IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Goldie v. McLean,*
2019 BCSC 991

Date: 20190618
Docket: 50727
Registry: Vernon

Between:

Matthew Goldie

Plaintiff

And

Dawn McLean and Joseph Goldenthal

Defendants

Docket: 53191
Registry: Vernon

Between:

Matthew Goldie

Plaintiff

And

Marcus Kehler

Defendant

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:	J. Cotter R. Irving
Counsel for the Defendants:	K. Watts D. Griffin
Place and Date of Trial:	Vernon, B.C. April 16 – 18, 23 – 26, 2019
Place and Date of Judgment:	Vernon, B.C. June 18, 2019

I. Introduction

[1] This is a personal injury action. The plaintiff, a previously active 41-year-old welder, seeks damages arising out of two separate motor vehicle collisions that occurred four years apart. The first was on March 4, 2011 (“First Accident”) and the second was on August 29, 2017 (“Second Accident”), (together the “Accidents”).

[2] Liability for the Accidents is admitted. The core issues in this trial are to what extent the Accidents caused the plaintiff's injuries and the damages that flow from those injuries.

[3] The plaintiff maintains that he began to experience low back pain shortly after the First Accident and that it worsened after the Second Accident. The defendants’ position is that any low back pain the plaintiff is experiencing is mechanical pain caused by normal aging processes and, thus, is unrelated to the Accidents.

[4] Defence counsel, who acts for both defendants in this matter, advised at the outset that no apportionment of damages is required. This means that the defence accepts that liability is joint and several and that there are no insurance coverage or limits issues involved.

II. The Plaintiff's Background

[5] The plaintiff was born and raised in Vernon. He is married with two children, aged seven and four. He graduated from high school in 1996 and entered into the construction trade thereafter. In and around that time, he also worked on the family farm and as a welder's helper. He was very active throughout his youth, playing a number of sports including soccer, basketball, rugby, volleyball, swimming, skiing and water polo. He was passionate about soccer and skiing in particular.

[6] After high school, the plaintiff moved to the Whistler area where he worked in construction and for Whistler Blackcomb ski resort for approximately ten years. He continued his active lifestyle while in Whistler. He says that prior to the First Accident, he was energetic and in top physical condition.

[7] In the 2006 timeframe, he returned to Vernon to obtain his welding trade ticket. Around that time, he also worked for his uncle's home construction company, KGG Construction.

[8] In 2007, he started formal welding training at Okanagan College, obtaining his “C" ticket seven months later. In 2009, he obtained his “B" ticket. Unfortunately, he could not obtain a welding job at that time due to the downturn in the economy. Instead, he worked for KGG Construction. At the time of the First Accident, KGG Construction was between projects.

[9] In 2010, the plaintiff was very fit and weighed between 165 - 175 pounds. He played soccer two to three times a week and would typically play entire 90-minute games without substitution. He also worked out, played water polo, skied and ran. He had no health issues or ailments of any kind.

[10] In the fall of 2010, he met Ms. McLean (“Ms. McLean”). They were engaged on February 14, 2011, and married on May 28, 2011.

[11] Two days before the First Accident, the plaintiff sustained a sprain to his left ankle while playing soccer. He was on crutches but expected a full recovery within two to four weeks.

III. The Accidents

i. The First Accident

[12] The First Accident occurred on March 4, 2011. Ms. McLean was driving the plaintiff’s vehicle, a 1998 Nissan Pathfinder, and the plaintiff was in the passenger’s seat. Ms. McLean was completing a left turn at the intersection of 32nd Street and 39th Avenue in Vernon when the vehicle was struck by a 1993 Ford driven by the defendant, Mr. Goldenthal. The Ford was proceeding through the intersection on a red or stale yellow light.

[13] The plaintiff felt immediate pain in his neck. He believes his head might have hit the passenger door. He braced his foot in anticipation of the impact, which he believes aggravated his pre-existing left ankle injury. He went to the Vernon Jubilee Hospital by ambulance and was released later that evening to Ms. McLean's care. Over the next few days, his ankle pain increased and he was referred to an orthopedic surgeon for assessment. He also experienced neck pain, upper back pain and headaches. He described his whole body as being quite sore.

[14] In the latter part of March 2011, the plaintiff started physiotherapy focused on his neck, upper back and ankle. Although there is nothing in the physiotherapy records about his low back until June 2011, Ms. McLean recalls him complaining of back issues soon after the First Accident.

[15] The plaintiff returned to work with KGG Construction in early April 2011 on light duties, which essentially involved touch-up work, landscaping, deck preparation and gardening. He did not return to regular duties until early June 2011, which is when he says he really began to notice left-sided low back pain bothering him. He reported this pain to his physiotherapist at the first opportunity. It began as a slow ache above his left buttock and radiated across his upper back and into his left leg.

[16] He continued seeing his physiotherapist into the summer. He cannot state precisely when his upper back, neck and ankle injuries resolved but believes it was by the fall of 2011. His low back, however, did not improve and remained a daily, constant issue for him with some days worse than others. He noted that lifting and bending aggravated the problem. His sleep was interrupted by pain on a nightly basis and he would often leave his bed to sit in a chair or lie on the couch.

[17] He continued with physiotherapy treatments and relied on over-the-counter pain medications to get by. In the years leading up to the Second Accident, he was able to function despite his persisting low back pain.

[18] During this time, his work history fluctuated. He was laid off at KGG Construction due to a shortage of work and in January 2012, looked for work in

northern Alberta. He was hired by Precision Drilling in February 2012, initially as a lead hand and thereafter as a roughneck. The weather conditions in Alberta were not to his liking. They were hard on his body. Because of the spring breakup in 2012, he returned to KGG Construction. He alternated between the two employers until spring 2013.

[19] In terms of his recreational activities, the plaintiff tried playing soccer in the summer of 2012 but after three games (playing at most 30 minutes each game), his low back got so bad that he could not continue. He has not played soccer since. His network of friends also began to fall apart in and around this time. He blames most of that on his First Accident injuries.

[20] By the spring of 2013, he had grown tired of working in the oil patch. It appears that the oil patch was also growing tired of him. He had a dispute with his foreman and his employment at Precision Drilling was terminated, he says unjustly. He returned to Vernon and decided to pursue a welding career.

[21] He says that throughout this time, his low back pain continued. Although he remained functional, he experienced a slow ache that never went away. In the mornings, he described the pain as a 3-4/10 and towards the end of a shift, 7/10.

[22] He began employment with New West Mill Installations Ltd. (“New West”) as a welder in July 2013. In the fall of 2013, he returned to school and obtained his “A” welding ticket. He continues to work for New West.

[23] In March 2015, the plaintiff and his family sold their home and moved into a larger home in the Bella Vista area (“Bella Vista Home”). The house was a ‘fixer-upper’ and needed work. In preparing their previous home for sale, the plaintiff landscaped the backyard, installed a fence, put down paving stones for a patio, and rebuilt the front porch. Although he was able to get the work done, he said he did so with pain and that the work aggravated the pain.

[24] He continued his rehabilitation regime through the spring and summer of 2015 by swimming and attending physiotherapy. His low back symptoms persisted, waxing and waning along the way depending on activities.

[25] Leading up to the Second Accident, the plaintiff felt that he was making slow but steady progress. His back still troubled him but he was able to continue functioning for the most part. He was also doing his best to maintain his fitness and weight levels. Importantly, he was happy with his welding job and was earning much more than he did previously. After his workdays, he had enough energy left to swim, spend time with his family, and go to the gym.

[26] He was working towards obtaining his red-seal welding certificate when the Second Accident sent him off course once again.

ii. The Second Accident

[27] The Second Accident occurred on August 29, 2015, near the Bella Vista Home when the defendant, Mr. Marcus Kehler, lost control of his Nissan Pathfinder and struck the plaintiff's 2012 GMC truck head-on. The impact was significant and stopped the plaintiff's truck dead in its tracks. The truck was a total loss.

[28] In addition to seatbelt bruising across his chest, the plaintiff suffered soft-tissue injuries to his neck, shoulder and elbow. He also experienced significant aggravation of his low back injury. The next day, his whole body hurt and he felt beaten-up. His already disturbed sleep was now much worse.

[29] His injuries from the Second Accident prevented him from returning to work for almost ten months. He became frustrated, irritable and short with Ms. McLean and his children.

[30] He called New West in May 2016 thinking that he might be ready to return to work. New West had a project starting in July 2016 and called the plaintiff in for it. Though he completed the job, it aggravated his back such that he had to take further time off. Complicating his return to work, the plaintiff and Ms. McLean's children lost

their spot in daycare that summer. The plaintiff accordingly decided that he would stay home with the children. That arrangement made the most financial sense, especially since he was still struggling with his low back pain. Accordingly, he did not return to work until late August 2016 after alternate daycare had been arranged. Save for a periodic lay-off or two, he has continued working full-time since then.

[31] He was laid off from New West from December 2016 through May 2017 because of a shortage of work. Despite ongoing back issues, he returned to KGG Construction in the interim because he needed to support his family.

[32] On May 17, 2017, after returning to work with New West, a crane broke loose and struck him on the right side of his face fracturing his right cheekbone. He also suffered a concussion. He underwent surgery and had a steel plate inserted in his right cheek. He began a graduated return to work program and was back to full duties in September 2017. He continues to have some facial pain (likening it to the sensation one has when dental freezing begins to dissipate). He also has slight tremors in his hands, but they do not affect his welding ability.

[33] Since returning to work full-time with New West in September 2017, he has tried to maintain his health by swimming, stretching and seeing a kinesiologist. He has also seen a pain specialist, Dr. Fester, for lidocaine and cortisone injections. He has had approximately ten injections, the last one about a month before trial. The injections provide temporary relief only.

[34] Since the Second Accident, he says he has been unable to help much around the household. He does not think he is much fun to be around because he is irritable. He has far less energy at the end of a workday than he once did.

[35] He says that although he can function at work, his back is still in pain and he slugs through the workdays. His symptoms are aggravated by crouching, twisting, bending and sitting. He does not complain to anyone because he does not want his co-workers or New West’s owners knowing for fear it could “taint” him for future work.

[36] It has now been over eight years since the First Accident. His low back issue is chronic. He has been prescribed Celebrex, an anti-inflammatory pain medication that he takes when his symptoms are especially bad. The rest of the time, he gets by using over-the-counter pain medications such as Advil.

IV. Medical Evidence

[37] The plaintiff tendered evidence from Dr. Steven Helper, a specialist in physical medicine and rehabilitation, who assessed the plaintiff on two occasions and provided two medical/legal reports.

[38] Ultimately, Dr. Helper's opinion was that the First Accident was likely the cause of the plaintiff's back pain. According to Dr. Helper, the fact that the plaintiff returned to work in April 2011 performing light duties does not mean that the First Accident was not a major contributing factor; in his view, delayed onset of low back pain symptoms is not uncommon. While it is true that the plaintiff had a pre-existing spine degenerative disease, Dr. Helper believed this to be largely inconsequential because it is not out of the ordinary for a person of his age to have such a condition.

[39] Dr. Helper's view was that the Second Accident, while not creating a new diagnosis or a definite change in his long-term recovery, aggravated the problem. He agreed, however, that given the physical nature of the plaintiff's job, it was likely that the plaintiff could have developed mechanical low back pain at some point in his working career in any event of the Accidents.

[40] According to Dr. Helper, back issues are difficult to treat. His opinion is that the plaintiff's chance for a spontaneous recovery is poor. Although he could not guarantee *any* major improvement, he made a series of "strong" recommendations to the plaintiff (including changing to a sport-based physiotherapist or seeing a kinesiologist instead). He also suggested that the plaintiff try pilates-led physiotherapy and swimming. He expected that there *might* be moderate or partial improvement in his symptoms if the plaintiff followed his recommendations.

[41] Dr. Helper also suggested that the plaintiff consider undergoing rhizotomies. A rhizotomy is a surgical procedure designed to kill nerve endings in order to reduce chronic back pain. He stated that there is a 60% probability of 80% relief and an 80% probability of 60% relief lasting up to one to one-and-a-half years.

[42] In short, Dr. Helper's opinion was that while further rehabilitation may improve the plaintiff's function, it would not cure his pain.

[43] The defendants tendered expert evidence from Dr. Robert Schweigel, an orthopaedic surgeon, who also assessed the plaintiff on two occasions. He prepared four medical/legal reports in total, two respecting his assessments and two reviewing the plaintiff's clinical records. He was qualified with expertise in the area of spinal disorders and long-term care of chronic pain using interventional pain treatments.

[44] After his initial assessment, Dr. Schweigel's impression was that the plaintiff had suffered soft-tissue injuries to his neck and ankle and had mechanical low back pain secondary to degenerative disc disease with possible soft tissue injuries to his lumbar spine. Respecting the low back, he acknowledged the possibility that the accident aggravated his degenerative disc disease, but believed that it was "likely he would have *some* of these symptoms whether he had the car accident or not" [my emphasis]. He likewise said that the Second Accident could have aggravated his condition but again maintained that he would have had low back pain regardless.

[45] Dr. Schweigel reviewed a CT scan of the plaintiff's lumbar spine that confirmed moderate to advanced degenerative disc disease at L5-S1, mild degeneration at the L4-L5 level and mild to moderate degeneration at the L3-L4. Dr. Schweigel felt that these findings were quite significant. Respecting the onset of low back pain, Dr. Schweigel nevertheless felt that it was "not unreasonable to suspect that the motor vehicle accident caused a soft tissue injury to the spine, aggravating the pre-existing degeneration."

[46] He agreed in cross-examination that spine degeneration does not always cause pain and that many people in the general population have spinal degeneration with no back symptoms at all.

[47] Regarding the plaintiff's functional limitations, Dr. Schweigel recommended a gentle stretching program at home on a regular basis along with walking, cycling and yoga. He felt a gradual reintroduction of sports would be appropriate as well.

V. Discussion

[48] The main issue for determination is whether, on a more likely than not basis, the Accidents caused or contributed to the plaintiff's low back issues beyond the *de minimus* range. The plaintiff must prove causation on the well-known "but for" test: *Resurfice Corp. v. Hanke,* 2007 SCC 7 at paras. 21-23.

[49] The defendants point to video surveillance footage and photographs of the plaintiff at work in support of their argument that the plaintiff is overstating the severity of his back pain. In effect, the defence argument is that no person who has severe back pain would be able to work as a framer, roughneck or welder. Those jobs are simply too physically demanding. Additionally, and relying on Dr. Schweigel's opinions, the defendants argue that the plaintiff would have become symptomatic in any event of the Accidents.

[50] The defendants further point to various clinical and work records in support of their argument. For example, there is a clinical entry in July 2011 where the plaintiff's physiotherapist noted, "cervical pain decreased a lot" and "cervical movement full and pain free." And in September 2011, a note that says "doing well – no cervical pain/minimal lumbar pain."

[51] The defendants' surveillance video taken in January 2019 shows the plaintiff sweeping and walking on his deck and bending normally. This is frankly of little value. The plaintiff does not suggest he is disabled. To the contrary, he admits to being able to perform most day-to-day activities (including those shown in the

surveillance video) as well as work that is much more arduous (such as framing and welding). The issue is that he experiences pain while doing these activities.

[52] As is the case with most if not all personal injury cases involving soft tissue injuries, the plaintiff's credibility and the court's ability to rely on the plaintiff's evidence is key. There is only one person who knows how the plaintiff feels, and that is the plaintiff himself. For me to accept the plaintiff's position, I must first be able to accept the plaintiff's evidence and reconcile it with the other evidence.

[53] The plaintiff testified that he feels guilty that he cannot do more around the house. Many of his household projects have fallen by the wayside and there are still a number of other projects on the "honey-do" list that have not been started. He believes that, but for the Second Accident, he would have recovered by this point and could have accomplished these projects.

[54] My impression from observing the plaintiff testify is that he is somewhat of a stoic. He does not like to complain. He is a soft-spoken man of simple words. He also struck me as someone evincing a depressed mood.

[55] In cross-examination, many propositions, dates, timelines and other details were put to him. He seemed to be doing his best to recall details but struggled at times to answer with precision. I suspect the same was true when he was giving his history to the various doctors and other treating practitioners assessing him. To the extent that there were inconsistencies in his evidence, they were minor and understandable given the lapse of time between the Accidents and the trial.

[56] Many family members, friends, and coworkers testified to their observations of the plaintiff following the Accidents. Mr. Waage, a red-seal welder and co-worker, has known the plaintiff since his return to work in late August 2016. He described the plaintiff as a hard worker who takes pride in his work and rarely complains. He has seen the plaintiff exhibit signs of pain but work through it.

[57] The plaintiff's brother-in-law, James McLean, described him as likeable, kind, generous, and a doting father. Prior to the Accidents, he said the plaintiff was very

athletic and had impressive work ethic and handyman abilities. He noticed that the plaintiff significantly “slow downed” after the Accidents and that he gained weight such that he is the heaviest he has ever been.

[58] The plaintiff’s mother, Ms. Laurie Goldie, also noticed a sharp change in the plaintiff’s physical appearance and function since the Accidents. She also noted a change in his mood since the Accidents. She described him as having a “twinkle in his eye” before the Accidents which is now gone. To her, he now appears sad.

[59] Ms. McLean also testified. She impressed me as an honest and genuine witness. She described the plaintiff pre-accident as being a romantic and sweet person who was physically fit, thoughtful, and caring. She said he had no physical issues or constraints prior to the First Accident. As mentioned earlier, she recalls him complaining that his lower back was sore shortly after the First Accident and before the time it was first noted in the physiotherapy records. She also spoke about the plaintiff’s inability to get restful sleep. They bought another bed to try to improve his sleep but the sleep continues to be non-restorative.

[60] After the First Accident, the plaintiff went to physiotherapy and attempted jogging. He was more helpful around the house and took part in activities with the children. Although he was not yet back to his pre-First Accident baseline, there was light at the end of the tunnel. From her perspective, it was the Second Accident that really sent him on a downward spiral. He gained significant weight and became grumpy, on edge and short-tempered. His mood and personality have changed. He is no longer happy. She attributes the change to his ongoing back pain.

[61] All of the lay witnesses gave their evidence in a frank and honest manner and did not contradict the plaintiff’s evidence in any significant way. I accept their evidence as reliable.

[62] Having listened to and observed the plaintiff testify, I conclude that he too did his best to present his evidence in an honest and forthright manner. I generally

accept the plaintiff's evidence as genuine and reliable. I accept that he has ongoing issues especially respecting his lower back.

[63] Respecting the cause of the plaintiff's low back pain, I conclude that Dr. Helper's opinion is probably correct. His leading diagnosis is soft-tissue mediated pain because of dysfunction of the muscles around the area. I accept that the probable triggering event for the plaintiff's low back pain was the First Accident and am satisfied that the plaintiff's ongoing low back pain is attributable to the Accidents.

[64] On this backdrop, I will now assess damages.

VI. Damages Analysis

i. Non-Pecuniary Damages

[65] An award of general damages is intended to compensate for pleasure and enjoyment that has been lost. It endeavours to alleviate, as far as possible, the pain and suffering endured by the plaintiff: *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at para. 106. Wedge J. recently reviewed and summarized the legal principles for non-pecuniary damages in *Tisalona v. Easton,* 2015 BCSC 565, aff'd 2017 BCCA 272:

> [80] The purpose of an award for non-pecuniary loss is to compensate the plaintiff for pain, suffering, disability and loss of enjoyment of life.
>
> [81] Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and for those she will suffer in the future. The award of a sum of money is to permit the plaintiff to substitute other amenities of life for those she has lost.
>
> [82] In *Stapley v. Hejslet*, 2006 BCCA 34, Kirkpatrick J.A., writing for a majority of the Court, quoted at para. 45 *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, with respect to the underlying rationale for non-pecuniary damages and the considerations that should guide a court in awarding such damages. In *Lindal*, the Court emphasized that the amount of an award for non-pecuniary damages should not depend only on the seriousness of the injury. Rather, the amount of the award must depend as well on its ability to ameliorate the condition of the injured plaintiff considering his or her particular situation. For that reason, the gravity of the injury will not, of itself, be determinative of the amount of the award. An appreciation of the loss in the context of the specific plaintiff's circumstances is the key, and "the need for solace will not necessarily correlate with the seriousness of the injury."
>
> [83] The factors to be considered in determining the amount of an award for non-pecuniary loss, as outlined in Stapley, are now well established. They include the following:

- the age of the plaintiff;
- the nature of the injury;
- the severity and duration of pain;
- level of disability;
- emotional suffering;
- impairment of family, marital and social relationships;
- impairment of physical and mental abilities;
- the plaintiff's stoicism (a factor that should not penalize the plaintiff).

[66] The plaintiff says that the circumstances of this case dictate that a fair award for non-pecuniary damages is $130,000. In support, he relies on the following cases: *Bellaisac v. Mara,* 2015 BCSC 1247; *Sekihara v. Gill,* 2013 BCSC 1387; and *Gill v. Lai,* 2018 BCSC 101 (rev'd on other grounds, 2019 BCCA 103).

[67] The defendants say that if I find that the plaintiff's low back complaints were caused by the First Accident, which I have, the range of non-pecuniary damages ought to be in the $55,000 to $65,000 range. In support, they rely on *Ali v. Rai,* 2015 BCSC 2085; *Driscoll v. Desharnais,* 2009 BCSC 306; *Farbatuk v. Lagrimas,* 2014 BCSC 1879; and *Torchia v. Siegrist,* 2015 BCSC 57.

[68] The plaintiff was taught to work in physically demanding jobs from an early age. He consequently developed a strong work ethic. As a result of the Accidents, he is now limited in his functioning both at work and at home. His low back pain prevents him from living the socially, recreationally and domestically active lifestyle he did prior to the Accidents. He is no longer able to participate in activities such as skiing and soccer. This evidence is corroborated by his wife, coworkers, and friends.

[69] The plaintiff describes himself post-Accidents as overweight and unfit. My assessment is that to a certain degree, his weight is probably contributing to his ongoing back issues. As a father, he feels he has let his kids down. He says he is not fun to be around. He finds it hard that he cannot play sports with them. As a spouse, he feels that he is also letting his wife down. He says he is not able to complete chores or participate fully in other day-to-day household responsibilities.

[70] As mentioned, I was particularly impressed with Ms. McLean's evidence. I accepted it without reservation. It was heartfelt, candid and convincing. The picture she painted satisfies me that the plaintiff is not the pain-free, energetic, spontaneous, active and athletic man he was before. Everyday activities are hard for him and, as a consequence, hard for his family.

[71] In my observations, the plaintiff appeared uncomfortable when describing his difficulties. It is not something he enjoys talking about. He has tried to be stoic and do his best to carry on. I accept that the low back injury will continue indefinitely and could get worse over time. To date, he has been able to work through it, but it still affects his day-to-day function. The back pain is always there and he continues to have sleep issues. While he can still work as a welder and earn an income to support his young family, he is unable to maintain his previously active lifestyle.

[72] I also accept that at some point, his back issues would have manifested themselves later in life due to his degenerative spinal condition. The Accidents, however, accelerated this process by an unknown number of years.

[73] All things considered, including the *Stapley* factors, I assess the plaintiff's non-pecuniary damages at $100,000.

ii. Special Damages

[74] The plaintiff claims $5,821.70 for the costs he has already incurred for physiotherapy, massage therapy, over-the-counter pain medication, and mileage. He also claims for the cost of certain welding certificates that expired while he was off work. He explained that while off work in 2016, he missed a recertification and had to pay for it himself. Otherwise, he says, New West would have paid for it.

[75] The defendants argue that the plaintiff has only proven $2,007.25 in special damages. In their argument, the expenses related to his low back pain are unrelated to the Accidents and thus, not eligible for reimbursement. They further argue that the welding recertification expense has not been proven. They submit that there is no

evidence that the plaintiff sought reimbursement from the employer nor is there evidence that the employer refused to pay.

[76] I am generally satisfied that the plaintiff has proven the expenses he incurred for mileage, massage therapy and physiotherapy. I also accept that he has been using Tylenol and Advil for pain control on a routine basis.

[77] The plaintiff's explanation regarding the $975 for the additional welding course was confusing. In the end, I am not satisfied that he incurred this cost as a result of the Accidents.

[78] Given my findings that the plaintiff's low back pain and subsequent treatment costs were caused by the Accidents, special damages of $4,846.70 are awarded ($5,821.70 less $975).

iii. Past Loss of Earning Capacity

[79] The plaintiff seeks an award of $65,000 to compensate him for his past loss of earnings based on approximately one month of lost work from KGG Construction following the First Accident, and nearly one year of lost work from New West following the Second Accident.

[80] The defendants acknowledge that the plaintiff suffered a past wage loss, but argue that it was only from the date of the Second Accident up until May 2016, when he advised New West that he was available for work.

[81] The plaintiff was earning $22 per hour at KGG Construction and was in between construction jobs at the time of the First Accident. It is unclear when he would have returned to work but for the First Accident, especially given his ankle injury. Given this uncertainty, the plaintiff suggests compensation of two weeks lost work (80 hours), translating into a gross wage loss of $1,760. I accept this suggestion.

[82] Following the Second Accident, the plaintiff did not fully return to work for New West until late August 2016 about one year later. Though he tried to go back

for one week in July 2016, he was not ready. Consequently, he and his wife decided that he would stay at home with the children for the summer. Ms. McLean testified that if the plaintiff had fully recovered in July 2016 and was ready to return to work, they would have made other childcare arrangements for the balance of the summer.

[83] The plaintiff argues that but for the Second Accident, there would have been plenty of work, including lucrative fieldwork, available for him throughout 2015 and 2016. This is confirmed by Mr. Waage.

[84] I accept that but for the Second Accident, it is more likely than not that the plaintiff would have worked full-time hours for New West, including some fieldwork. At the time, he was earning $30 per hour straight time and $45 per hour in the field, plus time-and-a-half over 12 hours per day. Additionally, he was paid $140 per day live-out allowance and $0.50 per kilometer to drive his own vehicle.

[85] Based on the plaintiff's income tax returns, he says his average gross income for the years 2014 through 2018 was approximately $85,000. Based on this amount, the plaintiff claims past wage loss of $65,000 net of income tax.

[86] The defendants say that nothing should be awarded for the First Accident. For the Second Accident, they say that the plaintiff's gross income loss was $48,376. That sum is based on 8.5 months of his 2018 earnings of $68,296. Net of tax, the defendants say that his past wage loss is $37,706.

[87] Of the two approaches, I prefer the averaging of past income approach used by the plaintiff because, in my view, it more closely approximates what the plaintiff would have earned but for the Second Accident.

[88] All things considered, including positive and negative contingencies, I award the sum of $65,000 net of tax under this head.

iv. Future Loss of Earning Capacity

[89] The plaintiff is only 41 years old. He argues that on a more likely than not basis, his career as a welder will be cut short and he will suffer a lost ability to earn income.

[90] The plaintiff seeks an award for loss of future earning capacity in the range of $425,000, reflecting five years of his current annual income of $85,000. While he is currently able to work through the pain, welding exacerbates his symptoms. Thus, he asserts, there will be a delayed recovery and a shortened work life expectancy that would not be the case but for the Accidents. Dr. Helper agrees that he will probably not reach his normal work life expectancy of 20-25 years.

[91] The plaintiff says that while he has options to transfer into another career (such as a welding instructor, welding inspector or boilermaker), these options are probably not realistic given his age and current qualifications. He submits that the most likely scenario is that he will continue working as a welder.

[92] The defendants say that nothing should be awarded under this head of damages. As they point out, the plaintiff has continued working full-time since late August 2016. They point to Mr. Waage's evidence that the plaintiff continues to be hard-working and meticulous. They assert that any troubles he may be experiencing are not related to the Accidents but rather to the normal aging process on the backdrop of working in physically laborious jobs. In any event, they say that the plaintiff's subjective fear that he may not be able to work as a welder in the future is insufficient to ground an award for loss of future earning capacity: *Ju v. Morpurgo,* 2019 BCSC 194 at para. 59.

[93] Alternatively, they argue, if I find that the plaintiff has shown a real and substantial possibility that he will suffer lost income because of the Accidents, I should award no more than one year's salary, or $68,000, using the loss of capital asset approach.

[94] The assessment of future loss of earning capacity was summarized by Kent J. in *Hoy v. Williams,* 2014 BCSC 234:

> [153] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232.
>
> [154] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.
>
> [155] Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185. The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.
>
> [156] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.

[95] I conclude that there is a real and substantial possibility that the plaintiff's work lifespan will be shortened and his income earning ability will be impaired, at least to some degree, as a result of the Accidents. He will be a less desirable employee as he ages and he will likely have an early retirement.

[96] This amount of loss cannot be calculated with any degree of precision. Accordingly, the most appropriate method in valuing the plaintiff's loss under this head is the loss of capital asset approach: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43. In doing so, I must consider whether:

a) the plaintiff has been rendered less capable overall from earning income from all types of employment;

b) the plaintiff is less marketable or attractive as an employee to potential employers;

c) the plaintiff has lost the ability to take advantage of all job opportunities which otherwise might have been open to him had he not been injured; and

d) the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

See *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at 356; and *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 and 56 ("the *Golaiy Factors"*).

[97] The plaintiff still has a residual earning capacity. At the moment, he is able to work but whether he can continue long-term is unknown. The extent of his pre-existing degenerative back condition (that may have forced him into another occupation in any event of the Accidents) is also unknown.

[98] His most viable replacement employment option is as a welding instructor. He is not optimistic, however, because any such job would likely require relocation to Kamloops, where Thompson Rivers University is located. He recently met with Ms. Jodi Webster, a vocational consultant, who discussed job options with him. She suggested courses he could take to make himself more marketable as well as networking suggestions he could initiate. To date, other than making cursory online searches, the plaintiff has not taken any steps to investigate other career options. This suggests that the plaintiff is content to continue working as a welder and tolerate the pain, at least in the short-term.

[99] The plaintiff has some 25 years of work life ahead of him. He has chronic low back issues that, according to the medical opinion I have accepted, will not improve. Accordingly, he is less capable overall of earning income in his line of employment, he is less marketable and attractive as an employee, he will have lost the ability to take advantage of job opportunities that would have otherwise been open to him,

and finally, he is less marketable to himself in the competitive labour market. He satisfies all four of the *Golaiy Factors.*

[100] An award for loss of future earning capacity requires an exercise of judgment. In this case, I conclude that a fair approach to assessing the plaintiff's future loss of earnings is to award two years of his annual earnings as a welder, which I determine to be $70,000 per year, giving a total of $140,000.

[101] In awarding this sum, I have taken into consideration various positive and negative contingencies, including the potential improvement in health once he has had the benefit of future care, the potential loss of employment, the possibility of re-training, and the possibility that his work life would have been shortened by his degenerative back condition in any event of the Accidents.

v. Cost of Future Care

[102] To be awarded, items of future care must not only be reasonable but must be medically justifiable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78; aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.).

[103] Additionally, the plaintiff must show that items of future care, if awarded, would be utilized: *O'Connell v. Yung,* 2012 BCCA 57 at para. 68. Because the future cannot be predicted, the assessment of future care costs requires some measure of common sense. Just because an expert has recommended an item of future care does not necessarily mean it will be awarded.

[104] The plaintiff tendered two separate capacity and cost of future care reports. The first was prepared by Ms. Lucas, an occupational therapist, in preparation for a trial then set to commence in November 2015. Because of the Second Accident, that trial was adjourned. Ms. Nadia Hudon, another occupational therapist, prepared the second report in preparation for this trial. She saw the plaintiff in December 2018 and completed her report in January 2019.

[105] The defendants also tendered two reports, both authored by Ms. Cheryl Black, a consulting occupational therapist, critiquing Ms. Lucas' and Ms. Hudon's evaluations.

[106] The plaintiff bases his claim for future care on the recommendations made by Ms. Hudon. Broadly speaking, she recommends a multidisciplinary pain program, ongoing physiotherapy, kinesiology (and related pool and gym memberships), psychological counselling, pilates, diagnostic injections and rhizotomy treatments.

[107] Ms. Hudon was subjected to a detailed and lengthy cross-examination on the testing and methodology used for her functional capacity testing. She was not asked much about her future care recommendations. While the defence took issue with the plaintiff's self-reported level of pain during the functional capacity evaluation, Ms. Hudon's impression was that he was consistent and reliable. In her view, the plaintiff's subjective complaints squared with her objective observations.

[108] Ms. Hudon was forthright and responsive throughout and I have no difficulty accepting her evidence and recommendations. In terms of future care, she recommends that the plaintiff have assistance with heavier home maintenance and larger projects involving heavy lifting, bending and stooping (such as flooring, plumbing, and renovation projects).

[109] Ms. Hudon also recommends that the plaintiff get active and, if necessary, exercise through the pain. Dr. Helper and Dr. Schweigel support these recommendations. If he does, he will enjoy increased strength, have less flare-ups, and probably be happier over all.

[110] In terms of the plaintiff's mental well-being, Dr. Helper stated: "Mr. Goldie's decreased mood is common in chronic pain. I recommend that he speak with his family physician. A referral to a psychologist with a special interest in chronic pain would be appropriate."

[111] The defence expert, Ms. Black, was simply asked to evaluate the plaintiff reports. She was not asked to conduct an assessment of her own. As such, she did

not meet the plaintiff. Essentially, Ms. Black's reports critique the methodologies and processes used by Ms. Lucas and Ms. Hudon. She was specifically critical that neither occupational therapist conducted a home assessment. She also believed that the occupational therapists should have placed more weight on objective (as opposed to subjective) findings. She agreed, however, that there was no way for her to know what findings Ms. Lucas and Ms. Hudon placed the most weight on.

[112] Counsel took the plaintiff through each one of Ms. Hudon's recommendations. The plaintiff confirmed that, if ordered, he would follow through on each one. My sense, however, is that the plaintiff has thus far been slow to follow through on various recommendations already made to him. Instead, he has opted to go to work and put up with the pain.

[113] The following table sets out the parties' positions on the various future care costs amounts. The sums in each column represent the present value of the costs projected up until the plaintiff's 80th birthday:

ITEM	**PLAINTIFF'S POSITION**	**DEFENDANTS' POSITION**
Multi-Disciplinary Pain Program	$ 21,686	$ 0
Physiotherapy – First Year	1,671	500
Physiotherapy – Years 2 +	33,093	0
Kinesiology	1,543	1,500
Fitness/Aquatic Membership	11,777	0
Psychological Counselling Assessment	193	0
Pilates – First Year	2,378	0
Pilates – Years 2 +	35,952	0
Diagnostic Injections (Travel)	90	0
MRI Arthrogram of Left Hip	770	0
Occupational Therapy (Sleep Restoration)	627	627
Vocational Assessment and Retraining	3,168	0
Home Maintenance	111,984	0
Yard Maintenance	48,190	0
Snow Removal	51,581	0
Medications	13,351	1,200
TOTAL	$338,054	$3,827

[114] Given my findings regarding the plaintiff's injuries, including that his pre-existing degenerative spine condition would have become symptomatic at some point in any event of the Accidents, I am not satisfied that many of claimed items are medically justifiable or related to the Accidents.

[115] In the paragraphs below, I will detail my findings with respect to each category in the above chart. In arriving at my conclusions on the present value of these future care costs, I have had the benefit of economist reports provided by Mr. Darren Benning and Mr. Mark Gosling.

[116] Starting with the multi-disciplinary pain program, I am not persuaded it is medically necessary. His back pain is not debilitating. Further, the plaintiff has expressed concern that he would lose his job if he were to take five weeks off work to attend the program. On that basis, I am not persuaded the plaintiff would attend. Thus, even though Ms. Hudon recommends such a program, I make no award for it.

[117] Regarding physiotherapy, the plaintiff has had multiple treatments that provide him with pain relief. Dr. Helper recommended that he try a different physiotherapist "with a good reputation working with athletes in the region." Dr. Schweigel felt that three to six months of ongoing physiotherapy would suffice. He agreed that follow-up treatments would be useful from time to time.

[118] The plaintiff has a good rapport with his current physiotherapist and I am not persuaded that starting with someone else is necessary. I conclude that ongoing physiotherapy is appropriate while he is still working as a welder, which I estimate to be until he is 55 years old. Using Mr. Benning's multipliers, I award $1,671 for the first year and $11,772 for the remaining years for a total of $13,443.

[119] Regarding kinesiology, Dr. Helper has recommended 24 further sessions. It was Dr. Helper's opinion that after those sessions, the plaintiff would have the tools necessary to continue with a self-directed program. The plaintiff gave evidence that an ongoing gym and pool pass would assist him in his kinesiology regimen. The

defendants generally do not quarrel with an award of $1,500. Accordingly, I award the plaintiff $1,500 for kinesiology services.

[120] Regarding psychological counselling, I accept that the plaintiff is suffering from a depressed mood likely caused by his chronic back pain. He needs access to counselling. The defendants are not opposed to the plaintiff receiving some counselling sessions. They suggest six months. In my view, this is appropriate and reasonable. I award $2,000. This would allow the plaintiff to have one counselling session every two months for about two years.

[121] Regarding pilates, the plaintiff has tried beginner classes and says he would be willing to go in the future. I am not, however, persuaded that such is the case. Accordingly, I decline to make an award for future pilates classes.

[122] Dr. Helper also recommends diagnostic injections to better locate the source of the plaintiff's back pain. These injections are covered by MSP. The plaintiff claims travel costs to and from Kelowna where he receives the treatments. I agree that these injections should continue as needed. This travel cost is allowed at $90.

[123] Dr. Helper also recommends rhizotomy treatments. The plaintiff has done some cursory investigation and, despite his legitimate concerns, is prepared to try these treatments. The defence position is that he has not yet arranged to be placed on a waitlist, which speaks to his motivation. As I understand it, however, the plaintiff has taken steps in the consultation process, including undergoing an MRI and arthrogram of his left hip. I find that this request is a reasonable one and agree that the procedure should be undertaken. The claim is allowed in the sum of $770.

[124] Ms. Hudon also recommends ongoing therapy for the plaintiff's sleep issues. The defendants do not oppose this claim. The claim is allowed at $621.

[125] Ms. Hudon further recommends a vocational consultant to assist the plaintiff in his search for a viable career. The defendants' position is that the plaintiff has already received vocational consultant services and has not pursued the options already offered to him. I do not agree. I accept the plaintiff's submission that a full

residual employability assessment is not only reasonable, but is required so that he will have a long work life expectancy. This claim is allowed at $3,168 for the cost of the assessment plus an additional allowance of $1,000 for travel and any vocational services after the assessment.

[126] Ms. Hudon says that as long as the plaintiff is cautious when engaged in heavy lifting, he should be able to perform most of his daily housework activities. What she does recommend, however, is assistance for home maintenance, yard maintenance, and snow removal. I agree with these recommendations and order home maintenance care costs until age 60. I conclude that $5,000 per annum for these services is a reasonable sum, totalling $80,000 up to age 60.

[127] The plaintiff also seeks an award for pain medications such as Celebrex, Robaxacet, Robaxisal, Tylenol and Ibuprofen. I accept that continued use of pain medication in moderation will assist the plaintiff and allow him to continue working as a welder. I award the sum of $5,000.

[128] In sum, I award the following future care costs:

Multi-disciplinary pain program:	nil
Physiotherapy:	$ 13,443.00
Kinesiology and aquatic/fitness:	1,500.00
Psychological counselling:	2,000.00
Pilates:	nil
Diagnostic injections:	90.00
Radiofrequency ablation (rhizotomy):	770.00
Occupational therapy for sleep:	621.00
Vocational assessment:	4,168.00
Home maintenance	80,000.00
Medications	5,000.00
Total:	$107,592.00
Rounded:	**$107,000.00**

vi. Loss of Housekeeping Capacity

[129] The plaintiff seeks an award of $25,000 under this head. The defendants say that nothing should be awarded.

[130] Awards under this head are fact sensitive and discretionary: *Kim v. Lin*, 2018 BCCA 77 at para. 33. Depending on the nature and effects of the injury, loss of housekeeping capacity can be compensated by a pecuniary or non-pecuniary award. Treating it as a non-pecuniary loss may be best suited to cases where the plaintiff is still able to perform household tasks (albeit with difficulty), while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.

[131] The plaintiff is able to perform routine household tasks but with difficulty. His symptoms reduce his satisfaction in contributing to the upkeep of his home as he otherwise would. For these reasons, I find that the plaintiff's loss can be compensated in a non-pecuniary way and have accordingly factored his loss of housekeeping capacity into his non-pecuniary damages award. I decline to make a separate pecuniary award.

VII. Mitigation

[132] The defendants allege that the plaintiff failed to mitigate his damages and that his award should therefore be reduced. The issue of mitigation involves the application of a subjective/objective test: *Harry v. Kalutharage,* 2019 BCSC 579, summarizing *Chiu v. Chiu,* 2002 BCCA 618 at para. 57.

[133] In short, while the plaintiff has an obligation to take all reasonable measures to reduce his damages, including undergoing treatment to alleviate or cure his injuries, to make out a mitigation defence, the defendants must prove both that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss.

[134] The focus of the defendants' cross-examination of the plaintiff was mainly about his failure to exercise routinely (as recommended by his physiotherapist), his

failure to change physiotherapists and commence pilates-guided physiotherapy or kinesiology (as recommended by Dr. Helper), and his failure to participate in rhizotomy treatments (also recommended by Dr. Helper).

[135] The plaintiff in response argues that his decision to continue with his physiotherapist was reasonable. They had a good therapeutic relationship and he trusted his abilities. Further, Dr. Helper's *actual* recommendation was that the plaintiff try a different physiotherapist "with a good reputation working with athletes." The plaintiff said that he was not aware of any such physiotherapists and the defence led no evidence to suggest there were any in the region. Further, the plaintiff points out that even had he followed Dr. Helper's recommendations, there was no guarantee that his symptoms would improve, only that they *might* improve.

[136] It is true that the plaintiff did not follow all of Dr. Helper's recommendations. He says this was because he could not take time off work and needed to support his family. Overall, I found his explanations and attempts to justify failing to follow Dr. Helper's recommendations to be unpersuasive.

[137] The plaintiff's efforts have been half-hearted and I agree that the defendants have a point. However, the plaintiff is not expected to act to a standard of perfection with the benefit of hindsight: *Dosangh v. Xie,* 2017 BCSC 1937 at para. 151. Perhaps due to his chronic pain or perhaps because of his work schedule and financial obligations, the plaintiff has not been motivated in his recovery thus far. He needs to be exercising and following the advice of his medical team. Even though his back pain may not resolve, his general health and mood will likely improve.

[138] Notwithstanding these findings, however, I find that the defendants' mitigation argument fails. In my view, the plaintiff's low back symptoms would not have significantly improved even had he followed Dr. Helper's recommendations. Thus, his damages would have been similar to what I have awarded.

VIII. Summary

[139] The plaintiff is entitled to damages for the injuries he sustained in the Accidents as follows:

Non-pecuniary damages:	$100,000.00
Special damages:	4,846.70
Past loss of earning capacity:	65,000.00
Future loss of earning capacity:	140,000.00
Cost of future care:	107,000.00
Total:	**$416,846.70**

[140] The plaintiff is entitled to pre-judgment interest on special damages and past loss of earning capacity awards.

[141] Subject to matters of which I am unaware, the plaintiff is entitled to costs for both actions, as if there were two actions, until the September 19, 2017 consent order joined the actions for trial. After that, he is entitled to one set of costs.

"G.P. Weatherill J."