whether (for example) she considered it but decided not to take that approach. Ms. Bracken's conclusion that "it is not possible to determine [Mr. Larson's] objective capacity for work in his current or previous job from this assessment" was not put to Ms. Tencha. It is not up to Ms. Bracken to tell me (referring to Ms. Tencha's report) whether it is "difficult to have full confidence in this work capacity opinion." By doing so, Ms. Bracken strays inappropriately into argument.

[93] The result, from my perspective, is that the criticisms in Ms. Bracken's report exist largely in a vacuum, especially when Ms. Bracken was not asked to carry out

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her own functional capacity evaluation. Ms. Bracken's opinion evidence is therefore of little assistance and I give it little weight. Ms. Bracken, based on her qualifications and experience, may well have been able to provide the court with important and valuable opinion evidence concerning Mr. Larson's functional capacity, had she been asked to carry out a functional capacity evaluation – especially the functional capacity evaluation that she says Ms. Tencha ought to have carried out. However, that was not the assignment Ms. Bracken was given by defence counsel (not, I note, Ms. Finn).

[94] Ms. Walker is an occupational therapist who has been in practice for about 30 years. She is a member in good standing with the College of Occupational Therapists for British Columbia and the Canadian Association of Occupational Therapists. Ms. Walker is also a certified Canadian Life Care Planner. Ms. Walker was qualified as an occupational therapist with expertise in functional assessments, qualified to give opinion evidence concerning Mr. Larson's functional capacity and future care needs.

[95] Ms. Walker carried out a three-hour assessment at Mr. Larson's home on April 20, 2017 and also reviewed the reports prepared by Dr. Parhar, Dr. Stewart and Ms. Tencha. Ms. Walker's report is dated May 1, 2017.

[96] Ms. Walker made a number of future care recommendations, including costs. For example, Ms. Walker recommended that Mr. Larson participate in a multi-disciplinary pain management program. She explained that her assessment indicated that "Mr. Larson has limited understanding of how to manage his symptoms in a sustainable way without experiencing the flare-ups and gradual decline in function associated with over performance." Ms. Walker also recommended a "one off" session with an occupational therapist in relation to an assessment of Mr. Larson's office workstation.

[97] I turn finally to the economists.

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[98] Mr. Benning was qualified to give opinion evidence concerning future income loss multipliers and assessments, present value calculations, and the calculation of the present value of the cost of future care items based on Ms. Walker's report.

[99] Mr. Benning prepared a report dated May 16, 2017 in which he estimated future income loss multipliers for Mr. Larson. In a second report dated May 15, 2017, Mr. Benning provided an estimate of the lump sum present value of future care items.

[100] Mr. Gosling was qualified to give opinion evidence concerning future income loss multipliers and assessments. Mr. Gosling prepared a report dated June 20, 2017 in response to Mr. Benning's report dated May 16, 2017.

[101] The principal difference between Mr. Benning and Mr. Gosling concerned the contingencies to be included in the economic income loss multiplier used in the future income loss multipliers, in particular, the treatment of labour force participation. As a result, Mr. Gosling's economic income loss multiplier was about 3.9% below that used by Mr. Benning.

7. Findings and conclusions about Mr. Larson's injuries

[102] I will begin with some observations about the evidence, and about credibility and reliability. Mr. Larson's credibility and reliability are particularly important, given the general absence of objective findings of continuing injury related to the accident. The medical opinion evidence is premised in part on Mr. Larson providing an accurate history, and one that is broadly consistent with evidence presented at trial that I accept.

[103] In closing submissions, Ms. Finn (on behalf of the defendants) argued that, in cases such as Mr. Larson's, the evidence must be scrutinized carefully. She cited one of the often-quoted passages from ***Price v. Kostryba*** (1986), 70 B.C.L.R. 397 (S.C.), where McEachern C.J.S.C. (as he then was) stated, at p. 398:

> Perhaps no injury has been the subject of so much judicial consideration as the whiplash. Human experience tells us that these injuries normally resolve

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> themselves within six months to a year or so. Yet every physician knows some patients whose complaint continues for years, and some apparently never recover. For this reason, it is necessary for a court to exercise caution and to examine all the evidence carefully so as to arrive at fair and reasonable compensation.

[104] Ms. Finn also cited ***Prince v. Quinn***, 2013 BCSC 716, where Williams J. commented, at para. 26:

> [26] In my view, the point to be observed is this: where a plaintiff's claim is founded quite substantially on self-reported evidence, it is necessary for the trier of fact to scrutinize the plaintiff's evidence carefully and evaluate it in the light of other evidence, such as the circumstances of the collision, other relevant information concerning the plaintiff's activities and statements made by the plaintiff on other occasions. However, where the evidence of physical injury is substantially based on subjective evidence - the testimony of the plaintiff - that should not constitute an effective barrier to proof of a claim.

[105] Ms. Finn submits that that Mr. Larson was inconsistent in his evidence regarding his standing and walking tolerance as well as his ability to cycle and snowboard since the accident. She argues further that, in his testimony, Mr. Larson minimized or completely discounted the impact of non-accident related events (in particular, the effect of his structured overtime) on his life since the accident. Ms. Finn points out that Ms. Tencha did not rely on Mr. Larson's subjective reports of his capacities due to her concerns with his reliability. In addition, Ms. Finn points out that Mr. Larson has never had any performance issues raised by any of his supervisors, either at Deltaport or at Neptune. Moreover, he is able to manage his pain symptoms by over-the-counter medication such as ibuprofen, and by stretching and taking short breaks on the job.

[106] Ms. Finn submits that, as a result, in determining Mr. Larson's true limitations, Mr. Larson's evidence must be carefully scrutinized, in the context of the evidence regarding his <u>actual</u> activities (especially his hours of work) since the accident.

[107] I am also, implicitly, being asked to draw an inference, based on the evidence of Mr. Bahrami and Mr. Mooney, and the minimal amount of damage done to the Subaru and the Volvo, that the collision is unlikely to have caused the extent of the

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losses and damage asserted by Mr. Larson. However, as has been observed many times, this does not follow either as a matter of logic or legal principle.

[108] Some caution is appropriate when looking at Mr. Larson's evidence. For example, as I have pointed out when discussing Dr. Stewart's report, he is not a particularly good historian, especially for dates. Dr. Parhar was under a misapprehension about the reason for the move from the townhouse. In contrast to Ms. Marchant-Larson, Mr. Larson is not a reliable reporter about what happened immediately after the collision (something that would be explained by Dr. Conly's diagnosis of concussion).

[109] However, on the important points, Mr. Larson's evidence does not stand alone. It is supported by the evidence of Ms. Marchant-Larson, Mr. Marchant, Ms. Scott and Mr. Larson's work colleagues. In addition, there is a reasonable and credible explanation for the apparent inconsistency between Mr. Larson's continuing complaints of pain and disability, and his level of activity at work. I find Mr. Larson's evidence concerning the effects of his injuries, both physically and in his life generally, to be both credible and reliable.

[110] Mr. Larson's evidence concerning the symptoms he experienced following the accident and in the weeks thereafter is supported by the evidence of Ms. Marchant-Larson (who arranged for Mr. Larson to see Dr. Conly), Dr. Conly's observations at the time, her referral for physiotherapy, and by Ms. Scott's evidence.

[111] Moreover, there is general consensus among the medical experts that, as a result of the accident, Mr. Larson sustained soft tissue injuries to his neck and back. That medical diagnosis is consistent with Mr. Larson's description of how he was feeling, and supports his evidence.

[112] There is no question that Mr. Larson continued, with little time off, to work at Deltaport throughout the summer in 2014. However, Mr. Larson's evidence concerning the effect on him of carrying on in the way he did, and that there was no improvement in his symptoms, is supported by the evidence of Ms. Marchant-Larson

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and Ms. Scott. Indeed, from Ms. Scott's perspective as a treater working to try and improve Mr. Larson's condition and symptoms, his physical work and the long commute were completely counterproductive to his recovery. Although Dr. Gharsaa commented that soft tissue injuries "typically" resolve within three months, Mr. Larson's situation was not typical at all. Rather, as Dr. Parhar explained in his evidence, there is a smaller group of patients that have long term sequelae, and have pain and disability chronically and some permanently. That, I find, describes Mr. Larson's situation. Dr. Stewart explained how, after a certain amount of time, pain incorporates itself into the nervous system, and, becomes chronic. I find that also describes Mr. Larson's situation. Although Mr. Larson's pain symptoms are not constant, they are chronic. They will flare up with the type of activity that has been a daily feature of Mr. Larson's work. While the elimination of the long commute to Deltaport in March 2015 resulted in improvement of Mr. Larson's symptoms, it was temporary and limited.

[113] I find, therefore, that, as a result of the accident, Mr. Larson suffered soft tissue injuries to his cervical, thoracic and lumbar spine. I find further that, as a result of the soft tissue injuries he sustained in the accident, Mr. Larson has been left with stiffness in his neck and back, and with chronic pain, particularly in his neck, and (to a lesser extent) in his back. Activity, particularly the heavy physical demands of his current job, exacerbates the pain and causes flare-ups, as Mr. Larson described. I accept his evidence in that respect. I find that, once Mr. Larson was able to eliminate his long commute and begin his job as foreman at Neptune in March 2015, his symptoms improved. However, as of trial, his symptoms have reached the point of maximum medical improvement. While, as Dr. Parhar noted, future treatment might offer some temporary pain relief, it will not be a cure for the lingering effects of the soft tissue injuries caused by the accident. Accordingly, I find that Mr. Larson will continue to experience pain symptoms caused by the soft tissue injuries he sustained in the accident, and the associated limitations of those symptoms, for the foreseeable future. His pain is chronic and will not be cured. The symptoms will be exacerbated by activities such as twisting, crouching, bending and reaching, which are regular features of Mr. Larson's work.

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[114] In my view, Dr. Gharsaa's opinion evidence is not inconsistent with my findings. His evidence was carefully qualified in terms of the lack of any "objective musculo-skeletal traumatic-related impairment" and "from an orthopedic point of view" (underlining added). In that light, his statement in his second report that, following a review of additional documents including the reports of Dr. Stewart and Dr. Parhar, his opinions remained unchanged is not surprising, given the limits within which he was qualified to give opinion evidence, and the qualified nature of his opinions. Dr. Stewart and Dr. Parhar were better positioned, in terms of their qualifications and experience, to address and explain Mr. Larson's ongoing pain symptoms and limitations, which they did.

[115] In my view, Mr. Larson's ability to work a gruelling schedule of structured overtime, once he started at Neptune, is also not inconsistent with my findings, nor does it demonstrate that, as of trial, the pain symptoms and stiffness Mr. Larson experiences are primarily work-related, and not a result of the injuries he sustained in the accident. Dr. Stewart touched on this in her oral evidence. She rejected the proposition that Mr. Larson's current symptoms were work-related. Work-related pain would be time-limited. Mr. Larson's pain is chronic and it is not pain that he had before he was injured in the accident.

[116] Moreover, I find that, as a result of the symptoms Mr. Larson has continued to experience resulting from his soft tissue injuries, most of his resources are being consumed by doing what he needs to do to meet the heavy demands of his job. This demonstrates what I find to be Mr. Larson's strong work ethic, and a stoic approach to working through, and despite, pain and discomfort. The result has been that Mr. Larson has had little time or energy away from work to devote to recovery, rest and management of his symptoms, a point that Dr. Stewart made in her report. The rest of Mr. Larson's life, including his relationship with his wife and the activities (athletic and otherwise) that he enjoyed and pursued before the accident, has suffered as a consequence. His shift work interferes with sleep, and adversely affects his chronic pain. Mr. Larson has little left when he gets home from work, and

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(as Ms. Marchant-Larson testified) sits on the couch, watching television. He is – in her words – not himself.

[117] In addition, I find, based on the evidence of Mr. Larson, Ms. Marchant-Larson and Mr. Bahrami, that Mr. Larson sustained a mild concussion in the accident, together with dizziness, headaches and tinnitus. This is consistent with Dr. Conly's medical diagnosis at the time. I find that Mr. Larson's concussion-related symptoms, and tinnitus, resolved relatively soon after the accident. In my view, Dr. Parhar's diagnosis of tinnitus caused by the accident and continuing as of February 2017 is too speculative. Neither Dr. Conly nor Dr. Stewart made such a diagnosis. (Dr. Gharsaa was not qualified to do so.)

[118] Dr. Parhar also diagnosed depressed mood and anxiety, and Dr. Conly made a diagnosis of "reactive depression." Dr. Stewart did not make a diagnosis respecting Mr. Larson's mood. At trial, Mr. Larson did not say very much about his mood or feelings, although from time to time he expressed frustration, anger and sadness about his circumstances. I think that Ms. Marchant-Larson's description, that, after the accident, Mr. Larson is not himself, is a fair one. However, Mr. Larson's moods are situational. On the bad days, when his pain symptoms have been exacerbated, he is depressed, frustrated and anxious.

[119] I do not accept Dr. Conly's diagnosis of knee symptoms, and patellar femoral pain syndrome, as being causally related to the injuries Mr. Larson sustained in the accident. Dr. Conly was alone in making such a diagnosis, which she described as "possibly set up by the accident." I conclude that Mr. Larson has failed to show that his knee symptoms are causally related to the accident.

8. Non-pecuniary damages

[120] It is well-established that the purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering;

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impairment of family, marital and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism (a factor that should not, generally speaking, penalize the plaintiff). See ***Stapley v. Hejslet***, 2006 BCCA 34, at paras. 45-46.

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[121] On behalf of Mr. Larson, Mr. Bisbicis submits that an appropriate and fair award in this case would be $110,000. In support of his position, Mr. Bisbicis cites in particular: ***Benson v. Day***, 2014 BCSC 2224 (plaintiff, 57 as of trial, worked in construction pre-accident; suffered soft tissue injuries to his neck and back, along with concussion; he continued to have pain five years after the accident, which court found was chronic; he also suffered anxiety and emotional distress as a result of the accident, as well as some cognitive issues; both personal and work life were affected as a result; non-pecuniary damages of $110,000 awarded); and ***Lane v. Pedersen***, 2014 BCSC 1302 (plaintiff school psychologist, 54 as of the accident and pursuing a doctorate in education; she suffered soft tissue injuries to her neck, shoulder and back, and a mild traumatic brain injury; as of trial, she continued to experience residual pain on a daily basis and had mild cognitive symptoms, including poor balance, memory and attention; she lost her sense of smell and taste; personal relationships deteriorated; non-pecuniary damages of $110,000 awarded).

[122] On the other hand, on behalf of the defendants, Ms. Finn submits that an appropriate and fair award is between $40,000 and $45,000. The defendants acknowledge that Mr. Larson continues to be affected by residual pain in his neck and back. They say, however, that Mr. Larson has returned to many of his recreational activities, although there has been some restriction in the frequency and intensity of those activities. The defendants say that the structured overtime Mr. Larson is required to do also plays a significant role in the reduction of his recreational pursuits and domestic responsibilities, and that Mr. Larson's injuries do not currently substantially interfere with his life.

[123] In support of the defendants' position concerning the appropriate range of non-pecuniary damages, Ms. Finn cites the following cases: ***Mothe v. Silva***, 2015

BCSC 140 (plaintiff longshoreman, 48 as of trial; court found that he suffered from neck and shoulder pain and headaches as a result of the accident; his recovery had plateaued and his condition was chronic; he was able to work, but in pain; his injuries contributed to fatigue, a pessimistic outlook and reduced his enjoyment of activities and family life; non-pecuniary damages of $40,000 awarded); ***Eng v. Titov***, 2012 BCSC 300 (plaintiff bus driver, 43 at time of trial; sustained moderate soft tissue injuries; he was left with chronic pain that was exacerbated by work, and restricted his pre-accident activities; non-pecuniary damages of $40,000 awarded); ***Jones v. McLerie***, 2016 BCSC 763 (plaintiff, 36 years old as of trial, married with young children; pre-accident, he worked doing maintenance and repairs on forklifts; following the accident, he worked as a field technician for a forklift distributor; his injuries resulted in persistent episodes of low back pain with exertion; prognosis for full recovery was poor; non-pecuniary damages of $45,000 awarded); and ***Olynyk v. Turner***, 2012 BCSC 1138 (plaintiff landscaper, in mid-40s as of trial; he was unable to return to work because of soft tissue injuries to his neck and low back; condition found to be permanent and his leisure activities were significantly restricted; non-pecuniary damages of $40,000 awarded, then reduced to account for pre-existing condition).

[124] Of course, it is well established that each case must be decided on its own facts, and prior cases are useful as a guide – but only a guide – in the assessment of non-pecuniary damages.

[125] In my opinion, the range of damages suggested by Ms. Finn is too low, and does not fully reflect the findings I have made concerning Mr. Larson's injuries, their continuing effects and the consequences for his life. Among other things, as a result of the injuries sustained in the accident, Mr. Larson moved to his current job, the demands of which consume all his energy and resources, and exacerbate his pain and other symptoms. Mr. Larson's determination to work through the pain is, ultimately, counterproductive and not sustainable long term.

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[126] The enjoyment and pride Mr. Larson took prior to the accident from the exercise of his skills on the job as a multiple red seal tradesman are now diminished by his physical limitations, which are permanent. The lingering effects of the soft tissue injuries Mr. Larson sustained have also deprived Mr. Larson of the ability to employ his skills doing work and improvements around his and his wife's home. This was an activity he took great pride in and enjoyed very much, especially knowing that the result was something he had achieved himself. In addition, as a result of the injuries, Mr. Larson's relationship with his wife, and their ability to enjoy activities such as cycling together, has been impaired. Ms. Marchant-Larson described him after the accident as "not himself." Even if he could find time away from work, Mr. Larson is no longer able to engage in pastimes such water-skiing as he was able to do before the accident.

[127] On the other hand, the cases cited by Mr. Bisbicis feature cognitive impairments (in addition to the physical injuries and their consequences) that were significant, and are not factors here.

[128] Taking into account Mr. Larson's circumstances, the factors described in ***Stapley*** and the cases cited to me in argument, I conclude that an appropriate award for non-pecuniary damages is $80,000.

9. Loss of earning capacity

[129] Claims for both past and future loss of income capacity are subject to the same legal test. The plaintiff must demonstrate that the injuries suffered in the accident and the resulting symptoms have impaired his ability to earn income, and that there is a real and substantial possibility his diminished earning capacity has resulted or will result in a pecuniary loss. The onus is not a heavy one but must be met in order to justify a pecuniary award: see ***Perren v. Lalari***, 2010 BCCA 140, at paras. 21, 32 and 33.

[130] With reference to past loss of earning capacity, Rowles J.A. in ***Smith v. Knudsen***, 2004 BCCA 613, put the matter this way (at para. 29):

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> . . . 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.

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[131] A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: see ***Athey v. Leonati***, [1996] 3 S.C.R. 458, at para. 27. The plaintiff's loss is assessed on the basis of the difference between the plaintiff's original position just before occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission: ***Athey***, at paras. 34-35. Where a plaintiff establishes a real and substantial possibility of a hypothetical event, the event must be given weight according to its relative likelihood and compensation must be awarded on an estimation of the chance that the event will occur: see ***Steward v. Berezan***, 2007 BCCA 150, at para. 17.

[132] The plaintiff may prove the amount of the loss of earning capacity using an earnings approach or a "capital asset" approach: see ***Perren***, at para. 32. Both are correct. The earnings approach will be more useful when the loss is more easily measurable. Either way, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his working career, taking into account relevant and realistic negative and positive contingencies. The assessment is an exercise of judgment, not a mathematical calculation. Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable. See, for example, ***Parypa v. Wickware***, 1999 BCCA 88, at para. 70.

[133] In ***Brown v. Golaiy*** (1997), 26 B.C.L.R. (3d) 353 (S.C.), at para. 8, the court described some of the considerations to take into account in making the assessment. These 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 might otherwise 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.

Consideration of these factors can be particularly useful when the capital asset approach is used: see ***Perren***, at paras. 11-12.

[134] A plaintiff may be able to prove that there is a substantial possibility of a future loss despite having returned to his or her usual employment: see ***Perren***, at para. 32. As Southin J.A. commented in ***Palmer v. Goodall***, 1991 CanLII 384 (B.C.C.A.), at para. 25:

> Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability.

[135] Mr. Bisbicis (for Mr. Larson) also notes the following observation by Frankel J.A. (for the court) in ***Morlan v. Barrett***, 2012 BCCA 66, at para. 41:

> [41] . . . In my view, it was open to the trial judge to find—essentially as a matter of common sense—that constant and continuous pain takes its toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations an employer is prepared to make. . . .

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[136] Mr. Larson testified that, before the accident, he (with Ms. Marchant-Larson) considered moving to Tsawwasen or Delta, since he was happy working at Deltaport and wanted to become a foreman. In that light, I conclude it is reasonable to deal with Mr. Larson's claim for loss of earning capacity on the basis that, but for the accident, he would have been promoted from working "on the tools" to working as a foreman and earning roughly what he was being paid at Neptune.

[137] I will first address loss of earning capacity to the date of trial.

[138] On behalf of Mr. Larson, Mr. Bisbicis submits that, absent the accident, Mr. Larson would not have missed any work at Neptune. Instead (and as Mr. Larson testified), Mr. Larson was off work periodically because of the effects of the injuries he sustained in the accident. Mr. Bisbicis submits that, based on Mr. Larson's oral evidence, together with Ex. 21, it is reasonable say that Mr. Larson lost 168.5 hours at the regular time wage rate as it was from time to time (see Ex. 23). Any missed overtime hours would be excluded, since Mr. Larson could not be certain about what these would have been. As a result, the total gross past income loss is conservatively estimated at $9,066 (using an average hourly rate of about $53.80).

[139] On the other hand, on behalf of the defendants, Ms. Finn submits that the only time off work that can be attributed to the accident is the week immediately following the accident, when Mr. Larson was working at Deltaport. In Ms. Finn's submission, it is unclear how many hours Mr. Larson would likely have worked that week, but for the accident. However, assuming he would have worked 57 hours (the number of hours he worked the week before the accident), the gross loss would be about $2,700.

[140] In Ms. Finn's submission, once Mr. Larson started working at Neptune, the demands of his structured overtime were such that, even without the accident, he would likely have had to take occasional days off or leave early from time to time to rest and recover. In Ms. Finn's submission, Mr. Larson has failed to prove any past income loss or loss of income earning capacity that relates to the accident, once he started at Neptune.

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[141] In my view, the theory advanced by Ms. Finn, that, even without the accident, Mr. Larson would likely have taken time off work because of the demands of the structured overtime at Neptune, is not supported by the evidence. Mr. Larson has demonstrated a very strong work ethic, and, as he testified, he continued and continues to work, even when in pain. Before the accident, when Mr. Larson was working at Deltaport, he put in long days (including the commute) without any difficulty. His work hours increased at Neptune, but he eliminated the commuting time, and he was no longer "on the tools" 100% of the time. When it was put to him on cross-examination, Mr. Larson rejected the proposition that, even without the accident, he would have been more likely to take days off as his hours increased at Neptune. His actual recorded work hours in Ex. 21 show that, in the period prior to trial, he rarely took time off, except with good reason. The reason almost always was related to the injuries he sustained in the accident.

[142] Even though the 168.5 hours was described as a conservative estimate of Mr. Larson's lost hours, I have some concerns about the reliability of the number, given Mr. Larson's evidence about how it was arrived at. However, I find that Mr. Larson has shown that he lost at least 130 hours of work at Neptune (at an average hourly rate of $53.80) as a result of the injuries he suffered in the accident, and, in addition, lost 57 hours of work at Deltaport in the week after the accident and because of the injuries he suffered in the accident. I assess his total gross past income loss at $9,600.

[143] I turn then to Mr. Larson's claim in respect of loss of future earning capacity.

[144] Mr. Bisbicis submits that, on the evidence, Mr. Larson has demonstrated a real and substantial possibility that his residual pain symptoms will, in the future, lead to an income loss. As a result of the soft tissue injuries he sustained in the accident, Mr. Larson is unable to work either as a heavy duty mechanic, a maintenance foreman or a structural welder, on a full-time, durable basis. Mr. Bisbicis submits that, as a result, Mr. Larson is less valuable to himself as a person capable of earning an income in a competitive labour market. He was, and is,

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ambitious and hard-working. He has a specialized skillset that, as a result of the injuries he suffered in the accident, he is no longer able to use directly. Instead, he must look for less physically demanding work (such as stores foreman) where his knowledge, training and skills can still be of value. Therefore, in Mr. Bisbicis' submission, Mr. Larson has demonstrated an entitlement to compensation for loss of future earning capacity.

[145] Mr. Bisbicis submits that Mr. Larson's loss can best be measured using the earnings approach, based on the difference between what he would likely have earned had he been able to continue to work full-time as a mechanical maintenance foreman, and what he would earn in the much less physically demanding job of stores foreman. Mr. Bisbicis argues that in the stores foreman (or equivalent) position, Mr. Larson's income would be cut by about $56,000 annually, compared with what he would have earned as a mechanical maintenance foreman. On this basis, assuming that Mr. Larson would work until age 67 and using the economic multiplier from Mr. Benning's May 16, 2017 report, the loss is approximately $900,000.

[146] The capital asset approach could also be used on the facts of this case. If that approach were used, then, in Mr. Bisbicis' submission, $600,000 (or roughly three years' gross income) is a reasonable assessment of Mr. Larson's loss.

[147] On the other hand, Ms. Finn submits that there is no viable claim for loss of future earning capacity and that Mr. Larson has failed to establish an entitlement to any award. She cites ***Moore v. Cabral et al.***, 2006 BCSC 920, at para. 78, for the propositions that ongoing symptoms alone do not mandate an award for loss of future earning capacity, and that there must be some cogent evidence to trigger, in particular, any of the four considerations set out in ***Brown v. Golaiy***. Ms. Finn argues that there must be evidence of impairment associated with the accident and the resultant injuries which leads to a conclusion that an employment asset previously enjoyed by the plaintiff has been either impaired or lost.

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[148] In Ms. Finn's submission, the court must be cautious in relying on Mr. Larson's subjective reports of his impaired function. She argues that the objective evidence regarding Mr. Larson's activities since the accident, and the objective medical evidence regarding his physical impairment seriously call into question whether Mr. Larson's perception of his functionality can be relied upon.

[149] Ms. Finn submits that, since the accident, Mr. Larson has shown the capacity to work on a sustained basis in two physically demanding jobs. She points out that Mr. Larson's work hours have in fact increased since the accident. In the 23 weeks in 2014 before the accident, Mr. Larson worked a total of 873 hours, or 38 hours a week on average. In 2015, Mr. Larson worked 2,427 hours, averaging (excluding vacation time) 49.5 hours a week. In 2016, he worked an average of 51.7 hours a week, and in 2017, he was averaging 50.9 hours a week. Ms. Finn argues further that, since Mr. Larson was able, after the accident, to secure the mechanical maintenance foreman position at Neptune, he has demonstrated he is competitively employable. Moreover, there was no evidence at trial of any complaints about Mr. Larson's performance at work, despite his own views about his difficulties and the observations of his co-workers.

[150] Alternatively, if the court determines that Mr. Larson has demonstrated an entitlement to compensation, then, in Ms. Finn's submission, the loss would be limited to Mr. Larson having to take the occasional day off work to manage a flare-up in his neck or back pain. In her submission, given Mr. Larson's record of being able to work extensive hours with minimal time off for over three years, these future absences should be relatively infrequent. In short, in Ms. Finn's submission, the objective evidence reflects a loss of capacity that is no more than Mr. Larson having to take an occasional day off over the course of his working life to manage his symptoms.

[151] In Ms. Finn's submission, an appropriate award to compensate Mr. Larson for any loss of future capacity would be $15,000. This equates to the present value of a loss of about $1,000 per year to age 65, using Mr. Gosling's future income loss

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economic multiplier. Ms. Finn submits this should be used rather than Mr. Benning's economic multiplier, which Ms. Finn argues is based on a flawed assumption about participation rates. (If Mr. Benning's economic multiplier were used, the amount would be about $16,300.)

[152] However, I do not accept the implicit premise of Ms. Finn's argument, namely, that Mr. Larson's evidence concerning his impaired function is not reliable, and in the absence of objective evidence of impairment, Mr. Larson has failed to meet the burden on him to prove a real and substantial possibility of a future event leading to an income loss, apart (perhaps) from the very modest loss occasioned by the need to take the occasional day off over his working life to manage flare-ups of his pain symptoms. My findings concerning the continuing effects of Mr. Larson's injuries are inconsistent with the premise of the argument. I have found Mr. Larson's evidence to be reliable, and consistent with the medical opinion evidence of Dr. Stewart and Dr. Parhar, which I accept. The effect of the opinion evidence of both Dr. Stewart and Ms. Tencha (and supported by Dr. Parhar's opinion evidence) is that Mr. Larson does not fully meet the physical demands of his current job. Therefore, in my opinion, the evidence is sufficient to establish an entitlement to compensation for loss of future earning capacity.

[153] Before the accident, Mr. Larson clearly had the capacity to work full-time in any of the trades in which he held a red seal, and I find that he had the capacity to work full-time, and without accommodations, as a mechanical maintenance foreman at Neptune, with all that entails. I find that, after the accident, there is a real and substantial possibility of a future event leading to an income loss, specifically Mr. Larson's inability because of his chronic pain symptoms to continue to work full-time as a mechanical maintenance foreman at Neptune, with structured overtime as a condition of his employment. Dr. Stewart's opinion was that Mr. Larson did not fully meet the physical demands of that job, and her opinion in that respect is supported by Ms. Tencha's functional capacity evaluation. Dr. Stewart recommended that Mr. Larson eliminate shift work – a condition of his employment as mechanical maintenance foreman – and not work long hours in a physically demanding job,

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since those factors made life more difficult for people, such as Mr. Larson, with chronic pain. It is true that, since joining Neptune, Mr. Larson has worked long hours in a physically demanding job. But not only has that impaired his physical condition, it has also been at the expense of most other aspects of his life. This is not sustainable over the long term.

[154] As the court observed in ***Morlan***, as a matter of common sense, constant and continuous pain takes its toll, and over time, it will have a detrimental effect on a person's ability to work, regardless of accommodations. This common sense conclusion is, in my view, entirely consistent with Dr. Stewart's opinion and recommendation that Mr. Larson eliminate shift work and not work long hours in a physically demanding job.

[155] I find therefore that Mr. Larson has demonstrated that there is a substantial possibility that the effects of his chronic pain will affect his ability to earn income in the future. As a result of the effects of the injuries he suffered in the accident, Mr. Larson has been rendered less capable overall from earning income from all types of employment (given his qualifications, training and skills) and he has lost the ability to take advantage of all job opportunities that might otherwise have been open to him had he not been injured. Mr. Larson is, therefore, entitled to compensation for his lost future earning capacity.

[156] Generally speaking, I agree with Mr. Bisbicis that the earnings approach can be used, although since this is an assessment and not a calculation, I have also considered the factors under the capital asset approach. Based on Mr. Larson's evidence, he envisaged himself working for about another 25 years. That would mean retirement at age 65 or 66. With respect to a present value, I prefer to use Mr. Benning's economic multiplier rather than Mr. Gosling's. In my view, Mr. Benning's assumptions concerning participation rate were better grounded and could be reasonably justified, while Mr. Gosling's verged on a guess.

[157] However, in my opinion, the assessment of Mr. Larson's loss is not as straightforward as applying the appropriate economic multiplier to what Mr. Bisbicis

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submits is the difference in annual income between a stores foreman and a mechanical maintenance foreman.

[158] Mr. Larson is continuing to work as a mechanical maintenance foreman (with, hypothetically, no or little loss of income). Although Mr. Larson is optimistic he will be successful in obtaining a position as a stores foreman, and he is taking the course at BCIT to improve his chances of success, whether a new position will open up soon, or a year or more from now, is unknown. Some deduction must be made to recognize the possibility that it may be some time yet before Mr. Larson moves into the lower paying job. His evidence indicated that, at this time and despite his difficulties, he did not plan to leave the mechanical maintenance foreman position until he had secured the stores foreman position (or equivalent). Until then, and given Mr. Larson's very strong commitment to work, he would be earning the income of a mechanical maintenance foreman.

[159] Second, Mr. Larson explained that the difference in income between what he earned as mechanical maintenance foreman and what he would earn as stores foreman was based on the structured overtime hours involved in the maintenance foreman position. However, the stores foreman position also involved overtime hours (in addition to the 2 hours at time and a half) from time to time, and the overtime hours in the maintenance foreman position, over and above the minimum 45 hours per week, were unpredictable (as Ex. 21 shows). This indicates that the gap between the incomes may not be as large as Mr. Bisbicis submitted in argument, and which was larger than Mr. Larson had estimated in his evidence.

[160] Third, I consider that some deduction must be made to allow for the contingency that, at some point, Mr. Larson would decide he wanted to have his evenings and weekends free, and be willing to trade the increased income available from structured overtime for more free time to spend with his wife and family, and more leisure time generally. I would put that chance at 15%.

[161] However, it must be remembered that, Mr. Larson is being compensated for his loss of earning capacity. Before the accident, and by hard work, he had put

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himself in a position where he would command a substantial income in a variety of different jobs. Now, as a result of the injuries Mr. Larson sustained in the accident, and despite his training and qualifications, he is limited.

[162] Taking all of those factors into account, I conclude that a reasonable and fair assessment of Mr. Larson's loss of future earning capacity is $400,000. This is roughly equivalent to the present value of an annual loss, to age 65, of about $25,000.

10. Loss of housekeeping capacity

[163] Mr. Larson seeks an award of $40,000 for past and future loss of housekeeping capacity. Mr. Bisbicis submits that the evidence shows that, since the accident, Mr. Larson has been almost completely incapacitated from doing or assisting with household maintenance and improvements because of the pain and other symptoms he has at the end of his workday. Ms. Marchant-Larson has had to do more of the household chores, and Mr. Larson has had to hire others to do work (such as landscaping and plumbing repairs) that he was capable of doing and did before the accident. Mr. Bisbicis submits that, given Mr. Larson's demonstrated skill level, it is reasonable to value his time at $30 per hour, and to estimate the time he spent on housekeeping and household maintenance at about 20 hours per month. On that basis, in his submission a global award for past and future loss of capacity of $40,000 would be both conservative and cautious.

[164] On the other hand, the defendants say that an award for loss of housekeeping capacity is not supported by the evidence. Among other things, the defendants say that, with Mr. Larson's significant increase in work hours once he started at Neptune, Ms. Marchant-Larson would be expected to take on more of the household responsibilities even without the accident. Mr. Larson's structured overtime has also meant he had less time and energy to perform outdoor maintenance and projects. The defendants say that any loss of housekeeping capacity can be adequately addressed in the award of non-pecuniary damages.

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[165] The applicable principles are summarized in ***Yip v. Saran***, 2014 BCSC 1283, at paras. 81-82:

> [81] Awards for loss of housekeeping capacity may be made for either past or future losses, or both: see ***Kroeker v. Jansen*** (1995), 123 D.L.R. (4th) 652, 1995 CanLII 761 (B.C.C.A.), at para. 25. . . . Such claims are different from a future cost of care claim in that they reflect a loss of a personal capacity and are not dependent on whether replacement housekeeping costs are actually incurred: see ***O'Connell v. Yung***, 2012 BCCA 57, at para. 67. An award ordered for loss of housekeeping capacity is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. A claim in respect of loss of housekeeping capacity is also distinct from a claim for non-pecuniary damages. Even though the claim is not dependent on whether replacement housekeeping costs are actually incurred, it is frequently valued using a replacement cost approach.
>
> [82] However, any award should be approached conservatively: see ***Kroeker***, at para. 29.

[166] In my view, and based on my findings concerning Mr. Larson's injuries resulting from the accident and their continuing effects on him, Mr. Larson is entitled to some compensation for loss of housekeeping capacity as a separate head of damages, and this is not a case suited to treating a loss of capacity as a non-pecuniary loss. Following the accident, Mr. Larson was no longer capable of performing all of the tasks (and specifically all the home maintenance and improvement) that he had done before the accident. In some instances (as shown by Ex. 22), he hired outside help.

[167] On the other hand, before the accident, Mr. Larson was ambitious and liked to work hard. Before the accident, he was physically capable of doing the job of a mechanical maintenance foreman with structured overtime, without limitations, and he enjoyed the income that came with it. I conclude in that light that, without the accident, there was a real and substantial possibility that Mr. Larson would have traded the flexibility that he had at Deltaport "working on the tools" for the increased responsibility, time commitment and very substantially increased income that came with the foreman's position, particularly when he and Ms. Marchant-Larson took on the added financial responsibility that came with purchasing a new home. That would have left him (for at least some period of time) with less time to work and do

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projects around the home. Ms. Marchant-Larson would likely have had to do more, or, as a couple, they would likely have hired others to do tasks (such as plumbing, carpet cleaning, gutter cleaning, landscaping and so on).

[168] In my view, compensation at the level put forward by Mr. Bisbicis goes beyond what would be justified by a conservative or cautious approach. There is little support in the evidence to conclude that Mr. Larson was spending about 20 hours a month on household tasks, or that, but for the accident, he would have continued to do so indefinitely. The expenses shown in Ex. 22 (which I discuss in more detail below) give some indication of the types of tasks Mr. Larson hired outside help to perform after the accident. Moreover, a change (which is predicted) from the hours and physical demands required in his current position should give Mr. Larson both more time and more energy to perform tasks around the home, and restore some of his capacity to do so. With respect to compensation for future loss of capacity, and as a rough guide, I have considered the present value multipliers in Mr. Benning's May 16, 2017 report. The present value of an annual loss of $1,000 to age 66 is about $20,900. An annual loss at that level could be justified on a conservative approach. I am not persuaded that a higher amount could be.

[169] Accordingly, and taking a conservative approach, I award Mr. Larson the sum of $35,000 as compensation for loss (both past and future) of housekeeping capacity.

11. Cost of future care

[170] The purpose of an award for costs of future care is to restore, as best as possible with a monetary award, the injured person to the position he would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff, and the claims must be reasonable. See ***Tsalamandris v. McLeod***, 2012 BCCA 239, at paras. 62-63, and ***Harder v. Poettcker***, 2017 BCSC 312, at para. 114. Moreover, the future care costs must be likely to be incurred by the plaintiff.

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The onus is on the plaintiff to show that there is a reasonable likelihood that he will use the suggested services: see ***O'Connell v. Yung***, 2012 BCCA 57, at para. 68.

[171] Although Ms. Walker's report costed out a number of future care items, in closing submissions, Mr. Bisbicis advised that Mr. Larson's claims were limited to the following (using Table 2 in Mr. Benning's May 15, 2017 report):

Item	**Cost (including GST/PST where applicable)**	**Frequency**	**Present value**
Pain management program	$14,963	Year 1	$14,804.00
Occupational therapy	$666	Year 1	$659.00
Kinesiologist	$284	Annual to Year 4	$1,087.00
Remedial massage	$1,040	Annual to Age 65	$19,361.00
Physiotherapy	$660	Annual to Age 65	$12,292.00
Heavy yard maintenance	$840	Annual to Age 75	$19,615.00
Total			$67,818.00

[172] The defendants say that no award for future care costs should be made, although much of their argument was based on a view of Mr. Larson's injuries and limitations that is contrary to my findings.

[173] Although Dr. Gharsaa noted that Mr. Larson "should be educated about pain that hurts versus pain that harms," only Ms. Walker recommended attendance at a pain management program, on the basis that, in her view, Mr. Larson had limited understanding of how to manage his symptoms. In my opinion, it is significant that none of the plaintiff's medical experts made such a recommendation. If attendance at a pain management program was medically justified in Mr. Larson's case, I would have expected either Dr. Stewart or Dr. Parhar to say something about it. Moreover, I am not persuaded that, at this stage, Ms. Walker's justification (her conclusion

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about Mr. Larson's "limited understanding") applies. I am not persuaded this is a reasonable cost to be awarded in this case.

[174] An occupational therapy session was recommended by Ms. Tencha (with whom Ms. Walker agreed) and by Dr. Parhar in connection with the set-up of an ergonomic workstation for Mr. Larson at his place of employment. I do not question the value of a good ergonomic workstation. However, I do not see the cost of an occupational therapist, to assess and set up an ergonomic workstation at Mr. Larson's place of employment, to be justified or reasonable as an item of cost of future care.

[175] Dr. Parhar recommended 8 to 10 sessions with a kinesiologist. Ms. Walker's recommendation of a four-year program goes far beyond that, and, in my view, cannot be justified. I would award $593 (being the present value of 8 sessions at $75 per session in Year 1) for kinesiology.

[176] Both Dr. Stewart and Dr. Parhar recommended remedial massage therapy for Mr. Larson. However, the recommendations were made primarily in the context of Mr. Larson's symptoms associated with his job as mechanical maintenance foreman. The clear expectation is that, once Mr. Larson moves out of that position and into a less physical job, and although he will continue to have pain, he will not have the constant aggravation of his symptoms from work, and will also have more leisure time to rest and recover. In that light, in my view, a significant contingency deduction must be made to reflect that remedial massage may no longer be required (at least not to this degree) in the future, and also to reflect the likelihood that Mr. Larson will not incur the expense. In my opinion, a reasonable contingency deduction is 70%. I therefore award $5,800 for this item.

[177] In my view, and for similar reasons, the cost for physiotherapy is also excessive. Neither Dr. Stewart nor Dr. Parhar recommended the equivalent of regular physiotherapy for Mr. Larson for the rest of his working life. Dr. Parhar's recommendation was in terms of occasional physiotherapy as an alternative to massage therapy. Mr. Larson has used physiotherapy services in the past, and

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benefitted from them. However, I think there is a real likelihood that Mr. Larson would not incur the expense in Ms. Walker's report, and a contingency deduction is required. I therefore award $3,690 for this item.

[178] The final item is heavy yard maintenance. Based on the evidence, Mr. Larson has struggled to do this, and felt the need to hire help. In my view, this is another area where there is a considerable amount of uncertainty because what Mr. Larson will be physically capable of doing, once he moves out of the maintenance foreman position, is unknown. As I observed above, the expectation is that he will be able to do more, although it may be somewhat more difficult and take more time than before the accident. Moreover, Ms. Marchant-Larson, as the other homeowner, must share some of the burdens of homeownership. In that light, I have concluded that a contingency deduction of 50% is appropriate, and I award $9,800 for this item.

[179] In summary, I award the following amounts for cost of future care:

Item	**Frequency**	**Present value**
Pain management program	Year 1	$0.00
Occupational therapy	Year 1	$0.00
Kinesiologist	Year 1	$593.00
Remedial massage	Annual to Age 65 (70% contingency deduction)	$5,800.00
Physiotherapy	Annual to Age 65 (70% contingency deduction)	$3,690.00
Heavy yard maintenance	Annual to Age 75 (50% contingency deduction)	$9,800.00
Total		$19,883.00

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12. Special damages

[180] The parties agreed (in Ex. 1) that Mr. Larson incurred special damages in the sum of $3,284.04. The details of these expenses are not in evidence. However, there is no dispute that Mr. Larson is entitled to recover this amount as special damages.

[181] In addition to those expenses, Mr. Larson seeks to recover the additional sum of $2,673.12 as special damages. The details and invoices are found at Ex. 22, and the expenses are as follows: $215.96 for yard clean-up in November 2016; $283.50 for chimney sweeping and repairs; $249.37 for plumbing repairs in the kitchen sink; $840 for the installation of a fence; $304.29 for carpet cleaning; and $780 for labour on the installation of a fireplace insert (which, in turn, required the chimney to be swept). All of these expenses were incurred in relation to the home that Mr. Larson and Ms. Marchant-Larson share. Mr. Larson's evidence was to the effect that, but for the injuries he sustained in the accident, he would have done all of this work himself and the expenses would have been avoided. Therefore, the argument in support of these amounts being recoverable as special damages is, essentially, that they were incurred as a result of the injuries Mr. Larson sustained.

[182] The defendants say that the only amount that should be recoverable as special damages is the agreed amount.

[183] Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, in the absence of some authority (and none was provided to me), I am not persuaded that it is appropriate to have the defendants pay for what are essentially the costs of home repair and improvements, especially when there are two homeowners, only one of whom is the plaintiff, and Mr. Larson has been compensated for lost housekeeping capacity. The claim for these additional expenses is denied.

13. Summary and disposition

[184] In summary, I award damages to Mr. Larson as follows:

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(a) non-pecuniary damages in the sum of $80,000;

(b) income loss to trial in the sum of $9,600 (less applicable taxes);

(c) loss of future earning capacity in the sum of $400,000;

(d) loss of housekeeping capacity in the sum of $35,000;

(e) cost of future care in the sum of $19,883; and

(f) special damages in the sum of $3,284.04.

[185] I will leave counsel to deal with applicable taxes on the award for income loss to trial. If they are unable to reach agreement, they have liberty to apply.

[186] There will be pre-judgment interest in accordance with the ***Court Order Interest Act***, R.S.B.C. 1996, c. 79.

[187] Subject to any submissions that the parties may wish to make, Mr. Larson is entitled to his costs. If the parties wish to make submissions on costs, they should contact Scheduling within 45 days of these Reasons to schedule a hearing date convenient to the parties and their counsel, and to the court.

"ADAIR J."

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