IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Middleton v. Lightheart,*
2020 BCSC 437

Date:20200401
Docket: M178391
Registry: New Westminster

Between:

Scott Middleton

Plaintiff

And

Nicole Dawn Lightheart

Defendant

Before: The Honourable Mr. Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiff:	P.G. Kent-Snowsell
Counsel for the Defendant:	S. Vefghi J. Guest
Place and Date of Trial/Hearing:	New Westminster, B.C. February 24–28, 2020
Place and Date of Judgment:	New Westminster, B.C. April 1, 2020

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[1] On September 5, 2014, the plaintiff, Mr. Middleton, was driving home from work. As he drove eastbound on Kingsway, the defendant's vehicle turned in front of him. The front of Mr. Middleton's vehicle struck the passenger side of the defendant's vehicle. The defendant admits liability for the accident.

[2] This trial is an assessment of the damages that Mr. Middleton suffered in that accident. The plaintiff seeks non-pecuniary damages, past income loss, special damages, and future care costs. He also seeks an in-trust award for the additional services provided by his wife.

[3] The plaintiff alleges that he continues to suffer from myofascial pain in his neck and back as well as a right shoulder injury. He alleges that his injuries continue to affect his ability to work. However, he does not claim for loss of capacity to earn income. He says that he is working despite his symptoms and that he plans to retire later this year.

[4] The defendant argues that Mr. Middleton's ongoing pain is caused by either pre-existing conditions, or subsequent injuries.

The Plaintiff

[5] Mr. Middleton is a sheet metal worker with Red Seal certification. He has been employed in that capacity by the Vancouver School Board ("VSB") since 1999. He is 64 years old. He plans to retire in August 2020, on his 65th birthday.

[6] The plaintiff has been married for 42 years. He has two adult daughters and four grandchildren. He has been very involved in the lives of his grandchildren. In the years before the accident, he took on a parenting role with his oldest grandson, including coaching his baseball teams and participating in other activities. His second grandchild was born in 2013. The third and fourth grandchildren were born after the accident. He says that his injuries affect his ability to interact with his grandchildren.

[7] In addition, Mr. Middleton was an avid golfer before the accident. He played up to 3–4 times per week in addition to practice sessions. He enjoyed lifting weights. He and his wife would also attend concerts and go on long walks.

[8] The extent of Mr. Middleton's pre-existing conditions is at issue. He concedes that, prior to the subject accident, he suffered periodic pain in his neck, back, and left shoulder. On occasion, he took Tylenol #3 tablets for pain in his neck or back. He concedes that he missed ten weeks of work after a motor vehicle accident in 2010. He missed a further two weeks of work with neck pain in March 2014. He underwent an MRI of his cervical spine on August 22, 2014 (two weeks before the subject accident). That scan was ordered in March 2014. He says that the neck pain in March 2014 was a flare-up and it had resolved by the time the MRI occurred.

[9] All of the doctors who saw Mr. Middleton for Independent Medical Examinations ("IMEs") commented upon the impact of the pre-existing conditions on his current condition. Their evidence and diagnoses are discussed below under the heading "Medical Evidence". There is no evidence that the plaintiff had any pre-existing injury to his right shoulder.

[10] Objectively, the evidence indicates that Mr. Middleton was not limited in his activities before the accident. As noted, he was an avid golfer, playing regularly. He worked on a full-time basis in a heavy job. He lifted weights. He was actively involved in raising and caring for his grandchildren. The clinical records from before the subject accident do not indicate a pattern suggestive of chronic pain, although there were intermittent treatments of his neck and back.

The Accident and the Injuries

[11] The mechanism of the September 5, 2014 accident was a "T-Bone" collision. Mr. Middleton was eastbound in the curb lane on Kingsway when the defendant's vehicle turned in front of him. The left-turning defendant crossed three lanes of eastbound traffic, attempting to enter a parking lot. The front bumper of the plaintiff's vehicle struck the passenger side of the defendant's vehicle.

[12] Immediately after the accident, the plaintiff turned into the parking lot to exchange information with the defendant. He then drove home. No emergency vehicles attended.

[13] In the accident, the plaintiff struck his head on the steering wheel. He had a lump on his forehead when he saw his family physician, Dr. Sidhu, the next day. There is no allegation of a brain injury. He complained of pain and stiffness in his neck, both shoulders, and his low back. The pain in his low back referred down to his legs.

[14] At the recommendation of his doctor, the plaintiff took time off work after the accident. He did not return to work until October 31, 2014. After that date, he worked on a full-time basis.

[15] The plaintiff acknowledges that he had significant improvement during September and October while he was off work. Upon returning to work, his pain increased again. He says that the pain has remained relatively consistent since his return to work.

[16] To deal with the lingering pain, Mr. Middleton sought therapy in the form of physiotherapy, massage, and chiropractic treatments. He also attended at a pain clinic in 2018. Dr. Sidhu continued to prescribe pain-killing medication including Naproxen, Tylenol #3, and Gabapentin. Mr. Middleton continues to take Tylenol #3, primarily in the evening, to assist him with sleep.

[17] As part of his therapy, he had “needling” treatments of his trigger points. Through the pain clinic, he attended ten one-hour seminar sessions where he learned pain reduction strategies. The plaintiff said that these were not pleasurable therapies (like massage), and he argues that he would not have undertaken them if he was not in pain.

[18] The plaintiff also says that he has been accommodated by his employer, although there is no formal accommodation in place. His supervisor confirmed that,

as compared to other workers, Mr. Middleton undertakes his tasks in ways that minimize his physical exertion.

[19] The main areas of ongoing complaint are in his right shoulder, neck, and low back. He also has some pain in his left shoulder, but it is less than his right.

[20] The plaintiff described the effect of these injuries on his life. He noted that he has altered the manner in which he interacts with his grandchildren. He also described the changes in the way he performs his duties at work. He described both of these changes as modifications, as opposed to complete changes. He also described the pain as waking him up at night. Overall, as discussed below, I find that the plaintiff generally understated the effect of the accident on his life.

[21] The defendant argues that the majority of the plaintiff's ongoing injuries either existed before the subject accident or were suffered in subsequent incidents. The defendant points to the following:

a) He was injured in a motor vehicle accident in 2010 and missed ten weeks of work. In response, the plaintiff says that he recovered from the injuries suffered in that accident.

b) In March 2014, he reported neck, back, and left shoulder pain to his family doctor. He missed two weeks from work. He was referred for an MRI which occurred in August 2014. The plaintiff says that his pain had resolved by the time the MRI occurred.

c) In August 2016, the plaintiff fell backwards while working on bleachers at a school. He broke a finger and injured his pelvis with pain in his low back. The defendant notes that it was after August 2016 that the plaintiff returned to physiotherapy and complained of low back pain. He was off work for five weeks after this fall. The defendant also references a clinical note from the plaintiff's chiropractor, Dr. Yee, in 2019. That note indicates that the plaintiff's chronic low back pain was due to a fall in bleachers while at work. In response to these arguments, the plaintiff says that the

primary injuries in that incident were to his finger and his pelvis. He denies that he ever told Dr. Yee about the bleacher incident. Clearly, Dr. Yee knew about it and recorded it.

d) On June 20, 2017, the plaintiff was pulling flashing off the roof at a school. He wrenched muscles in his trunk on the left side. The plaintiff says that that injury was primarily to his trunk and not to his low back. However, the records indicate that he suffered some degree of low back pain after this incident.

e) In February 2018, the plaintiff was involved in another motor vehicle accident (the "2018 Accident"). He was at fault for that accident. The defendant argues that the physical damage to the plaintiff's vehicle was greater in this 2018 Accident than in the subject accident. She argues that I should infer that he was more severely injured in the 2018 Accident. The plaintiff admits that he was injured in the 2018 Accident, and took two or three days off work, but he says that he then returned to his baseline pain. Of note, there are no clinical records indicating that he received any treatment for any injuries suffered in the 2018 Accident. I decline to draw the inference that the plaintiff must have been injured because there was significant damage to his vehicle. I would expect that if he suffered significant injuries, he would have sought medical attention and missed more time from work.

f) In July 2018, he suffered injuries to his back caused by a coughing fit.

g) In January 2019, he complained to Dr. Sidhu that he had injured his ribs and low back. The origin of the injuries was an interaction with his grandson. He missed work for two weeks.

[22] The defendant concedes that the plaintiff has ongoing symptoms. However, she argues that the cause of any ongoing problems has not been established on the balance of probabilities. She says that the pre-existing problems, in addition to the

subsequent incidents, could be the cause of his current symptoms. The defendant also submits that credibility and reliability are at issue.

Credibility and Reliability

[23] The defendant argues that I should approach Mr. Middleton's evidence with caution. Primarily, she argues that he was not reliable. She also suggests that portions of his testimony were not credible.

[24] The defence notes that the plaintiff claimed in his direct evidence that he lost weight after the accident because the pain prevented him from lifting weights. He conceded during cross-examination that he had lost the weight before the accident on the advice of his cardiologist.

[25] The defence also argues that the evidence regarding Mr. Middleton's golfing activities was inconsistent. The plaintiff testified that, before the accident, he was golfing 3–4 times per week as well as attending at the driving range on other occasions. He played to a handicap of "4", which indicates he was very good.

[26] Mr. Middleton testified that he now golfs once per year, in a tournament with his friends from work. He testified that his golfing reduced after, and because of, the subject accident. The defendant notes that the plaintiff's daughter testified that she worked at a golf course with a driving range. She testified that she had the ability to give him tokens for buckets of balls. She said that, to her memory, she continued to give him tokens until 2017. Of note, she confirmed that his attendance declined after the 2014 accident. She also confirmed that the length of each practice session decreased significantly. Before the accident, he would hit multiple buckets of balls and practice for over an hour. After the accident, he would hit a half-bucket then retire.

[27] The defence argues that this evidence suggests that he was neither reliable nor credible when he testified that he only golfs once per year.

[28] However, there is a significant difference between hitting golf balls at the range and “golfing”. I take judicial notice that an avid golfer would not say he was “golfing” unless he had played a round of golf. Going to the driving range is “hitting balls”. Mr. Middleton was not being untruthful when he testified that he golfs once per year. He did not include the visits to the driving range in that equation. Further, the evidence confirmed that his visits to the range are significantly restricted after the accident.

[29] The defendant also points to the clinical records in the period after the accident. A physiotherapy clinical note, dated October 22, 2014, indicates that he stated that he was “feeling much better”. When asked, the plaintiff agreed that he improved before the end of October, but he said that the pain increased again after he returned to work.

[30] The defendant also argues that Mr. Middleton failed to advise some of the doctors who conducted IMEs about prior or subsequent injuries and incidents. Each of the plaintiff’s IME doctors was cross-examined regarding the history provided by the plaintiff. Each testified that they felt that Mr. Middleton had provided the history honestly and to the best of his ability. Notably, there is no allegation of a failure to report relevant information to Dr. Ballard, the defence physiatrist. The only inconsistency between her report and the testimony at trial relates to the plaintiff’s use of prescription medications. Her report says that the plaintiff told her that he was not taking any medications for his accident-related injuries. He disagrees and says that he is still taking Tylenol #3 tablets for pain. It is unclear where the logic would lie in Mr. Middleton purposefully failing to advise Dr. Ballard about continuing to take pain medication.

[31] Overall, the defendant argues that, given Mr. Middleton’s issues with credibility and reliability, I should be wary of finding that his current condition is worse than it would have been if the subject accident had not occurred.

[32] In part, the consideration of the plaintiff’s credibility is tied to its conformity with the testimony of other witnesses.

[33] Other members of the plaintiff's family described the impact of the accident as being more severe than the plaintiff's own description.

[34] Mr. Middleton's wife and daughter testified. They corroborated his evidence regarding the effect of the accident on his life. The plaintiff's daughter indicated that, when growing up, she bonded with her father over golf. As noted above, she confirmed that his golfing had been restricted. She testified about his limitations in terms of caring for her children. Her testimony corroborated her father's evidence. She did not describe major ongoing problems, but she has noticed that he has some pain and he limits his activities. He avoids lifting and rambunctious play with his younger grandchildren.

[35] The plaintiff's wife described the plaintiff's problems after the accident. Her evidence was more compelling that the plaintiff's. She described him as looking like a "crooked old man" after the accident. While the plaintiff testified that, he sometimes has difficulty sleeping and he can wake up at night, his wife described him waking up screaming in pain. She had to calm him down. She said that, after the accident, he has become moody, especially after a day of work. It is her impression that he comes home in pain. She said that there have been times when she had missed work because he needed her to comfort him. She often massages his neck and shoulder with Tiger Balm to relieve the pain.

[36] Mrs. Middleton confirmed that, after the accident, her husband ceased being involved in a number of activities, including coaching baseball and playing golf. The couple no longer go camping, walking, or golfing together. They no longer attend concerts. She said the result of the accident was as though she had lost her "best buddy". Her evidence on these issues was not challenged in cross-examination.

[37] The plaintiff also called Mr. Kelly Freigang. He has been the plaintiff's supervisor at VSB since 2015. Prior to that time, Mr. Freigang was a co-worker with the plaintiff. Mr. Freigang testified that the plaintiff has a good work ethic. He described the plaintiff's mood as being somewhat worse than other men in the shop. He confirmed that the plaintiff performs his work in a manner that reduces the stress

and strain on his back. If he needs to go onto a roof, he uses a power lift instead of lugging a ladder. He uses a hydraulic steel bender instead of doing the tasks by hand using an extender and his arm-strength. Mr. Freigang described Mr. Middleton as a diligent, but not the fastest, sheet metal worker in the shop. He said Mr. Middleton never complained to him about any pains, and noted that Mr. Middleton is not a complainer. Mr. Freigang also confirmed that he knew Mr. Middleton to be a passionate golfer before the accident. Mr. Freigang volunteered that it would make sense that he quit golf if his back hurt from an accident.

[38] I have also considered the clinical records that were put to the plaintiff in cross-examination. I did not find that any of those records were significantly inconsistent with his description of the progress of his injuries or condition over time.

[39] Overall, I find that Mr. Middleton was a good witness on his own behalf. Having said that, he was not particularly talkative, and he had difficulty with the sequencing of events. I find his answers to be refreshingly curt and understated. He did not attempt to overplay the extent of his injuries, nor their effect on his life. As noted, the testimony of the other witnesses either corroborated his evidence, or indicated that he had understated his ongoing problems.

[40] In cross-examination, where appropriate, Mr. Middleton admitted that he had suffered either prior or subsequent injuries. Where appropriate, he denied that there was a relationship between certain events and his current complaints. After considering those admissions and the entirety of the evidence, I find that, since returning to work in November 2014, Mr. Middleton has worked through pain. He has been stoic in that regard. As discussed below, his stoicism has led to sacrifices in other areas of his life.

[41] I find Mr. Middleton curtailing his golf after the accident to be a clarion piece of evidence. There is no explanation for his cessation of golfing apart from the injuries suffered in the accident.

Medical Evidence

[42] The plaintiff underwent three IMEs for this action. They all occurred in 2019.

Dr. De Forge

[43] At his counsel's request, the plaintiff saw Dr. Dan De Forge, a physiatrist. Dr. De Forge provided a report dated August 15, 2019.

[44] Dr. De Forge noted the plaintiff's prior history of pain in the neck and low back. He opines that the plaintiff's neck and low back pain were not caused by the subject accident, but it made them worse. Conversely, the right shoulder pain was solely attributable to the accident. He wrote that

> Mr. Middleton does have a history of pre-existing musculoskeletal problems related to both his age and the physical nature of his work. This includes neck and left-sided shoulder pain and arm pain. … However, he was able to work through these symptoms and did not require significant time off work and he was able to maintain his level of recreational activities.

[45] Regarding his present condition, Dr. De Forge wrote that

> in my opinion, Mr. Middleton experienced an exacerbation of his pre-existing cervical pain and lumbar symptoms but a new right shoulder girdle injury which caused him to require a period off of work followed by therapy and rehabilitation. This still affects his recreational activities and enjoyment. Furthermore, he does have some nighttime pain which affect [*sic*] him and negatively impact on his recovery.

[46] After reviewing the history provided by the plaintiff and the associated clinical records, he opines that the certain changes on MRI of his cervical spine before and after the accident could be age-related.

[47] His opinion was that, but for the subject accident, the plaintiff's right side neck, right shoulder girdle, and right arm pain would not be present. The other pains are worse because of the accident. His prognosis is guarded, but he believes the plaintiff may obtain some relief when he retires from his physical job.

[48] He recommends tricyclic medications to assist with the plaintiff's sleep; alternatively, he recommends a trial of Lyrica. He also recommends stretching and exercise.

Dr. Mark Matishak

[49] Dr. Matishak, a neurosurgeon, provided a report dated October 29, 2019. He noted that the plaintiff had pre-existing findings on X-ray and MRI, including spondylosis in the cervical spine and spondylolisthesis due to a congenital anomaly in the lumbar spine. He also noted that there was some osteoarthritis in the right shoulder, although that area was not symptomatic before the accident.

[50] In terms of causation of the continuing symptoms, Dr. Matishak wrote the following:

> It is evident … Mr. Middleton harbored pre-existing changes in his cervical and lumbar spine. These have been made worse by the subject motor vehicle accident of September 5, 2014.
>
> He harbored pre-existing spondylosis at C3-4, C4-5, C5-6 and C6-7 which is worse both clinically and radiographically based on his MR scan of June 21, 2016. He also harboured pre-existing L5-S1 spondylolisthesis secondary to pars interarticularis defects at L5. This condition was also made worse by the trauma of the accident of September 5, 2014.

[51] Because Dr. Matishak is a neurosurgeon, his focus was on the condition of Mr. Middleton's spine. He did not provide any opinion regarding the plaintiff's right shoulder, apart from noting that it was mildly restricted.

[52] In cross-examination, the defence asked Dr. Matishak whether he had a complete history of the plaintiff's health. Dr. Matishak confirmed that he only had certain clinical records up to 2016. However, he had the records of Dr. Sidhu, the family physician, through August 2019. He confirmed that Mr. Middleton had not advised him of some of the subsequent injuries. As noted above, there were two work-related injuries in 2016 and 2017. There was also a further car accident in 2018. However, Dr. Matishak's opinion was not altered by those events. As noted, there were no clinical records following the 2018 motor vehicle accident because the

plaintiff sought no treatment. Dr. Matishak had reviewed the clinical records for the incidents in 2016 and 2017 and considered them in forming his opinion.

[53] I do not find that the foundation of Dr. Matishak's opinion was weakened by the information that was not in his possession. He confirmed, and did not resile from his opinion, that the accident made the pre-existing pains in the plaintiff's neck and low back worse.

[54] Dr. Matishak's prognosis is guarded. However, he also thinks the plaintiff may have some reduction of symptoms following retirement.

Dr. Tonya Ballard

[55] The defence called Dr. Ballard, a physiatrist. She saw the plaintiff on October 24, 2019, and provided a report dated November 5, 2019.

[56] She found that the accident-related injuries were

a) cervical spine strain with ongoing myofascial pain;

b) bilateral shoulder strain;

c) thoracic spine strain with ongoing myofascial pain; and

d) lumbar spine strain with ongoing myofascial pain.

[57] She felt that there was an exacerbation of pre-existing shoulder and low back pain, and the accident likely contributed to the myofascial pain in the neck and upper back.

[58] She noted that the plaintiff had subsequent injuries at work as well as pre-existing pains. She stated, "As the accident occurred approximately 5 years ago, I am not able to determine the degree to which these pre-existing conditions may have been exacerbated." I interpret that statement as Dr. Ballard offering no opinion on the contribution by the subject accident to the plaintiff's current condition. In other words, to employ a double negative, she did not give the opinion that the accident

did not affect his current condition. She simply stated that she was unable to determine the degree of its contribution to the current picture. That position differs from the opinions of Dr. Matishak and Dr. De Forge.

[59] There is an aspect of Dr. Ballard's report that causes me concern for the objectivity of her entire report. I discussed above the stark evidence regarding Mr. Middleton's involvement in golf. On that topic, I have particular problems with Dr. Ballard's opinion arising from the history she took from the plaintiff and the opinion at which she arrived. Her hand-written notes recorded, under the heading "Recreation", that the plaintiff told her that he "golfed 3 – 4 x/wk – took 1 yr off. now – 1 tournament/ yr – swinging (increases) pain".

[60] I interpret those notes as recording that the plaintiff informed Dr. Ballard that he golfed a lot before the accident and he ceased golfing after the accident.

[61] In her report, Dr. Ballard wrote, "He reported that he plays golf less often, but due to the pre-existing shoulder pain, I am not able to attribute if this is solely a result of the injuries sustained in the accident."

[62] My concern arises from the fact that the history provided by Mr. Middleton was clear (and later confirmed at trial). He golfed a lot before the accident and curtailed that activity after the accident. If I assume he golfed because he enjoyed golfing, then the cessation of golf after the accident must have been due to the injuries suffered in the accident. None of his pre-existing conditions limited his golf before the accident. Hence, the accident caused him to stop golfing. Dr. Ballard's opinion on that issue is not supported by facts or logic.

[63] Given my concern regarding Dr. Ballard's opinion on the golf issue, I have concerns about the entirety of her opinion. Again, I note that she provided no opinion on the level of causation that the accident played in his current presentation. I prefer the opinions of Dr. De Forge and Dr. Matishak on the issue of causation.

[64] Dr. Ballard's prognosis for full recovery is guarded. She recommends that the plaintiff undergo an active rehabilitation program to strengthen his shoulder, plus six months of massage treatments.

[65] On the basis of all the evidence, I find that the plaintiff suffered

a) exacerbation of neck and low back pain that continues as myofascial pain. Prior to the accident, his pain was sporadic, and subject to flare-ups. Since the accident, this pain has become constant. He also suffered subsequent injuries that contribute to some degree to his current neck and low back pain;

b) a new right shoulder injury that continues as myofascial pain, and a worsening of his left shoulder pain; and

c) alteration of his mood. He has not been diagnosed or treated for any psychological condition. However, the evidence discloses that he is a moody person after the accident.

[66] The medical experts are in relative agreement that, with respect to the pre-existing conditions in his neck and back, his pain is worse because of the subject accident. Further, his right shoulder continues to cause him pain and limit his activities. Overall, his injuries continue to cause pain, limit activity, and interrupt sleep. Prognosis for recovery to his pre-accident condition is guarded.

[67] Although the plaintiff has been able to continue working, that work has come at a high cost to his home and recreational life. He testified, and I accept that, although he had some initial recovery by the end of October 2014, when he returned to work in November, his symptoms increased again. His wife's testimony told of the time it takes him to recover in the evenings. He arrives home moody and in pain. He requires hot baths and heating pads. He has ceased many of the activities the couple pursued before the subject accident. Most notably, the plaintiff stopped playing golf, which was his passion before the accident. My impression is that he is the classic stoic plaintiff. That evidence was clear from his wife's testimony. He

continued working despite significant pain. In order to continue working, he suffered the pain and gave up his recreational pursuits.

Assessment of Damages

Non-Pecuniary Damages

[68] The plaintiff seeks an award of $95,000 for non-pecuniary damages. The defendant submits that the award should be in the range of $30,000.

[69] In this case, the plaintiff's injuries caused limited time off work. However, he suffers from continuing pain due to his injuries. He had some pre-existing pain, and the evidence establishes that his subsequent injuries have contributed to the current picture. In my considerations below, I have factored in the plaintiff's age, the nature of the injury, the severity and duration of the pain, the period of disability, emotional suffering, impairment of social relationships, and impairment of physical abilities and lifestyle: *Stapley v Hejslet*, 2006 BCCA 34 at para. 46.

[70] My primary measure of non-pecuniary damages, combining all of the considerations listed above, is how the plaintiff's life changed because of the accident. I noted above that, in my opinion, the plaintiff returned to work and has been stoic. However, his work has caused him problems in other areas of his life. His wife described him as a "crooked old man" and testified about the limits on his abilities. He is less able to be active with his grandchildren although he described this as a change in the manner of his activity as opposed a loss of an ability.

[71] Most starkly, Mr. Middleton was passionate about golf before the accident. He has had to give up his main recreational activity. I consider that to be evidence of both the severity of his injury and a significant alteration in his lifestyle.

[72] The plaintiff submits the following cases:

a) *Benson v. Day*, 2014 BCSC 2224: The 57-year-old steel fabricator suffered soft-tissue and emotional issues. He missed one day from work, but continued to suffer pains through to the trial. He was found to be stoic.

He was diagnosed with an adjustment disorder and cognitive problems. The court awarded non-pecuniary damages of $110,000 (which was ultimately reduced for a failure to mitigate).

b) *Courtney v. Hutchinson*, 2012 BCSC 188: The plaintiff was a stoic 48-year-old mechanic in the logging industry with pre-existing disc disease in his spine. He suffered chronic pain. The court awarded $70,000.

c) *Lampkin v. Walls*, 2016 BCSC 1003: The 46-year-old stoic landscaper suffered soft tissue injuries that developed into chronic pain. Notably, he was unable to continue playing cricket, which was his passion before the accident. The court awarded $75,000.

d) *McCartney v. McArthur*, 2014 BCSC 2164: The 62-year-old cabinet salesman had pre-existing neck and low back pain. The accident caused an aggravation of that pain as well as mood changes. The court awarded $75,000.

[73] The plaintiff says that the award in each of these cases should be adjusted for inflation. Based on these cases, the plaintiff submits that a non-pecuniary award of $95,000 would be appropriate.

[74] The defendant argues that the plaintiff suffered soft-tissue injuries that aggravated pre-existing conditions in his neck, left shoulder, and low back. She acknowledges that the accident caused a new injury to his right shoulder which continues to bother him at trial. With respect to the other injuries, the defendant argues that, based on Dr. Ballard's opinion, the evidence is not sufficient to establish that the accident played a causative role in the plaintiff's present condition. She argues that the pre-existing problems, in addition to the subsequent injuries, could account for the plaintiff's current pain levels in his neck, left shoulder, and low back. The same argument holds true for the plaintiff's reduced mood.

[75] I have noted above my preference for Dr. De Forge's and Dr. Matishak's opinions over Dr. Ballard's and my findings regarding causation.

[76] The defendant's cases are not, in my opinion, helpful. It appears to me that the quantum cases relied upon by the defendant were chosen based on the low award as opposed to the similarity to the facts of this case. The defendant submits that non-pecuniary damages should be in the range of $25,000–$30,000.

[77] The defendant cited the following cases:

a) *Ma v. Haniak*, 2017 BCSC 549: The plaintiff was self-represented, and there were significant credibility issues. The court, at para. 521, found that he did not suffer from chronic pain, but suffered from a "factitious disorder or had been malingering in the hopes of receiving many hundreds of thousands of dollars in damages." The court awarded $25,000 in non-pecuniary damages.

b) *Bay v. Woollard*, 2019 BCSC 1073: The 76-year-old plaintiff claimed that he gave up playing hockey because of the injuries suffered in the accident. The court did not accept that evidence. The majority of the plaintiff's problems were due to a stroke he suffered after the subject accident. The plaintiff had significant credibility problems. The court awarded $30,000.

c) *Ben-Yosef v. Dasanjh*, 2016 BCSC 360: The 59-year-old plaintiff had been totally disabled by a prior accident in 1998. The evidence established that most of his ongoing problems pre-existed the subject accident. The court awarded $30,000.

[78] I do not find any of the defendant's cases to be of assistance in assessing Mr. Middleton's non-pecuniary damages.

[79] Having reviewed the cases submitted by the plaintiff, I find that the *Courtney* and *McCartney* cases are the most similar on their facts. Factoring some degree of inflation for cases decided in 2012 and 2014, and adjusting for the facts of this case, I find that an award of $80,000 is appropriate for Mr. Middleton's injuries.

Income Loss/Loss of Capacity

[80] The evidence presented at trial relates to gross income loss. I have assessed the gross loss below. An adjustment should be made to calculate the net income loss as required.

[81] The plaintiff missed work from the accident to October 31, 2014. His gross past income loss was in the amount of $7,639.35.

[82] A representative of the VSB testified that there was a reduction in the plaintiff's sick day bank equivalent to 17.96% of the value of his days missed. That amount is calculated by the plaintiff at $1,372.14. That amount is also awarded.

[83] In addition to the income loss, the plaintiff lost the employer's portion of his pension contribution for that period. That amount is $816.66.

[84] The defendant does not dispute the gross income loss nor the reduction in his sick day bank ($7,639.35 + $1,372.14). The defendant disputes the loss of the pension contribution of $816.66. She notes that the plaintiff could have repurchased this pension entitlement if he made the contribution himself within five years after the work absence.

[85] The defendant's position on this issue makes no sense. The plaintiff claims the amount of the contribution that the employer would have made if the plaintiff had been at work. The defendant argues that within five years of the loss, the plaintiff could have repurchased that entitlement within the pension. However, the fact that his right to make that repurchase does not affect the loss he suffered. The loss is $816.66. If he had repurchased the lost amount, the loss would still be $816.66.

[86] I award $816.66 for the loss of pension contribution. Given that $816.66 would have been contributed to the plaintiff's pension, I do not believe it is correct to adjust that figure to a net income loss figure. The plaintiff would have received that income at some point in the future and could have split that income with his wife.

Whether there would be tax on it in the year that it would have been paid out is unknown.

[87] I award the gross past income loss of $9,011.49. That figure should be adjusted for net income loss. I also award a further $816.66 for the loss of the pension contribution.

Housekeeping/In-trust Claim

[88] The plaintiff claims an in-trust amount to compensate his wife for the additional tasks and time lost in order to care for him.

[89] The evidence on this issue came from the plaintiff and his wife. The plaintiff testified that his wife would massage his back and shoulder, and apply Tiger Balm to ease his pain. His wife testified that the plaintiff often awakened in pain in the middle of the night. She would then calm him down and talk to him about his pain. In addition, during times when he was feeling low, she testified that she stayed home from work because he needed her to be with him.

[90] The plaintiff seeks an award of $2,500 to compensate for this additional assistance.

[91] The test for awarding damages under this head is set out in *Bystedt v. Hay*, 2001 BCSC 1735:

> [180] From a review of these authorities one can construct a summary of the factors to be considered in the assessment of “in trust” claims:
>
> (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff’s injuries;
>
> (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
>
> (c) the maximum value of such services is the cost of obtaining the services outside the family;
>
> (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;

> (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
>
> (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[92] The defendant's position is that no such damages should be awarded. The actions of the plaintiff's wife, while admirable, did not rise to the level required under the test in *Bystedt*.

[93] In this case, although Mrs. Middleton has provided additional assistance and support to her husband, I cannot say that it was in excess of what would be expected of a spouse in the circumstances. I decline to make any award under this head.

Special Damages

[94] The plaintiff presented the total special damages of $5,082.03 consisting of medications, physiotherapy, massage, chiropractor, and pain clinic.

[95] The defendant's position is that the special damage claim should be capped at $1,074.36. That position is based upon the plaintiff having recovered from the majority of his injuries by November 2014. Thereafter, the defendant says that his treatments and expenses were related to subsequent injuries in 2016, 2017, and 2018.

[96] I do not accept the plaintiff's argument on this issue. As noted above, the IME doctors all agree that the plaintiff's shoulder injury was solely caused by the subject accident. Further, all of his other myofascial pains were made worse because of the injuries suffered in the accident.

[97] The plaintiff attended a pain clinic, including ten seminars on strategies to reduce and prevent recurrence of his chronic pain. I noted above that the plaintiff is a stoic individual who has worked through the pain. I find that the therapies that he

undertook allowed him to continue at work. The tortfeasor is liable to pay for special damages in the amount of $5,082.03.

Cost of Future Care

[98] The plaintiff claims an amount of approximately $1,500 for future active rehabilitation and massage therapy treatments.

[99] Although those types of treatments were recommended by Dr. Ballard (the defence physiatrist), she also testified that he would have benefited from these treatments in the absence of the accident. In other words, the defendant says that these treatments do not meet the “but for” test.

[100] I return at this point to consider the plaintiff’s ability to golf. All of the IME doctors opined that, with appropriate treatment and strengthening, the plaintiff could improve his condition to the point where he will be able to golf again. I consider that to be a worthy goal as he nears retirement. I award the amount of $1,500 for an active rehabilitation program plus other treatments with the goal of reducing his pain and allowing him to be more active, including the pursuit of his golf game.

Summary

[101] In summary, I award the following amounts:

a) Non-Pecuniary damages	$80,000
b) Past Income Loss (gross)	$9,011.49
c) Loss of Pension Contribution (net)	$816.66
d) Special Damages	$5,082.03
e) Cost of Future care	$1,500
Total	$96,410.18

(To be reduced for net income loss)

[102] The plaintiff is entitled to interest on the pecuniary damages.

[103] Counsel did not make submissions on costs. Subject to any offers by either party, the plaintiff is entitled to his costs.

"A. Ross J."