IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Schweitzer v. Li,*
2021 BCSC 52

Date: 20210114
Docket: M187291
Registry: New Westminster

Between:

Carey Wilfred Schweitzer

Plaintiff

And

Fei Li

Defendant

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Plaintiff:	P.G. Kent-Snowsell
Counsel for the Defendant:	T. MacLachlan P. Wingenbach
Place and Dates of Trial:	New Westminster, B.C. December 14–17, 2020
Place and Date of Judgment:	New Westminster, B.C. January 14, 2021

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Overview

[1] This is a personal injury claim arising from a motor vehicle accident.

[2] The plaintiff, Carey Schweitzer, was injured in a motor vehicle accident on March 6, 2015 (the "Accident"). He and his wife, Divina (Debbie) Schweitzer, were returning home from dinner on a Friday evening. Mr. Schweitzer was driving through an intersection, on a green light, when the defendant, Fei Li, came through the intersection and hit the left side of Mr. Schweitzer's right-hand drive Suzuki vehicle.

[3] Mr. Li admits that he ran a red light and he admits liability. The primary issue before me is quantum of damages.

[4] Mr. Schweitzer was 62 years of age at the time of the accident and 67 years of age at the time of trial.

Background Facts

Pre-Accident Work

[5] Mr. Schweitzer was born in October 1953. He has a grade nine education. Mr. Schweitzer testified that when he left school he went to work as a labourer. He has worked various jobs including seismic graphing in the logging industry, railway labouring, sandblasting, heavy machinery painting, and construction framing. In 1977, Mr. Schweitzer began working at Labatt's Brewery in New Westminster. He obtained his forklift ticket while he was employed at Labatt's. Mr. Schweitzer worked in the bottling shop, operated a forklift, loaded heavy beer kegs on and off trucks, and delivered kegs to customers in the lower mainland. He was working at Labatt's on the canning production line when the Labatt Brewery plant shut down in 2006.

[6] After taking some time off Mr. Schweitzer looked for alternative work. He found work in the film industry through the union hall of the International Alliance of Theatrical Stage Employees ("IATSE").

[7] Mr. Schweitzer testified that he initially worked for a number of different productions through IATSE. In the few years prior to the accident he primarily worked

for the same production company, MaiTrai Services Ltd. ("MaiTrai"), which is owned by Mr. Walshe. Mr. Schweitzer worked full-time for MaiTrai.

[8] Mr. Walshe testified that MaiTrai would contract with both Los Angeles and local producers. His crew was paid by the respective production company, not MaiTrai. Since January of 2015, Mr. Schweitzer worked on the following shows: *Proof*, *Girlfriend's Guide to Divorce*, and *A Series of Unfortunate Events*. Mr. Schweitzer was directly paid by EP Canada Film Services Inc.

[9] In the film industry, Mr. Schweitzer worked as a labourer which involved loading and unloading lumber, sorting lumber, helping carpenters move scenery, lifting walls, cleaning up, setting up a location, and unloading trucks. He performed some of this work by operating a forklift. He described the job as tough and very physical. He testified that there could be rush work to do; none of the work was "laid back". He worked long hours. The labourers had to build entire sets and move irregularly shaped objects. For example, they built set versions of a rocket ship, courtrooms, and the Empire State Building. They lifted materials including plywood sheets weighing 75 pounds and extremely heavy windows and other props. Although they used A-frames on castors to move the heaviest materials, the materials would have to be loaded onto the A-frames manually.

[10] Mr. Schweitzer's direct supervisor, Mr. Turpin, confirmed that Mr. Schweitzer's job was very physical in nature, that he worked under tight deadlines, that he needed to be in good shape, and that he worked long days and hours.

[11] Mr. Turpin testified that Mr. Schweitzer's work ethic was very good. He was held in high regard as a member of the team. Mr. Walshe testified that Mr. Schweitzer was a very well regarded member of the MaiTrai core crew.

Accident

[12] Mr. Schweitzer gave evidence concerning the Accident. He and his wife were returning home from dinner at Boston Pizza on a Friday evening. They were traveling through an intersection on a green light when the defendant ran a red light. The defendant hit the left side of Mr. Schweitzer's right-hand drive Suzuki vehicle. The vehicle veered to the right and Mr. Schweitzer testified that it was a significant impact. He estimated his vehicle travelled approximately 60 feet. The impact was primarily to the left front wheel hub which extends out from the wheel.

[13] Mr. Schweitzer immediately noticed a spasm in his back. He called the police.

[14] Mr. Schweitzer testified the damage to his vehicle consisted of both motor mounts being broken and having to replace a trailing arm. The impact bent the front stabilizer bar. The defendant was unable to drive his vehicle home after the Accident.

Post-Accident Symptoms

[15] Mr. Schweitzer described his body as being thrown around in the vehicle. The next day he noticed not only his back pain but also pain in his neck and in his shoulders.

[16] Mr. Schweitzer called his general practitioner, Dr. Reznek (now retired), in Burnaby. He saw him within the week. He described his neck, back, and shoulders as being very sore. He was sent by Dr. Reznek for physiotherapy after his x-rays came back normal.

[17] Mr. Schweitzer testified that prior to the Accident he occasionally had aches and pain from his work but these would go away after a day or two. He thought it would be the same way when he returned to work after the Accident. Unfortunately, that did not occur. He did not recover.

[18] Mr. Schweitzer testified that he attended at Cedar Valley Physiotherapy in Mission for physiotherapy and massage therapy. The therapists worked on his back

and neck. He also saw an acupuncturist. Despite these treatments, and the application of heat and ice, he could not achieve significant or lasting relief.

Post-Accident Work

[19] Mr. Schweitzer testified that he went into work on the Sunday following the Accident because he had keys to the shop and usually opened. His boss looked at him and told him to go home. He then took time off from work.

[20] It was clear from their testimony that Mr. Walshe and Mr. Turpin held Mr. Schweitzer in high regard. Mr. Schweitzer said he was not doing well, but said he was going to keep trying. Mr. Walshe testified that although Mr. Schweitzer was injured, he wanted to work and Mr. Walshe and Mr. Turpin were fully supportive of this. Mr. Schweitzer kept working, but he was in pain.

[21] Mr. Walshe and Mr. Turpin tried to accommodate Mr. Schweitzer as best they could. He was given a helper, Johnny Cao, to assist him with lifting as he found it very difficult to move things himself. Mr. Schweitzer would do the driving and Mr. Cao would set blocks out, move and lift things, and generally assist. Mr. Schweitzer was cross-examined regarding assistance from Mr. Cao. Mr. Schweitzer testified that Mr. Cao provided assistance for approximately a year, including the period from December of 2015 to June of 2016 during which he was working on the set of *A Series of Unfortunate Events*, which was a particularly large production.

[22] Mr. Schweitzer testified that his injures began to flare up in April and May of 2016 due to lifting. In early June 2016 there was a meeting between Stan, another supervisor on the set, Mr. Schweitzer, and Mr. Cao. Stan informed Mr. Schweitzer that Mr. Cao would no longer be able to assist him. Mr. Schweitzer testified that after he lost Mr. Cao, he tried to get assistance from other labourers, but they were not always available. He explained that other people on the crew may be busy and he could not just go over and ask them to do something when they were under their own deadlines and subject to pressure to finish sets.

[23] Without assistance, the work proved to be much more difficult for Mr. Schweitzer. He testified that the loads are not on pallets all the time. They sometimes have to use an A-frame and load scenery onto the A-frame to move it. They may have to put blocks underneath a load. Lumber was always piled on top of each other and needed to be sorted. Mr. Schweitzer testified that he struggled at work and he "screwed up [his] back again."

[24] Mr. Schweitzer also testified that he would have to step up and into his forklift. To operate the forklift he had to move the levers to lift, tilt, and side shift the forklift. He was always having to look up and behind and that bothered him a lot. He advised that the forklift has no suspension on it and that it is a very rough ride.

[25] Mr. Schweitzer testified that he would not sleep well at night and that he was applying ice packs and heat on a regular basis. He testified that if he overexerted himself, he would end up on the couch with heat packs and ice. He testified that this continues to present day.

[26] In June 2016, Ms. Schweitzer collapsed when getting out of his truck after a day at work. This was the final incident for him. Mr. Schweitzer testified at that point it was clear to him that he could no longer work. He realized that he "needed help".

[27] Mr. Schweitzer contacted ICBC for assistance. Mr. Schweitzer testified that he attended Back in Motion, a program recommended by ICBC, on 48 different occasions. Yet, after attending these sessions, he was still injured. Mr. Schweitzer testified that he did the exercises and followed the program put in place by Back in Motion. Yet at the end, he still had pain in the neck and in his back. He tried doing exercises at home but he could not get back to his previous physical condition. He realized he was unable to return to work.

[28] Mr. Schweitzer testified that when he realized he would not be able to return to work, it "hit him pretty hard". He could not believe it was the end of his career. Mr. Schweitzer testified he could not do any other job. He did not have any formal training or education. As he stated, "who would hire a 67 year old with a bad back?"

[29] Mr. Schweitzer testified that he was aware that there was a job site visit by Back in Motion to investigate the possibility of a graduated return to work program. He decided not to go because it was scheduled at a time that was not reflective of his job. He had told the representatives from Back in Motion that there are no light duties in his position. This was confirmed by Mr. Turpin who was present on the job site when a kinesiologist from Back in Motion attended the workplace. Mr. Turpin explained to the kinesiologist that they thought it would be of assistance to have Mr. Schweitzer stay on the forklift; the advice back was that Mr. Schweitzer should not be working on the forklift given his injuries.

[30] Mr. Turpin testified that they tried to accommodate Mr. Schweitzer but it became apparent after a while he could not keep up with the pace. Mr. Turpin testified that there is only physical work and not much else available. You can do the job or you cannot. He said the representative from Back in Motion understood there were no light duties.

[31] Despite vigorous cross-examination, Mr. Schweitzer did not resile from his position that he could not return to work due to his neck and back pain, mostly mid-back pain. He did not have neck and back problems prior to the accident. These injuries prevent him from doing the heavy lifting required of him in his former job.

[32] Mr. Schweitzer agreed in cross-examination that he can do some things around the home such as yard work. He rakes, mows the lawn, and does the odd pruning of trees. He testified that his doctor told him to remain active. He testified that these tasks are much lighter than those he performed at work.

Credibility

Legal Principles

[33] The leading authority on credibility is *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296. Justice Dillon summarized the key elements:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)*

> (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Famya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Famya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Famya* at para. 356).
>
> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[34] The validity of the evidence at trial depends on the overall consistency of the evidence with the probabilities affecting the case as a whole: *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354, [1952] 4 W.W.R. 171 (B.C.C.A.).

Analysis

[35] The defendant pointed to certain parts of Mr. Schweitzer's testimony which he says damage Mr. Schweitzer's credibility. For the following reasons, I disagree.

[36] Mr. Schweitzer readily admitted aches and pains prior to the Accident. He testified that due to physical labour it was inevitable that at times he would be sore but that prior to the accident the pain would subside within a few days.

[37] Mr. Schweitzer was cross-examined regarding whether there was light work for him as a labourer/scenic helper. He had testified during direct examination that there is no light work in his position; it is physically demanding. He was taken to his discovery evidence where he stated that when he worked on the show *Proof* there

was very little work and that the show *Girlfriend's Guide to Divorce* was "pretty light". I note that Mr. Schweitzer stated that when he worked on *A Series of Unfortunate Events* the work was no longer light. Also, during the period he worked on all the shows post-accident, he had a helper, Mr. Cao. Mr. Schweitzer testified during his discovery that when he had help, the work "was a lot lighter". Mr. Cao had been assigned to him but this help was removed in June 2016. Mr. Schweitzer left his job after his helper, his "accommodation", had been removed. I find no significant discrepancy based on this testimony.

[38] Mr. Schweitzer was extensively cross-examined regarding the culminating incident that lead him to go off work permanently in June 2016. Mr. Schweitzer testified that in June 2016 he aggravated his back lifting steel. When he got home from work that day he collapsed when getting out of his truck. At that point he made the decision to stop work and seek treatment. The defendant made an issue of the fact that Mr. Schweitzer advised Dr. Lu that he stopped working because he "fell off a truck", pointing to the difference in terminology. During testimony at trial, Mr. Schweitzer was steadfast in stating he collapsed when getting out of his truck. Despite repeated questioning, Mr. Schweitzer was not shaken on cross-examination. In any event, I fail to see the significance of the distinction regarding whether he fell while getting out of the truck or whether he collapsed.

[39] The defendant also emphasized that in discovery testimony Mr. Schweitzer stated he had no injuries post-accident. Mr. Schweitzer explained that he did not consider his collapse a new injury. I accept this explanation.

[40] The defendant made an issue of Mr. Schweitzer's pay. The defendant cross-examined Mr. Schweitzer extensively regarding being paid for hours he did not work. Mr. Schweitzer was honest about how he was paid on occasion when he did not work, but was unable to say exactly why. He was concerned that by admitting being paid for hours not worked he was getting his bosses in trouble. He was forthcoming and demonstrated integrity by worrying about his superiors. Mr. Walshe and

Mr. Turpin testified that they occasionally paid Mr. Schweitzer when he would take days off or when he had to go home early due to his pain.

[41] Mr. Schweitzer testified that he came to work, voluntarily, an hour before the other crew members, opened the workplace, put on coffee, and had the place ready when the others arrived. Mr. Turpin confirmed this. Both Mr. Turpin and Mr. Walshe testified that occasionally good employees were paid for an extra hour or two a day as an incentive to stay with their crew. This was a known practice in the industry. As Mr. Walshe stated, they negotiated with people to get paid more, "sort of an honorarium", to stay on their show. Mr. Walshe further testified that if you have a person who is a member of the core crew, which included Mr. Schweitzer, as an incentive to stay with his crew he would increase their pay. Here, he classified Mr. Schweitzer as a scenic helper rather than a labourer which resulted in a pay increase of $2.00 per hour. Both Mr. Walshe and Mr. Turpin testified they did this because Mr. Schweitzer was a valuable part of their crew and they wanted to keep him.

[42] There is no evidence before me that anything improper was occurring with respect to Mr. Schweitzer's pay.

[43] The defendant pointed out other discrepancies, such as Mr. Schweitzer's missed appointment with a specialist, which I find does not affect his credibility. Mr. Schweitzer was not prone to exaggeration or embellishment. There was no intention to mislead the court.

[44] To the extent that there were any inconsistencies in Mr. Schweitzer's evidence, I find these are due to the passage of time. The issues the defendant raised relate to reliability, not credibility, and were not material to Mr. Schweitzer's overall evidence.

Causation

Legal Principles

[45] The law of causation is well established. Before assessing damages, the "plaintiff must establish a causal connection between the defendant's negligence and [the plaintiff's] pain": *Farrant v. Laktin*, 2011 BCCA 336 at para. 8. The plaintiff bears the onus of proving that the defendant's negligence was the cause of their current symptoms: *Warkentin v. Riggs*, 2010 BCSC 1706 at para. 107.

[46] The generally accepted test for causation is the "but for" test: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–22. The plaintiff bears the onus of proving on a balance of probabilities that but for the defendant's negligent act or omission, the injury would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 [*Athey* cited to S.C.R.]; *Blackwater v. Plint*, 2005 SCC 58. Causation is found if the injury would not have occurred without the defendant's negligence: *Clements v. Clements*, 2012 SCC 32 at para. 8. The plaintiff need not establish that the defendant's negligence was the sole cause of the injury: *Athey* at para. 17.

Medical Evidence

Soft Tissue Injuries

[47] Dr. Giantomaso, who was qualified as a physiatrist, testified for the plaintiff. He had notes from Mr. Schweitzer's family physician but found them difficult to interpret. Dr. Giantomaso states that the notes seem to indicate the Accident in question and some post-traumatic issues. Dr. Giantomaso opined Mr. Schweitzer was involved in a serious motor vehicle accident and now has significant functional limitations that are well documented from his therapists and family physician. Although Dr. Giantomaso had limited medical records before him, there were no credibility issues with Mr. Schweitzer and no other evidence to suggest that Mr. Schweitzer had any pre-existing conditions. There is no evidence that Mr. Schweitzer was not forthcoming when interviewed by medical experts. I attach little weight to the defendant's concern that Dr. Giantomaso was unable to rely on the family physician's clinical notes.

[48] Dr. Giantomaso concluded that Mr. Schweitzer has a history of chronic pain which is temporally and causally related to the Accident. Under "Impression and Diagnosis" in his report he states:

> 1. Post-traumatic cervical sprain-strain injury consistent with WAD-II injury. Chronic.
> 2. Post-traumatic thoracic sprain-strain injury grade 1-2. Chronic.
> 3. Post-traumatic lumbar sprain-strain injury. Now essentially resolved.

[49] Since soft tissue symptoms tend to be subjective, it is important to note that Dr. Giantomaso found reproducible trigger points in Mr. Schweitzer's rhomboids, upper trapezius and mid-cervical paraspinals bilaterally. Mr. Schweitzer also had a hiked shoulder position and significant spasm when palpated on the left side on the T8, 9 and 10 paraspinals.

[50] I find, and the defendant accepts, that the medical evidence establishes that Mr. Schweitzer sustained soft tissue injuries to his neck, mid back and low back in the Accident. I agree with the defendant that Mr. Schweitzer's lumbar sprain-strain injury has resolved and his neck and mid-back injuries have improved since the Accident. However, I accept the medical evidence and Mr. Schweitzer's testimony that he is suffering from ongoing soft tissue injuries as a result of the Accident, and that these injuries are now chronic.

Emotional Toll

[51] The plaintiff tendered an expert medical opinion of Dr. Lu, who was qualified as an expert in Psychiatry and Chronic Pain. Dr. Lu is qualified to opine only on the psychiatric aspects of Mr. Schweitzer's condition, not the physical components. However, Dr. Lu is qualified to give an opinion addressing chronic pain arising from physical injuries.

[52] Dr. Lu did not have many underlying medical records on which to assist in his assessment. Like Dr. Giantomaso, Dr. Lu based his diagnosis largely on Mr. Schweitzer's subjective complaints. Mr. Schweitzer advised him that he has had pain lasting a duration of more than five years. Pain of more than six months is

considered an entrenched medical condition. The complete resolution of pain after six months is unlikely, and is considered chronic.

[53] Dr. Lu opined that chronic pain, especially pain associated with functional changes, is an independent risk factor for psychiatric conditions, including changes in mood and anxiety. Dr. Lu opined that the non-resolution of his pain has led to erosion of Mr. Schweitzer's psychological well-being. He opined that Mr. Schweitzer's pain and physical limitations have had a disproportionate negative impact on his mood. Dr. Lu's opinion is Mr. Schweitzer has to accept that he will not be able to return to physical work.

[54] Based on Mr. Schweitzer's clinical history and limited medical records, Dr. Lu opined that by 2017 Mr. Schweitzer met the DSM-5 Diagnostic criteria for chronic adjustment disorder with mood and anxiety features. The loss of healthy coping mechanisms and the structure provided by work are reinforcing factors for his emotional distress. Mr. Schweitzer's "psychological symptoms are related to the functional impacts of his pain and the changes in his self-concept." I accept the medical evidence and Mr. Schweitzer's testimony. I find that, as a result of his chronic pain and difficulty in accepting the end of his career, he is now suffering from chronic adjustment disorder which affects his mood and increases his anxiety.

Hip Pain

[55] Mr. Schweitzer developed hip pain around mid-2017, well over a year after the Accident. Mr. Schweitzer testified that at times the hip pain is severe, but that it occurs only intermittently. He admitted that when it bothers him he would be unable to get in and out of a forklift. It has resulted in him being unable to walk at times. Mr. Schweitzer was prescribed Tylenol #3 for pain management.

[56] Mr. Schweitzer had some pain at the time of trial. However, he had no hip pain when he was assessed by Dr. Giantomaso in August 2018. He was also not suffering at the time he met with Dr. Lu in September 2020.

[57] Mr. Schweitzer did not provide any medical evidence linking his hip pain to the Accident. The defendant submits Mr. Schweitzer's hip pain should be treated as an independent intervening event which serves to reduce his overall measure of damages. I deal with this argument below.

Prognosis

[58] Dr. Giantomaso states under "Prognosis" in his report that Mr. Schweitzer will likely continue to experience chronic pain in the future. By following his recommendations, Mr. Schweitzer may experience decreased pain and increased function in the future. However, this "should be considered part of a long-term pain management strategy and should not necessarily be considered curative."

[59] In terms of returning to work, Dr. Giantomaso states:

> In my opinion, it is unlikely that Mr. Schweitzer, given his age, lack of significant work experience out of the moderate to heavy realms of labour or skill of labour, and his ongoing pain, will be able to return to work in similar fields. He may require re-training; and in the future, in my opinion, it is more likely than not that he will be noncompetitively employable in his pre-accident field of work.

[60] While commenting upon competitive employability is outside Dr. Giantomaso's expertise, it is clear he is of the opinion that Mr. Schweitzer is too injured to work.

[61] Dr. Lu's opinion is that being unable to go back to work has been hard on Mr. Schweitzer. This has resulted in Mr. Schweitzer developing a chronic adjustment disorder. Chronic adjustment disorder and chronic pain increase the risk of progression to major depression and there is a risk of developing PTSD. Nevertheless, Dr. Lu opines that Mr. Schweitzer's prognosis is fair because he has a supportive wife and he is beginning to accept that he will be unable to return to work.

[62] I find that while Mr. Schweitzer has had some improvement since the accident, he continues to have ongoing neck and mid back pain. If he works, he aggravates his injuries, mostly due to lifting. Mr. Schweitzer will also continue to

have a chronic adjustment disorder, with a risk of developing depression, especially without treatment.

Mitigation

[63] The defendant asks me to reduce Mr. Schweitzer's non-pecuniary damages after January 1, 2019 due to Mr. Schweitzer's failure to mitigate.

[64] The onus is on a defendant to prove a plaintiff could have avoided a portion of their loss. In the case of a plaintiff who has not pursued a recommended course of treatment, the defendant must prove (i) that the plaintiff acted unreasonably and (ii) the extent to which the plaintiff's damages would have been reduced by pursuing the treatment: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, citing *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 16 D.L.R. (4th) 1.

[65] A plaintiff also fails to mitigate where they should have limited their losses by seeking accommodations or alternate employment: *Mullens v. Toor*, 2016 BCSC 1645, aff'd 2017 BCCA 384.

[66] The defendant suggested that Mr. Schweitzer did not follow recommended treatment, including seeing a physiatrist. I find there was some confusion regarding the physiatrist appointment and nothing turns on the fact that due to this confusion Mr. Schweitzer did not attend an appointment in May 2018.

[67] Mr. Schweitzer testified that he did the therapies and exercises that were recommended to him. He attended physiotherapy in 2015 at Cedar Valley Physiotherapy. He also received massage therapy at Cedar Valley Massage in 2015. When his massage therapist moved to Avalon Massage Therapy, he went with the therapist. In the fall of 2016 he attended the Back in Motion program. He also received acupuncture treatments in 2016.

[68] Dr. Giantomaso opined that Mr. Schweitzer has "engaged in reasonable rehabilitation programs and therapies with some improvements, but the results have been inadequate for complete return to work."

[69] Contrary to suggestions in cross-examination, Mr. Schweitzer actively sought treatment in an attempt to return to work. I find that he followed his physician's recommendations and actively sought rehabilitation after he collapsed when getting out of his vehicle in June 2016. He attended 48 sessions through "Back in Motion", approximately four hours per day working with a kinesiologist and physiotherapist. Despite seeking out therapy, learning stretches, applying heat and ice, and exercising at home, Mr. Schweitzer was still not able to return to work.

[70] In terms of re-training for a less physical job, Mr. Schweitzer has very little formal training, with no transferrable skills and no qualifications other than his forklift certification. Mr. Schweitzer attempted the forklift position but he was unable to operate it without aggravating his injuries.

[71] It was not reasonable for Mr. Schweitzer at age 63 (as he was in June 2016) to re-train in an attempt to find another position. Given his age, he would not have been competitively employable. There was no evidence before me that another accommodated position was available to him in the film industry. The evidence before me was there are no light duties available for a labourer/scenic helper.

[72] The defendant argued that Mr. Schweitzer unreasonably refused to participate in a graduated return to work program. The Back in Motion Active Rehabilitation Discharge Report, which addresses back to work issues, is somewhat ambiguous. It states that it would be reasonable for Mr. Schweitzer to begin a gradual return to work program, but the program set out is based upon "lighter" tasks. There was evidence before me that there are no light duties for Mr. Schweitzer. The evidence from Mr. Schweitzer's employers was that while Mr. Schweitzer was accommodated for a year, there are no light duties in his position. Despite being accommodated for a year, Mr. Schweitzer had not gotten better. Eventually the accommodation came to an end.

[73] The Back in Motion report also lists the following barriers to returning to work:

- Persistent pain with increased physical exertion, twisting and lifting;

- Limited strength and conditioning;
- Heavy physical job demands and fast paced environment;
- Fear of re-injury; and
- Perceived social pressures to perform at top physical condition.

[74] The report states that Mr. Schweitzer and his doctor have decided to forgo a return to work and that Mr. Schweitzer had been referred to a pain specialist.

[75] On the evidence before me, based on a balance of probabilities, I do not find that Mr. Schweitzer failed to mitigate his damages. His situation is vastly different than that of the (much younger) plaintiff in *Mullens* in terms of his attempts to return to work. He attempted to work for a full year after the Accident and utilized accommodations until they were removed. There are no light duties for him at his workplace, and he decided not to go back to work in consultation with his physician.

[76] Mr. Schweitzer actively sought out treatment and completed rehabilitation programs in an attempt to return to work. At his age and with his qualifications, Mr. Schweitzer likely would not have been competitively employable had he attempted to re-train for another position. His actions were reasonable in the circumstances.

Intervening Event

[77] The defendant argues that Mr. Schweitzer's hip pain is an independent intervening event which should reduce Mr. Schweitzer's award. The defendant relies on *Athey*:

> [32] To understand these cases, and to see why they are not applicable to the present situation, one need only consider first principles. The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was

> unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

[78] The defendant also relies on *Penner v. Mitchell* (1978), 10 A.R. 555, 89 D.L.R. (3d) 343 (S.C. (A.D.)) [*Penner*], cited with approval in *Larwill v. Lanham*, 2003 BCCA 629 at para. 18. In *Penner*, damages for loss of income were reduced to reflect the period of time the plaintiff would have been unable to work as a result of a heart condition that was unrelated to the accident.

[79] In *T.W.N.A. v. Canada (Ministry of Indian Affairs)* (*sub nom A.(T.W.N.) v. Clarke)*, 2003 BCCA 670, the Court of Appeal treated unrelated intervening events similarly to a "crumbling skull" scenario:

> [36] Unrelated intervening events must be taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately (*Athey v. Leonati* at 31-32).

[80] I agree with the defendant that since the Accident Mr. Schweitzer has suffered from unrelated hip pain. There was no testimony linking Mr. Schweitzer's hip pain to the Accident. It likely developed in mid-2017, well over a year after the Accident. There was no medical evidence suggesting it was causally related to the Accident or to Mr. Schweitzer's other injuries which were caused by the Accident.

[81] I accept that Mr. Schweitzer's hip pain is an intervening event that would have caused him problems at work absent the Accident. However, it is important to recognize that Mr. Schweitzer's hip pain only occurs intermittently. I find the hip pain alone, without the Accident, would not have prevented him from working, but likely would have resulted in him needing to take time off when his pain was severe. As discussed below, I find a 30% reduction in Mr. Schweitzer's award for loss of income from mid-2017 onwards is appropriate to reflect the effect of this intervening event.

Non-Pecuniary Damages

Legal Principles

[82] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Trites v. Penner*, 2010 BCSC 882 at para. 188 [*Trites*]. They do not compensate a plaintiff for losses that have a monetary value. Non-pecuniary damages do not focus on the injury alone but include a number of factors. As set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, the factors that influence an award of non-pecuniary damages include:

a) age of the plaintiff;

b) nature of the injury;

c) severity and duration of pain;

d) disability;

e) emotional suffering;

f) loss or impairment of life;

g) impairment of family, marital, and social relationships;

h) impairment of physical and mental abilities;

i) loss of lifestyle; and

j) the plaintiff's stoicism (as a factor that should not penalize the plaintiff).

[83] The "primary function of the law of damages is compensation, [so] it is reasonable that awards for non-pecuniary loss, which do not fulfill this function, should be moderate": *Lindal v. Lindal,* [1981] 2 S.C.R. 629 at 639–640, 129 D.L.R. (3d) 263. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide: *Trites* at para. 189.

[84] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with their injuries and their

consequences. The amount of an award should not depend only upon the seriousness of the injury; it should also consider its ability to ameliorate the condition of the plaintiff post-accident. The "need for solace will not necessarily correlate with the seriousness of the injury": *Lindal* at 637. The plaintiff's need for solace should be considered subjectively: *Boyd v. Harris*, 2004 BCCA 146 at para. 42 [*Boyd*].

[85] With older plaintiffs, the court may also take into account the Golden Years doctrine, as set out by Justice Griffin (as she then was) in *Fata v. Heinonen*, 2010 BCSC 385 [*Fata*]:

> [88] The retirement years are special years for they are at a time in a person's life when he realizes his own mortality. When someone who has always been physically active loses his physical function in these years, the enjoyment of retirement can be severely diminished, with less opportunity to replace these activities with other interests in life. Further, what may be a small loss of function to a younger person who is active in many other ways may be a larger loss to an older person whose activities are already constrained by age. The impact an injury can have on someone who is elderly was recognized in *Giles v. Canada (Attorney General)*, [1994] B.C.J. No. 3212 (S.C.), rev'd on other grounds (1996), 21 B.C.L.R. (3d) 190 (C.A.).

[86] *Fata* was recently cited for this principle in *Kassam v. Wong*, 2020 BCSC 764 at para. 79 [*Kassam*].

Analysis

[87] I have reviewed the cases to which the plaintiff and defendant referred me. The plaintiff referred me to *Benson v. Day*, 2014 BCSC 2224, *Sekhon v. Gill*, 2019 BCSC 811, and *Kassam*. The defendant referred me to *Farbatuk v. Lagrimas*, 2014 BCSC 1879, and *Riley v. Ritsco*, 2017 BCSC 925. These cases provide guidance but each case turns on its own particular circumstances. The factors to be considered include "the relative severity and duration of pain, disability, emotional suffering, and loss or impairment of enjoyment of life": *Boyd* at para. 42.

[88] Mr. Schweitzer suffers from chronic pain and now has a chronic adjustment disorder. He testified that he was an avid outdoorsman in the years before the car accident. Mr. Schweitzer provided examples of long hikes in Garibaldi Highlands and to the Lions. He also did shorter day hikes near Buntzen Lake. He hiked the arduous

West Coast Trail, albeit years before the Accident. He also did a difficult 72 km bike trip up the back of Indian Arm with an increase in altitude. He testified that before the Accident he would cycle weekly.

[89] Mr. Schweitzer has not been able to return to any of these pre-Accident activities. He has not been able to return to cycling because of his neck and back problems. He is limited to walking as his outlet for exercise. This has significantly impacted his enjoyment of life as he considered himself very fit for a person of his age prior to the Accident.

[90] Mr. Schweitzer has also been rendered incapable of gainful employment. This has profoundly affected his enjoyment of life. He found his work enjoyable and it formed a large part of his identity. As stated in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 368, [1987] 3 W.W.R. 577, cited with approval in *Boyd* at para. 54*:*

> Work is one of the most fundamental aspects in a person's life... A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

[91] Mr. Schweitzer's identity has been negatively affected by the accident. He has lost a job which he loved, despite his best efforts to continue working in the face of pain. As Dr. Lu states: "The loss of his work and productivities has an enduring negative impact on his self-perception."

[92] Although Mr. Schweitzer returned to work for approximately a year after the accident, I am not to punish Mr. Schweitzer for his stoicism under this head of damages. Mr. Schweitzer's compensation should not be negatively affected by his work ethic and persistence in attempting to work despite his pain.

[93] In all the circumstances, I find that an award of $80,000 is appropriate in this case. This award reflects Mr. Schweitzer's chronic physical injuries, and his frustration, irritability, and his chronic adjustment disorder which developed since the Accident. It also reflects the toll the Accident has had on his enjoyment of life both in

terms of having to give up his beloved job and his inability to be physically active as he was in the past. Lastly, it takes into account the Golden Years doctrine.

[94] I have not reduced this award for Mr. Schweitzer's intervening hip pain. I have found the award of $80,000 is appropriate in this case to compensate Mr. Schweitzer for his pain and suffering which was caused by the Accident. This is separate from any diminishment of his enjoyment of life he will suffer as a result of his intermittent hip pain.

Past Loss of Earning Capacity

Legal Principles

[95] A claim for past loss of income is a claim for loss of earning capacity. It is a claim for the loss of the value of the work the plaintiff would have performed but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. A plaintiff is only entitled to recover the net amount of their damages: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 152–186, leave to appeal ref'd [2009] S.C.C.A. No. 197.

[96] If a plaintiff establishes that there is a real and substantial possibility of an income loss, there are two possible approaches to assess loss of earning capacity: the "earnings approach" and the "capital asset approach": *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Both approaches are correct. Under either approach, damages are assessed and not calculated: *Grewal* at para. 49.

[97] The earnings approach is useful when the loss is more easily measurable in a pecuniary manner: *Perren* at para. 32. The earnings approach can be applied where the plaintiff has a history of predictable earnings.

Analysis

[98] Mr. Schweitzer has established that he can no longer work as a labourer/scenic helper. The defendant argued that Mr. Walshe made exceptions for Mr. Schweitzer, Mr. Walshe was not going to terminate him despite his limitations, and that Mr. Turpin testified that he never would have complained about Mr.

Schweitzer's limitations. This testimony needs to be put in context. When Mr. Walshe was questioned in cross-examination regarding Mr. Schweitzer working for a year when he was not productive, he answered that Mr. Turpin wanted to keep him but "at some point I would have to budget." In direct examination, Mr. Walshe testified that they wanted Mr. Schweitzer to work, but there were no light duties available. The job of a labourer is to lift.

[99] Mr. Walshe and Mr. Turpin testified that Mr. Schweitzer was a hard worker and a valuable employee. They were willing to accommodate him as he was working through his pain. However, Mr. Walshe testified that he could not do so forever. Mr. Turpin was hoping that with treatment Mr. Schweitzer would repair himself, but unfortunately it did not work out. I did not interpret this evidence to mean that Mr. Schweitzer would be accommodated indefinitely. As Mr. Walshe conceded, he would eventually have to look at his bottom line.

[100] Mr. Schweitzer was cross-examined regarding his ability to delegate the physical aspects of his work to other team members. The defendant relies on Mr. Walshe's and Mr. Turpin's evidence that Mr. Schweitzer was the lead labourer and could delegate. Mr. Schweitzer agreed in cross-examination that he was a lead labourer and had up to a dozen people working for him. Nevertheless, Mr. Schweitzer was steadfast in saying that while he could delegate some tasks, if no one was around he would have to do the work himself. He could not just walk around a set for half an hour looking for somebody to help him. The other workers had their own jobs to do. As part of the team, he was expected to participate in the physical work. I accept Mr. Schweitzer's testimony on this point.

[101] The defendant suggests that Mr. Schweitzer could continue to work in his current position, at least part-time. I do not accept this. The evidence before me is that Mr. Schweitzer wanted to get back to work and tried for a year while he was in pain. When he could no longer handle the pain, Mr. Schweitzer actively sought rehabilitation but he did not improve. He was unable to return to his position in the film industry because his job did not have light duties.

[102] In my view, his employer tried to accommodate Mr. Schweitzer for approximately one year after he returned to work following the Accident, by providing him with assistance from Mr. Cao. At some point it became clear that Mr. Schweitzer was unable to do the job and they withdrew the accommodation. Without this assistance, Mr. Schweitzer was unable to do the work without re-injuring himself. He only left work after his accommodation was withdrawn and the pain was overwhelming. Mr. Schweitzer then made the difficult decision to cease work because he "could not take it anymore" and needed help.

[103] The parties agree the earnings approach is appropriate to assess the past loss of earning capacity. The Crew Time Report summaries reflect that just prior to the Accident Mr. Schweitzer was paid for either 11 hour or 12 hour days and worked Mondays through Fridays. Although a labourer, Mr. Schweitzer was categorized as a scenic helper and his rate of pay was $30.54 per hour when he left work on June 8, 2016. He was paid slightly less per hour in 2015 and early 2016.

[104] In addition to his weekly pay, Mr. Schweitzer also received a pension contribution, vacation pay, and holiday pay as per his Time Report Summaries. Vacation and holiday pay equated to approximately 6% of his gross pay and the pension contribution amounted to 1% of his gross pay. He received these additional amounts each pay period.

[105] To calculate his baseline salary, I must review his prior employment income. In 2014, Mr. Schweitzer earned $58,701.

[106] In 2015, Mr. Schweitzer earned $68,785. Mr. Schweitzer missed days from work in 2015 which he reproduced on handwritten notes which are in evidence. He advised that he determined the days he missed by reviewing the Time Report Summaries in evidence for the productions that he worked on after the Accident, including *Proof* and *Girlfriend's Guide to Divorce*.

[107] Based on Mr. Schweitzer's handwritten notes from March 8 to May of 2015 he missed 32 days of work. At 11 hours/day multiplied by $29.35, his hourly rate, the

total is $10,331.20. From June to October 2015 he missed 16 days of work. At 11 hours/day multiplied by his hourly rate of $29.35, the total is $5,165.60. According to his evidence, there were no missed days as a result of the motor vehicle accident in November and December 2015. The total based on Mr. Schweitzer's notes for 2015 is therefore approximately $15,500. This amount should be added to his T4 earnings in 2015 of $68,785 to total approximately $84,000 in 2015.

[108] From January to March 2016 when working on *A Series of Unfortunate Events*, Mr. Schweitzer missed 4 days. At 11 hours/day multiplied by his hourly rate of $29.35, the total is $1,291.40. From April 2016 to June 8, 2016 he missed 6 days. At 11 hours/day multiplied by his hourly rate of $30.54, the total is $2,015.64. The total income missed based on Mr. Schweitzer's notes for the first half of 2016 is therefore $3,307.

[109] Mr. Schweitzer's 2016 Income Tax Return indicates he earned $42,688 when he worked only half a year. To this I must add the $3,307 of missed income which translates to an approximate annual income of $90,000 in 2016.

[110] I am not adding holiday, vacation, and pension pay to the amounts to account for the fact that Mr. Schweitzer may have taken some time off for reasons unrelated to the Accident. This should offset that discrepancy.

[111] The plaintiff submits I should assume a conservative sum of $80,000 for anticipated yearly earnings, starting on January 1, 2016.

[112] I have calculated Mr. Schweitzer's employment income in the year prior to the accident (2014), the year of the accident (2015) and the year following the accident (2016). The average salary is approximately $80,000. This is an appropriate income to use to calculate Mr. Schweitzer's past wage loss.

[113] Mr. Schweitzer's past and future loss of opportunity is assessed on the basis of a disruption of his income earning stream. I have found that but for the accident, Mr. Schweitzer would have continued to work on a full-time basis until age 67, his current age.

[114] Based on the intervening event of intermittent hip pain, I reduce Mr. Schweitzer's award by 30% since mid-2017 (thus, 15% for 2017 and 30% thereafter) to reflect the time he would have missed from work due to his hip pain. This reduction also takes into account the negative contingency that Mr. Schweitzer would not be able to continue working in a physically demanding job as he ages.

[115] In the years 2016 to 2020, I accept that Mr. Schweitzer would have earned the following, but for the accident.

Year	Anticipated Earnings	Actual Earnings	Shortfall
2016	$80,000	$42,688	$37,312
2017	$80,000	$0	$68,000 (minus 15%)
2018	$80,000	$0	$56,000 (minus 30%)
2019	$80,000	$0	$56,000 (minus 30%)
2020	$80,000	$0	$56,000 (minus 30%)
Total			$275,000 (approximate)

[116] I leave it to the parties to calculate the net value of the award pursuant to s. 98 of the *Insurance (Vehicle) Act* and interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

Loss of Future Earning Capacity

Legal Principles

[117] A plaintiff must prove a loss of earning capacity, not an actual loss of earnings. An assessment of both past and future loss of income involves a consideration of hypothetical events. A plaintiff is not required to prove these hypothetical events on a balance of probabilities. Rather, the assessment of loss is determined by weighing the possibility and probability of the event. The future or hypothetical event will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Karim v. Li*, 2015

BCSC 498 at para. 133; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 [*Grewal*]; *Findlay v. Sun*, 2020 BCSC 1330 at para. 103.

[118] If the plaintiff establishes a real and substantial possibility of loss, the court must determine the measure of damages by assessing the likelihood of the event: *Grewal* at para. 48. Depending on the facts of the case, a loss may be quantified either on an earnings approach or using a capital asset approach.

[119] Justice Finch (as he then was) in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8, [1986] B.C.W.L.D. 349 (S.C.) set out the factors to be considered when the court applies the capital asset approach:

> 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 [them], had [they] not been injured; and
>
> 4. The plaintiff is less valuable to [themself] as a person capable of earning income in a competitive labour market.

Analysis

[120] Based on the lay and expert evidence, I find there is a real and substantial possibility that Mr. Schweitzer would have continued to work part-time at the age of 67 for one year as he transitioned to retirement. Both Mr. Schweitzer and his wife testified that he had no plans to retire at the time of the Accident, when he was 62, and that he loved his job. Even if he could not continue to work full-time as part of a core crew, which Mr. Schweitzer accepts, there is plenty of work available through the union hall.

[121] Mr. Turpin confirmed that after 2016 there was work available for scenic helpers on Mr. Walshe's productions; if Mr. Walshe was not hiring, there were numerous others hours available for someone in Mr. Schweitzer's position. This evidence was confirmed by Mr. Walshe. Although the industry shut down for a

period due to COVID-19, it is now back with a vengeance. There would be work for Mr. Schweitzer if he could work.

[122] Accepting that there is plenty of work available, I must determine the measure of damages by assessing the likelihood of the event. Mr. Schweitzer worked at a physically demanding job. I find that as Mr. Schweitzer aged, his ability to continue working the long hours, with the physical demands, would have diminished. This is especially the case given his hip issues which are unrelated to the accident. I find that it is mere speculation Mr. Schweitzer would have worked past 2021.

[123] The plaintiff argues that the earnings approach should be applied. I agree the capital asset approach is not useful here where I know Mr. Schweitzer's hourly wage and there are few variables involved because of his age. This is supported by the statement of Justice Blok in *Ali v. Padam*, 2017 BCSC 1849 at para. 269:

> [269] ... I conclude that the one-year rule [the capital asset approach], to the extent there is such a rule, is a guideline sometimes used in cases involving plaintiffs who do physical work, whose physical capacity has been diminished, but where there is no presently identifiable future pecuniary loss.

[124] I accept that Mr. Schweitzer would have worked half-time in the year 2021. His 50% salary would be $40,000. This amount must be reduced by 30% to account for his hip pain and the negative contingency of doing physical work as Mr. Schweitzer ages. Mr. Schweitzer's award for loss of future earning capacity is $28,000. I am not applying a present value calculation because the change would be minimal.

Cost of Future Care

[125] Justice Fitzpatrick in *Langille v. Nguyen*, 2013 BCSC 1460, aff'd 2014 BCCA 430, summarized the principles to consider when awarding costs of future care:

> [231] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition, insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health.

> [232] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and (2) the claims must be reasonable.
>
> [233] Future care costs must be justified both because they are medically necessary and are likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award.
>
> [Citations omitted]

[126] Dr. Giantomaso recommends in his report that Mr. Schweitzer undergo prolotherapy or cortisone shots in the symptomatic regions of the thoracic spine. Mr. Schweitzer seeks the costs of prolotherapy in the amount of $6000.00 as suggested by Dr. Giantomaso. This should cover approximately six treatments. The defendant argues this is inappropriate because Mr. Schweitzer has demonstrated he is not likely to seek out the treatments. I accept that these treatments will likely be helpful to Mr. Schweitzer, and that he has shown a willingness to seek out treatment in the past. This amount could be used for cortisone injections or radio frequency ablation of the nerves in Mr. Schweitzer's spine if that is recommended by his physician instead of prolotherapy.

[127] Dr. Giantomaso also recommends in his report that Mr. Schweitzer undergo some counselling in regards to coping with chronic pain and decreased function. He specifically suggests cognitive behavioral therapy. Dr. Lu similarly strongly recommends psychological treatment due to his chronic adjustment disorder and risk of developing depression.

[128] Dr. Lu recommends 6 to 12 one-hour sessions of psychological or psychiatric support at a cost ranging from $180 to $200 per hour. Mr. Schweitzer seeks 12 sessions at $200 per hour. This would result in a cost of $2,400. I find that 12 sessions is reasonable here, where Mr. Schweitzer is suffering from a chronic adjustment disorder and chronic pain.

[129] I decline to award the costs of passive therapies because Dr. Giantomaso stated they would be unlikely to change Mr. Schweitzer's overall prognosis at this point, over five years after the Accident.

[130] Mr. Schweitzer is awarded $8,400 for cost of future care.

Special Damages

[131] The parties have agreed that Mr. Schweitzer should be awarded $6,300.20 in special damages.

Disposition

Non Pecuniary Damages	$80,000
Past Wage Loss	$275,000
Future Loss of Earning Capacity	$28,000
Future Care Costs	$8,400
Special Damages	$6,300.20 (by consent)

[132] If the parties cannot agree on costs, the plaintiff is at liberty to submit written submissions within 45 days of the date of this decision. The defendant is to submit written submissions within 15 days of the receipt of the plaintiff's submissions. Any reply submissions must be submitted within 10 days of the receipt of the defendant's written submissions.

"D. MacDonald J."