IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Curry v. Powar,
2015 BCSC 610

Date: 20150420
Docket: 1241899
Registry: Prince George

Between:

Robert Terrance Edward Curry

Plaintiff

AND

Paul Singh Powar and Northern Tire Capital Ltd.

Defendants

Before: The Honourable Mr. Justice Tindale

Reasons for Judgment

Counsel for the plaintiff:	D. Byl
Counsel for the defendants:	D.A. McLauchlan
Place and Date of Trial:	Prince George, B.C. June 16 - 20, and June 23 - 27, 2014 October 17, 2014
Place and Date of Judgment:	Prince George, B.C. April 20, 2015

Introduction

[1] The plaintiff, Robert Curry, claims damages for injuries that he received in a motor vehicle accident on February 24, 2012 (the "MVA").

[2] The plaintiff says as a result of the MVA he has suffered four distinct injuries. Those injuries are (i) left sided thoracic outlet syndrome ("TOS"), (ii) right hip joint injury, (iii) cervical spine injury, and (iv) depression.

[3] The defendants have admitted liability for the MVA.

Background

[4] The plaintiff is 44 years of age, having been born on December 1, 1970. He is married and has two children, ages 15 and 11. He resides with his family in the city of Prince George, British Columbia.

[5] On February 24, 2012, the plaintiff was employed as a tow truck operator with Ron's Towing. He was operating a five ton flat deck tow truck and traveling on Highway 97 toward the city of Quesnel when the MVA occurred. The plaintiff stopped his vehicle approximately ten miles north of Quesnel when he came upon a long line of stopped traffic.

[6] The defendant, Paul Powar, was driving a full-sized SUV. When he approached the plaintiff's vehicle he did not stop and rear-ended the plaintiff's vehicle. There was significant damage to Mr. Powar's SUV.

[7] At the time of the MVA, the roads were slippery and it was snowing.

[8] The plaintiff has not returned to work since the MVA.

The Evidence

The Plaintiff

[9] The plaintiff was raised in Vancouver, British Columbia. He left high school prior to graduation. He has held a number of different jobs, including working as a roofer after he left high school.

[10] In 1993, the plaintiff earned his GED.

[11] In 1999, he obtained his diploma from the Greater Regional Technical College as a locksmith technician. He worked in the Vancouver area as a locksmith for a number of different companies.

[12] In 2005, the plaintiff and his family moved to Prince George. The reason for the move was because the plaintiff's wife had finished a medical office assistant course and there was more lucrative work for her in Prince George. Also, the plaintiff decided to open up his own locksmith business in Prince George. He took a course through the Community Futures Development Corporation (the "CFDC") to assist him in starting his locksmith business. He also borrowed between $8000 and $10,000 from his father to assist in this endeavor.

[13] In 2010, the plaintiff decided to shut down his locksmith business which was not financially viable. He secured employment at Ron's Towing on December 1, 2010.

[14] The plaintiff stated that his intention was to try again with the locksmith business at a later date. The plaintiff's wage loss records can be found at Exhibit 5 in these proceedings. His income from 2003 until the MVA can be summarized as follows:

i) 2003 – total income $45,778;

ii) 2004 – total income $39,876;

iii) 2005 – total income $18,458 (employment income – $83, employment insurance benefits – $18,375);

iv) 2006 – total income $9472 (universal child care benefit – $600, employment insurance benefits – $13,848, net business income – negative $4976);

v) 2007 – total income $7210 (employment income – $1123, universal child care benefit – $1200, employment insurance benefits $2688, net business income – $2199);

vi) 2008 – total income $1717 (universal child care benefit – $1000, net business income – $717);

vii) 2009 – total income $192.55;

viii) 2010 – total income $4.87 (employment income – $2149.31, net business income – negative $2144.44);

ix) 2011 – total income $36,696; and

x) 2012 – total income $11,881.97 (employment income – $5461.97, employment insurance benefits – $6420).

[15] The plaintiff testified that in the 15 months that he worked at Ron's Towing prior to the MVA he did not have any physical problems nor did he miss any days of work. He says that he is now not able to do the work of a tow truck operator because he cannot perform the physical demands of the job.

[16] The plaintiff testified that at the point of impact during the MVA he had his seatbelt on and his body was turned to the right as he was looking out the rear window of his tow truck. His right arm and shoulder were on top of the bench seat with his left hand on the steering wheel. All of his weight was on his right hip. After the collision, the plaintiff saw that the defendant's wife and child were also in the defendant's vehicle. The plaintiff "shook off" the effects of the collision and got out of his vehicle to assist the defendant and his family. He loaded the defendant's vehicle onto his tow truck and cleaned up the road debris.

[17] The plaintiff testified that ambulance attendants arrived and he was taken to G.R. Baker Memorial Hospital in Quesnel. Initially, he felt some soreness on the side of his head and his arms. After being examined at the hospital, the plaintiff received a ride home from his father-in-law.

[18] The plaintiff testified that the next morning his whole body hurt. He had pain in his neck, arms, hips, and back. The plaintiff saw Dr. Christine MacLeod, his family doctor, a couple of days later. The plaintiff told Dr. MacLeod that he had pain in his neck and shoulder and that his back was in spasm.

[19] He testified that, prior to the MVA, he did not have any physical problems between 2002 and 2012 with his neck, arms, back, and hips.

[20] Dr. MacLeod sent the plaintiff to a chiropractor, Dr. Krell. The plaintiff reported to Dr. Krell that he was experiencing numbness in his left hand as well as numbness in his left forearm. As a result of those complaints, Dr. MacLeod referred him to a specialist, Dr. Gul. He saw Dr. Gul in September 2012. He also saw Dr. Sahjpaul, a neurosurgeon, in February 2013.

[21] The plaintiff testified that he had a stabbing type of pain in his forearm which became unbearable. Ultimately, on August 23, 2013, Dr. Gul performed an anterior cervical discectomy on the plaintiff which resulted in a 100% resolution of the pain in his forearm.

[22] The plaintiff also testified that his hips have not healed since the MVA. His right hip is the most problematic. As a result of this, the plaintiff's gait is affected. He indicated that he can only walk for one half to two blocks before he has to sit down.

[23] The plaintiff also complains of pain in the backside of his left shoulder blade and a tingling or numbness in his fingers if his left arm is raised for any length of time.

[24] The plaintiff testified that, in 2001, he had an accident at work that resulted in his lower back and hips being out of place.

[25] The plaintiff testified that, prior to the accident, he did most of the outside household chores. Now, he can only do a little bit of the inside household chores and then he has to rest.

[26] The plaintiff testified that he feels irritated and useless. He has seen a number of psychiatrists to attempt to address this. He testified that his relationship with his wife and children has become strained. The plaintiff saw the defendants' expert psychiatrist, Dr. Alexander Levin, in the fall of 2013. He said this interview did not go well because he had to talk about a number of painful childhood events including sexual abuse he had suffered as a child.

[27] On cross-examination, the plaintiff agreed that he had some skill with regard to repairing computers. He agreed that he has assisted people in repairing their computers. The plaintiff also agreed that he would be open to retraining to do work on computers; however, he was not sure if he could handle the courses required for such training.

[28] The plaintiff agreed on cross-examination that, from December 2004 until October 2005, he collected employment insurance benefits. He also agreed that, from February 2006 until January 2007, he received benefits from the CFDC. He also agreed that, from 2008 until 2010, he was working as a locksmith trying to get his business started and he was either just breaking even or losing money. As I mentioned, he began to work for Ron's Towing in December 2010.

James Thornley

[29] Mr. Thornley is the owner of J.D.M. Roofing in the Lower Mainland. He employed the plaintiff as a roofer between 1989 and 1990. He described him as a good worker and said he would hire him again.

Christa Lee Curry

[30] Mrs. Curry is the wife of the plaintiff. She described that, between the years of 1999 to 2004, the plaintiff worked full-time as a locksmith. He would often leave for work at 6:30 AM and not be home until after dinner. He was also on call and she said some days he worked 24 hours a day.

[31] She testified that she took a medical office assistant course in 2003 and she graduated in 2004. After doing some research, she concluded that she could obtain a higher paying job if the family moved to Prince George.

[32] She testified that the parties have been together since 1997 and were married on June 30, 2007. She stated that, between 2005 and December 2010 when the plaintiff secured employment with Ron's Towing, there were no relationship difficulties or any particular financial stressors.

[33] Mrs. Curry testified that, prior to the MVA, the plaintiff had a good relationship with his children and would take them fishing, biking, and to school. She also testified that she was not resentful during this period of time that she was working and supporting the family and the plaintiff was not able to.

[34] Mrs. Curry testified that, from 2002 until 2012 when the MVA occurred, the plaintiff did not have any problems with his low back, hips, or shoulder.

[35] Mrs. Curry testified that she noticed that the plaintiff was sore in his arm area the evening of the MVA. Over time, she noted that the plaintiff would lose his temper and ultimately began to seclude himself downstairs in his room. She agreed that the plaintiff became depressed over time and that she had never seen him like that before.

[36] Mrs. Curry testified that the plaintiff's injuries affected his relationship with his children as he was not able to do activities with them. She also testified that before the accident they shared household chores and that the plaintiff would do all of the outside chores, clean the toilets, and that they shared laundry duties. She stated that she now does all of the household chores.

[37] Mrs. Curry testified that, after the plaintiff saw Dr. Levin, he called her and he was uncontrollably upset. When he returned home he was very depressed and told her that he wanted to kill himself. I will note at this time that the plaintiff did not give any of this evidence in his testimony.

[38] Mrs. Curry also testified that the plaintiff walks "funny" now. She stated that the plaintiff does not drive anymore. He used to go visiting friends prior to the MVA but now he does not do that.

[39] On cross-examination, Mrs. Curry estimated that, after she took her medical office assistant course, she owed approximately $30,000 in student loans. She says these were paid off in September 2011. She also testified that she did not have a good idea of their budget and household expenses. I will note at this point that this is contrary to what the plaintiff said as he testified that his wife took care of all of their expenses.

[40] Mrs. Curry confirmed that she and the plaintiff did not have any savings prior to moving to Prince George. She agreed that she had originally purchased the family home from her grandparents and that over the years she had to refinance the mortgage in order to pay the family debts. She agreed that the mortgage on the family home increased from $100,000 to $160,000 over a couple of years.

[41] Mrs. Curry, on cross-examination, agreed that she began gambling in 2009 and it eventually became out of control. She would lie to the plaintiff about where she was going when she went to the casino. She began to lose significant amounts of money in 2011. Ultimately she told the plaintiff that they had significant debt.

[42] Mrs. Curry testified that initially the plaintiff and her agreed that they would give his locksmith business five years to become viable. When this did not happen, they discussed him obtaining employment with Ron's Towing for at least a year.

Patrick Wood

[43] Mr. Wood is a tow truck operator employed by Ron's Towing. He has known the plaintiff since September 2011. He described the plaintiff as an easy-going, happy individual prior to the MVA. After the MVA, he described the plaintiff as being unhappy and upset.

[44] On cross-examination, he agreed that working on his friends' and neighbours' computers makes the plaintiff happy.

Norman Clarke

[45] Mr. Clarke is the president of Ron's Towing. He described the plaintiff as a good employee who had no issues with absenteeism or disputes with customers or other employees. He would hire the plaintiff back if the plaintiff was healthy.

[46] On cross-examination, Mr. Clarke testified that the average salary for someone doing the plaintiff's job now would be between $3500 - $4000 per month and that they would typically work from 7:30 AM until 6 PM.

Expert Witnesses

Dr. MacLeod

[47] The plaintiff first saw Dr. MacLeod regarding the MVA on February 27, 2012. Dr. MacLeod noted in her clinical notes for that day, among other things, the following: "The next morning he woke up with some significant neck shoulder hip and back pain".

[48] Dr. MacLeod provided a medicolegal report, dated March 8, 2013. Dr. MacLeod opined the plaintiff was suffering from the following injuries:

i) Soft tissue injury to the cervical lumbosacral area leading to chronic pain;

ii) Headache secondary to soft tissue injuries and muscle tension in the cervical spine area;

iii) Depression secondary to long-standing chronic pain, lack of aggressive management and inability to afford treatment and medications; and

iv) Depression secondary to inability to carry out his normal roles as a husband and father. Also his uncertainty as to his ability to return back to work.

[49] It was necessary for Dr. MacLeod to explain her clinical notes which were quite inaccurate as a result of a voice recognition dictation program that she uses.

[50] On cross-examination, Dr. MacLeod agreed that the plaintiff's chief complaints to her were his upper body and low back. She said that she did not check his hips and had no explanation for not doing so.

Dr. Krell

[51] Dr. Tina Krell is the chiropractor who treated the plaintiff. She was called as an expert witness on behalf of the plaintiff. Dr. Krell provided a medico-legal report dated October 30, 2012 in this proceeding.

[52] She first saw the plaintiff on March 6, 2012 at which time he was complaining of neck pain as well as low back pain. The pain in his low back radiated into his gluteus muscles bilaterally. He also described having headaches that were different than the migraine headaches that he had a history of. The plaintiff also complained of left shoulder pain and he had noticed that both of his hands were very cold since the MVA.

[53] On examination, Dr. Krell noted that the plaintiff had an extreme antalgic gait.

[54] Dr. Krell diagnosed the plaintiff with a Grade III whiplash of the cervical and lumbar spine. She also diagnosed the plaintiff with a left-sided TOS.

Dr. Shuckett

[55] Dr. Rhonda Shuckett provided two medico-legal reports in this proceeding. The first report is dated December 12, 2013 and the second report is dated March 19, 2014.

[56] In her fist report, Dr. Shuckett made the following diagnoses:

> i) C5-6 nerve root injury. (She noted that there was a component of ulnar left ring and pinky finger numbness and she wondered whether there might be some component of left-sided TOS. However, with regard to the TOS, she

> said the following: "When I had him do bedside testing for thoracic outlet syndrome, it was inconclusive. He did have fatigue of the arm, but no frank new numbness");
>
> ii) headaches, of both cervicogenic and vascular migraine nature;
>
> iii) neck injury, soft tissue on the left side of the neck with myofascial pain syndrome and palpable muscle spasm and painful trigger points of the left side of the neck and shoulder girdle;
>
> iv) bilateral hip pain in the groins. (Dr. Shuckett felt that there may be acetabular labral tears); and
>
> v) possible chronic pain syndrome.

[57] Dr. Shuckett said the following with regard to causation of the plaintiff's injuries:

> I believe that his conditions were mainly caused by the subject MVA of February 24, 2012 with two caveats.
>
> The first caveat is that he had migraine headaches before the MVA, but these had been quite stable and were converted to daily severe headaches right after the MVA. I believe that the cervicogenic component of his headaches is probably new since the MVA. I believe that the MVA significantly exacerbated his migraine headaches.
>
> The second caveat is that I believe that the MVA caused something acute in his neck leading to acute impingement of the C6 nerve root as well as some C8 distribution neurologic symptoms. I believe that if Dr. Sahjpaul is correct that there was some osteophyte disc complex C5-6 on the left, this patient probably had some pre-existing compromise of that area but that it really took the MVA to convert him into a patient with neurologic symptoms and the need for neurosurgery of the neck[.]

[58] In her second medicolegal report, Dr. Shuckett noted that the MRI arthrograms revealed that the plaintiff had a probable pistol grip deformity in his right hip. There was a probable extensive labral tear involving the entire anterior labrum and interior half of the lateral labrum. In the left hip there was labral fraying but no compelling evidence of a labral tear.

[59] Dr. Shuckett opined that the right hip injury was sustained in the MVA; however, the plaintiff's hip was anatomically and developmentally at a greater risk for a labral tear in the face of trauma by virtue of his pistol grip femoral acetabular impingement ("FAI").

[60] Dr. Shuckett opined that the plaintiff should be referred to an orthopedic surgeon. She also opined that this injury rendered the plaintiff more likely to need hip replacement surgery in the future.

[61] On cross-examination, Dr. Shuckett testified that she had never seen a study on the effects of a person's occupation and labral tears. She noted that these tears are usually caused by trauma or sports injuries.

[62] Dr. Shuckett testified that she would expect a person with this type of injury to notice it within the first couple of weeks. She also noted that, with the extensive nature of the labral tear that the plaintiff had sustained, she would have expected him to notice it soon after the MVA, likely within one to two weeks.

[63] Dr. Shuckett agreed on cross-examination that there was a reasonable chance that the plaintiff had some damage to the labrum prior to the MVA. This was based on the description of the plaintiff's injuries found in Workers Compensation Board ("WCB") records.

[64] She testified that there was a 30% to 40% chance that, by age 45, the plaintiff would have developed symptoms of a labral tear in a previously asymptomatic labral tear because of his FAI.

[65] Dr. Shuckett did not find any compelling evidence of TOS when she assessed the plaintiff and stated that the numbness that the plaintiff experienced in his fingers may be the result of myofascial pain in the left neck and shoulder girdle. She did, however, testify that, as a result of her assessment, she suspected some element of TOS.

[66] Dr. Shuckett opined that the plaintiff had possible chronic pain syndrome, although she testified that she would defer to a psychiatrist with regard to a diagnosis of depression. She did, however, opine that, based on his physical injuries, the plaintiff would benefit from attendance at a pain clinic.

Dr. Anderson

[67] Dr. Stephen Anderson is a psychiatrist who provided a medicolegal report dated February 20, 2014 in this proceeding. He opined that the plaintiff's symptoms would warrant a diagnosis of a major depressive disorder. Dr. Anderson also opined that the plaintiff likely has a persistent somatic symptom disorder (previously called chronic pain disorder) with predominant pain of a moderate severity.

[68] Dr. Anderson opined that the plaintiff's major depressive disorder was likely primarily due to his chronic pain and functional limitations. This would include other factors such as financial stress and his wife's and his daughter's emotional difficulties.

[69] Dr. Anderson recommended that the plaintiff should receive counseling and medication for his anxiety and depression. Dr. Anderson also made a number of other recommendations for the assessment and treatment of the plaintiff which can be found at pages 12-14 of his report.

[70] Dr. Anderson's prognosis for the plaintiff from a psychiatric point of view was guarded.

[71] On cross-examination, Dr. Anderson agreed that the plaintiff had perfectionistic traits. Dr. Anderson stated that people with these traits often cannot cope with problems that they cannot control.

[72] Dr. Anderson also agreed on cross-examination that the plaintiff would have difficulty working for an employer he did not respect and that this would narrow his vocational options.

[73] Dr. Anderson agreed that the plaintiff was predisposed to a major depressive disorder because of his past history of being sexually abused. However, he did note that there was no evidence of depression until after the MVA. In particular, Dr. Anderson opined that the plaintiff could not have worked as a tow truck operator if he was suffering from major depression.

Dr. Wallace

[74] Dr. Gordon Wallace was qualified as an expert in vocational and rehabilitation psychology. Dr. Wallace provided a report dated March 12, 2014 in this proceeding.

[75] Dr. Wallace opined that the plaintiff would require a significant improvement in his functioning capabilities before being able to consider return to his occupation as a tow truck operator.

[76] Dr. Wallace also opined that the plaintiff would not likely be able to return to his occupation as a locksmith because that vocation requires individuals who can engage in standing, walking, bending, stooping, and kneeling in order to complete work that takes place at a low level. Dr. Wallace also noted this occupation would require extended periods of sitting while driving to various work locations.

[77] At page 9 of his report, Dr. Wallace stated the following:

> With Mr. Curry's strong perceptual skills coupled with experience with the Locksmith and computer field, he may be able to consider bench work mechanical repair/maintenance positions. Working with smaller products such as small appliances, electrical equipment, fire extinguishers, etc. may represent realistic occupational options for him. However, he would need to ensure that he would be able to alter his positions through sitting/standing throughout the workday which would not be available in all potential worksites.

[78] Dr. Wallace found that the plaintiff's intellectual abilities were within the high average range with a particular strength within the areas of perceptual reasoning.

[79] Dr. Wallace also provided some estimates for the cost of formal education training programs that might benefit the plaintiff.

Dr. Caillier

[80] Dr. Lisa Caillier is an expert in physical medicine and rehabilitation. She was called on behalf of the plaintiff who relies on a January 8, 2014 consult report that she prepared. The defendants did not object to this report being tendered as evidence despite the fact that her consult report does not strictly comply with the Supreme Court Civil Rules.

[81] As a result of her examination of the plaintiff which included motor nerve conduction studies, sensory nerve conduction studies, and electromyography, Dr. Caillier opined that the plaintiff suffered from left-sided TOS, among other things.

[82] On cross-examination, Dr. Caillier agreed that she had not reviewed the reports of Dr. McKenzie, Dr. Salvian, or Dr. Shuckett. She testified that she was qualified to diagnose neurological disorders.

[83] She testified that she examined the plaintiff's left elbow, though this is not specifically mentioned in her report. She did not agree that myofascial pain syndrome would account for all of the plaintiff's symptoms while, in her view, TOS would.

Dr. Salvian

[84] Dr. Anthony Salvian is a vascular surgeon who testified on behalf of the plaintiff. He provided two medicolegal reports for this proceeding. The first one is dated November 14, 2013 and the second is dated February 17, 2014.

[85] During his examination of the plaintiff on August 21, 2013, Dr. Salvian noted that the plaintiff walked with a normal gait.

[86] In his report dated November 14, 2013, Dr. Salvian opined that the plaintiff was not experiencing ulnar nerve entrapment at the level of the elbow. He further opined that the plaintiff had two neurological compression syndromes in his left arm:

> He has evidence of C5/6 osteophyte compression of the C6 nerve root, giving him some C6 radicular symptoms. He also has evidence of post-traumatic

> thoracic outlet syndrome affecting the C8 and T1 nerve roots (the lower nerves of the brachial plexus), affecting his fourth and fifth fingers.

[87] Dr. Salvian, on cross-examination, agreed that typically patients with TOS describe pain between the shoulder blades. He also agreed that there was no evidence that the plaintiff had any symptoms such as waking up with a "dead arm", which would be expected with TOS.

Dr. Levin

[88] Dr. Levin is a psychiatrist who was called on behalf of the defendants. He prepared a medicolegal report dated January 2014.

[89] Dr. Levin interviewed the plaintiff on December 10, 2013. As a result of that interview, a review of the documents, and a mental status examination, he concluded that the plaintiff did not develop any major mental illness or clinically significant psychiatric condition as a result of the MVA. Dr. Levin also opined that the plaintiff's clinical presentation did not suggest the presence of any type of somatic symptom disorder.

[90] On cross-examination, Dr. Levin accepted that the plaintiff had physical problems. However, he questioned the plaintiff's emotional response to pain.

[91] Interestingly, Dr. Levin also agreed on cross-examination that the plaintiff did meet the criteria for depression but the question was the severity of that depression. Dr. Levin conceded on cross-examination that the plaintiff could possibly be suffering from major depression but most likely he was suffering from mild depression

Dr. Dost

[92] Dr. Rehan Dost is a neurobgist who was called on behalf of the defendants. He provided two medicolegal reports in this proceeding. The first is dated April 30, 2014 and the second is dated May 22, 2014.

[93] In his report dated April 30, 2014, Dr. Dost opined that there had been no baseline change in the plaintiff's pre-existing migraine headaches. He went on to

further state if there has been a change then it was likely due to psychological factors as these would be the only possible traumatically-induced triggering factors.

[94] Dr. Dost also provided a responsive report to that of Dr. Salvian. Dr. Dost agreed with Dr. Salvian that the plaintiff had myofascial pain syndrome.

[95] Dr. Dost noted that the plaintiff was presenting with neurological symptoms. He also stated that the differential diagnosis of the plaintiff's symptoms were as follows:

i) Carpal Tunnel Syndrome;

ii) Ulnar Entrapment;

iii) Cervical Radiculopathy;

iv) Disputed/Controversial TOS; and/or

v) Myofascial Pain Syndrome.

[96] Dr. Dost took issue with Dr. Salvian's physical and neurological examination. He said that Dr. Salvian failed to properly examine the plaintiff's elbow, examine for dislocatable ulnar nerves, conduct the elbow flexion test, and he did not examine for myofascial pain syndrome.

[97] Dr. Dost criticized Dr. Salvian's interpretation of the provocative tests that he performed on the plaintiff. In particular, he pointed out that Dr. Shuckett's examination for TOS was negative.

[98] Dr. Dost also took issue with Dr. Salvian's interpretation of the nerve conduction studies. In particular, he pointed to the fact that Dr. Salvian acknowledged that the nerve conduction studies confirmed evidence of ulnar nerve entrapment.

[99] Dr. Dost asked what is more likely: that the plaintiff has a straightforward problem which is ulnar irritation at the elbow which is supported by the clinical findings and nerve conduction studies or that he has a controversial form of TOS?

[100] Dr. Dost, in his report dated May 22, 2014, provided responses to the report of Dr. Caillier. In particular, he said Dr. Caillier's diagnosis of the plaintiff was problematic because she did not examine the plaintiff's elbow and had not conducted the appropriate clinical tests for ulnar entrapment. Also, he criticized the TOS testing conducted by Dr. Caillier and her interpretation of these tests.

[101] On cross-examination, Dr. Dost clarified that when he said Dr. Caillier did not examine the plaintiff's elbow he meant that she did not "properly" examine the elbow. He also stated that Dr. Salvian did not perform an elbow flexion test. He pointed to the fact that is no reference in Dr. Salvian's report to this test.

Other Expert Evidence

[102] The plaintiff has provided two medicolegal reports from Dr. Ramesh Sahjpaul who is a neurosurgeon. He was not required for cross-examination by the defendants.

[103] In his first report, dated February 1, 2013, Dr. Sahjpaul made the following diagnoses:

> i) Neck pain – myofascial/possibly facet originating. Causation secondary to motor vehicle accident;
>
> ii) Left arm symptoms (pain, numbness, weakness). Causation secondary to motor vehicle accident. The investigations suggest a left-sided C5-6 foraminal compromise from disc osteophyte complex. This disc osteophyte complex is either traumatic or pre-existing and rendered symptomatic by the motor vehicle accident;
>
> iii) Low back pain – myofascial. Causation secondary to motor vehicle accident;

iv) Groin pain. Causation secondary to motor vehicle accident. Etiology uncertain; and

v) Migraines – pre-existing, aggravated by motor vehicle accident.

[104] In his medicolegal report dated February 15, 2014, Dr. Sahjpaul examined the plaintiff after the plaintiff's surgery for his cervical spine problem. With regard to the plaintiff's left arm symptoms, he noted that the plaintiff "is still having ongoing left arm symptoms, some of which may be related to thoracic outlet syndrome. Further comments left to more qualified individuals, i.e. Dr. Salvian".

[105] The plaintiff also provided two medicolegal report from Dr. Gerard McKenzie. The first report is dated January 20, 2014 and the second report is dated January 21, 2014.

[106] Dr. McKenzie examined the plaintiff on December 19, 2013. Of note, Dr. McKenzie stated that the plaintiff's gait was normal.

[107] Dr. McKenzie also opined that examinations of the plaintiff's shoulders, elbows, hands, and wrists were normal. Dr. McKenzie further opined that the neurologic examination of the plaintiff's upper extremities showed some slight tingling in the left lateral forearm but otherwise the neurologic examination, including power and deep tendon reflexes, was normal.

[108] In his medicolegal report dated December 19, 2013, Dr. McKenzie opined that the MVA caused the plaintiff's neck injury. Dr. McKenzie was of the opinion that the plaintiff had some pre-existing asymptomatic degenerative changes in the neck.

[109] Dr. McKenzie also opined that the MVA caused the left arm pain. Finally, Dr. McKenzie was of the opinion that the plaintiff's groin pain was caused by the MVA.

[110] In his medicolegal report dated January 21, 2014, after reviewing the MRIs of the plaintiff's hips, Dr. McKenzie deferred to the radiologist with regard to that investigation.

[11] The plaintiff also provided a functional work capacity evaluation report from an occupational therapist, Ms. Haley Tencha, dated February 20, 2014. Ms. Tencha was not required by the defendants to attend for cross-examination.

[12] Ms. Tencha opined that the plaintiff demonstrated capacity for activity requiring sedentary to modified light level strength. In particular, the plaintiff demonstrated mild limitations with prolonged sitting, bending, and left hand dexterity. She also noted that there were moderate limitations with the plaintiff with stair climbing, prolonged standing and walking, prolonged repetitive horizontal reaching vertical reaching, squatting/crouching, and repetitive bending.

[13] Ms. Tencha noted that the plaintiff had no significant functional limitations with right hand dexterity or balance. His grip strength was within normal limits bilaterally.

[14] Ms. Tencha also opined that the plaintiff was capable of performing light homemaking chores such as cleaning countertops, washing dishes, sweeping, mopping as long as he paced himself. She noted that the plaintiff is likely to experience more difficulty and increases in symptoms with heavier demands which require repetitive or forceful use of his left upper extremity.

[15] Ms. Tencha opined that the plaintiff did not demonstrate the capacity to safely perform the strength demands required as a tow truck operator.

[16] Ms. Tencha, at page 7 of her report, stated the following:

> Further, it is also my opinion that his overall ability to compete for work in an open job market is limited due to his ongoing functional limitations related to pain in his neck, left upper extremity and hips. That is, the overall number of jobs that he would be able to compete for given his physical limitations are limited. Specifically, he would not be well-suited for jobs that require prolonged standing or walking, repetitive or prolonged below waist level work, overhead work or repetitive/forceful use of the left upper extremity. He should avoid occupations with strength requirements above a modified light level. He will require modifications built into any occupation such as the flexibility to take frequent micro-breaks to change positions and stretch in order to remain productive. He would likely be capable of gainful employment in a sedentary or light strength occupation with limitations and modifications. I would recommend an ergonomic assessment be performed with any occupation requiring prolonged work – intensive sitting.

[17] The plaintiff also provided a cost of future care analysis dated February 27, 2014 prepared by Mary Carmen. This report outlines the cost for various treatment modalities including a pain clinic.

[18] The plaintiff provided a cost of future care report from Peta Consultants Ltd. which provides future cost of care multipliers.

[19] The defendants provided an additional medico-legal report from Dr. Leith however it was withdrawn during the trial.

[20] The defendants also provided a rebuttal report from Dr. Douglas Connell dated April 23, 2014. In that report, Dr. Connell stated the following with regard to the causation of the plaintiff's hip injuries:

> This individual does have the findings of femoroacetabular impingement which is present in both hips. There is prominence of the head/neck junction in both hips with a focal bony convexity being present. In association with this there is bilateral abnormality of the anterior and superior labrum in both hips.
>
> The scientific literature which has evaluated the incidence of labral tear in individuals with cam – type femoroacetabular impingement has demonstrated that in individuals of greater than 40 years of age greater than 95% demonstrate a labral lesion. Since this individual does have bilateral hip findings with bilateral femoroacetabular impingement and it is known that such persons in this individual's age group have a very high, greater than 95%, incidents of associated labral abnormalities and labral tears, it is likely that the labral abnormalities are secondary to the femoroacetabular impingement.

Positions of the Parties

[21] The plaintiff argues that there is no evidence of malingering or falsehoods in his testimony. The plaintiff says that the defendants' suggestion that he was not working because he was playing computer games is absurd.

[22] The plaintiff also says that the mere fact that he loaded the defendant's car onto his tow truck does not mean that he was not injured. He gave the explanation that he was in shock and his adrenaline was flowing.

[23] The plaintiff says that he is suffering from depression. There are numerous references beginning on April 16, 2012 to his treating physicians that he was having

psychological difficulties. Dr. Levin conceded that the plaintiff is probably suffering from mild depression. Dr. Anderson diagnosed the plaintiff with a major depressive disorder of moderate severity with a guarded prognosis.

[124] The plaintiff argues that the opinion of Dr. Anderson should be preferred over that of Dr. Levin because Dr. Levin did not have the complete medical documentation when he diagnosed the plaintiff and he ultimately changed his opinion on whether the plaintiff was suffering from depression.

[125] The plaintiff further argues that the injury to his cervical spine was caused by the accident. Dr. Sahjpaul opined that the plaintiff's left arm symptoms were caused by the MVA because the symptoms were as a result of injury to the left C5-6. The plaintiff goes on to say that there is no evidence in this case that he ever had neck pain or a C5-6 radiculopathy prior to the MVA.

[126] The plaintiff argues that the cervical spine injury is a "thin skull" injury. While the plaintiff concedes there were some degenerative changes in the cervical spine prior to the MVA, he says it was asymptomatic.

[127] The plaintiff argues that the injury to his right hip joint was caused by the MVA. The evidence in this case shows that there is a probable extensive labral tear in the right hip joint. The plaintiff argues that he engages in pain avoidance behaviour which results in an antalgic gait.

[128] I will note at this point that the plaintiff demonstrated his gait for me during the course of the trial. He clearly walks tilted forward favouring his left leg. I will also note at this point that Dr. Mckenzie and Dr. Salvian reported his gait as being normal.

[129] The plaintiff also argues that the three WCB claims that he made between 2000 and 2002 are not suggestive of a pre-existing hip problem. Rather, a review of the WCB records reveals symptoms that are primarily related to the lumbar region of the back on both sides.

[130] The plaintiff argues that, despite the fact that he referred to his hips in describing the WCB injuries in this trial, he was not in fact talking about the right hip joint or socket.

[131] The plaintiff argues that the right hip injury is not a pre-existing condition and points to the fact that he continued to work as a locksmith for almost two and a half years after the last WCB entry and he worked for almost 15 months as a tow truck operator.

[132] The plaintiff argues that the facts of this case with regard to the right hip joint give rise to the "thin skull" rule. In particular, they point to the fact that the left labrum was frayed, likely due to wear and tear. Following the MVA, there is now a clear and significant tear in the right labrum suggestive of injury.

[133] Dr. Mckenzie opined that the causation of the plaintiff's groin pain was the MVA.

[134] The plaintiff argues that, with regard to TOS, it is difficult to reconcile the opinions of Dr. Salvian, Dr. Dost, and Dr. Caillier. All three doctors were of the view that the plaintiff was suffering from myofascial pain syndrome ("MPS").

[135] Dr. Salvian and Dr. Caillier were of the opinion that the plaintiff was suffering from both MPS and TOS. Dr. Dost was of the opinion that the plaintiff suffering from MPS and ulnar entrapment syndrome.

[136] The plaintiff argues that Dr. Dost was at a disadvantage despite his qualifications when diagnosing ulnar entrapment syndrome. This is because all of the experts agree that there must be evidence from nerve conduction studies, a history from the patient and a clinical examination before a diagnosis can be made and Dr. Dost did not perform a clinical examination.

[137] Dr. Mckenzie checked the plaintiff's elbow and did not find ulnar entrapment syndrome. The plaintiff also argues that Dr. Salvian did in fact check the plaintiff's elbow during his physical exam, contrary to Dr. Dost's evidence.

[138] The plaintiff says that if there is no ulnar entrapment syndrome then the differential diagnosis is TOS.

[139] I will note at this point that Dr. Shuckett tested the plaintiff for TOS and could not conclude that the plaintiff was, in fact, suffering from TOS.

[140] The plaintiff argues that, given the severity and chronic nature of his injuries, the appropriate range for damages for non-pecuniary damages is between $200,000 - $225,000.

[141] The plaintiff relies on the following cases: Tompkins v. Bruce, 2012 BCSC 266, Felix v. Hearne Estate, 2011 BCSC 1236, Shenker v. Scott, 2013 BCSC 599, Cebula v. Smith, 2013 BCSC 1939, Courdin v. Myers, 2005 BCCA 91, Easton v. Chrunka, 2006 BCSC 1396, and Saunders v. Janze, 2009 BCSC 1059. I note that these cases offer a range of non-pecuniary compensation from $150,000 (less 40% due to pre-existing conditions) to $200,000 for plaintiffs with ages varying from 20 to 47 at the time of their accidents with varying states of physical injury and anxiety, post-traumatic stress, and depression.

[142] The plaintiff argues that he has not failed to mitigate his losses. In particular, the plaintiff refutes the suggestion by the defendants that he was content to stay home and play computer games while his wife worked long hours.

[143] The plaintiff argues that the depression coupled with the medication, Dilaudid, that he takes for his pain made it impossible for him to do other work.

[144] The plaintiff argues that he was earning approximately $3000 per month at Ron's Towing and this is the best indicator of his past wage loss. Both parties have agreed that a 20% deduction for income tax and other mandatory deductions is appropriate.

[145] The plaintiff argues that he should be awarded damages for loss of future earning capacity. In particular, the plaintiff argues that he should be earning $36,000 a year. He says that it will likely take approximately five years before he will be in a

position to earn that type of income again. This is because he needs to see a specialist with regard to his hip injury. He also needs to deal with his depression and learn to manage his TOS.

[146] The plaintiff argues that he will be approximately 50 years of age by the time this occurs and if he re-enters the labor force as a computer technician he will be competing against individuals who are younger than him and prepared to work longer hours for less money.

[147] The plaintiff submits that an appropriate award for loss of future earning capacity should be in the range of $200,000 - $250,000.

[148] The plaintiff relies on the following cases: Peters v. Ortner, 2013 BCSC 1861, Riding-Brown v. Jenkins, 2014 BCSC 382, and Rizzolo v. Brett, 2009 BCSC 732. I note that these cases all use the capital asset approach in order to assess the loss of future income earning capacity. That is where the similarities end. The age, work history, and award under this heading of damages in these cases vary greatly. For example, in Peters, a 53 year old certified general accountant was awarded $50,000 for future income loss based on evidence that his neck and shoulder injury would not significantly affect his future employment as an accountant or in finance. Whereas, in Riding-Brown, a 32 year old with an intermittent work history in physical labour jobs was awarded $450,000 for loss of future income earning capacity due to serious orthopedic damage suffered causing the loss of the ability to work in any line of employment involving physical labour.

[149] The plaintiff also claims $50,000 - $75,000 for loss of housekeeping capacity.

[150] The plaintiff relies on the following cases in that regard: Savoie v. Williams, 2013 BCSC 2060, McLeod v. Goodman, 2014 BCSC 839, Easton, and Cebula. I note that the awards for loss of housekeeping capacity in these cases vary from $20,000 in Savoie where the court found the 49 year old plaintiff lost the ability to perform and also the pleasure she took in the performance of housekeeping tasks to just under $60,000 in Cebula where the 48 year old plaintiff was a single mother of

two and was awarded the cost of housekeeping services two hours once a week until the age 80.

[151] The plaintiff also argues that the evidence is clear that he requires a pain clinic. He seeks an award based on the notice to admit that can be found at Exhibit 7A in these proceedings that outlines the cost to attend the Orion Health pain clinic at $20,543.68.

[152] The plaintiff suggests that the future care costs award that he is seeking should be left for the parties to determine following a determination of what costs are covered by the Insurance (Vehicle) Regulation, B.C. Reg. 447/83, with leave to apply this court if an agreement cannot be found.

[153] The defendants agree that the plaintiff has injuries as a result of the MVA. However, the extent and severity of those injuries are in issue. Also, the defendants say that mitigation is in issue.

[154] The defendants point to the fact that both Dr. Mckenzie and Dr. Shuckett recommended that the plaintiff receive injections in his hips; however, these were not done.

[155] The defendants agree that the cervical spine injury to the plaintiff was caused by the MVA. They say though that the plaintiff's pre-existing migraine problem did not change as a result of the MVA and that would have diminished his quality of life in any event.

[156] The defendants also argue that the credibility of the plaintiff – or, perhaps most accurately, the reliability of the plaintiff – is in issue. For instance, the plaintiff reported to Dr. Salvian that, since the MVA, his migraines can be "triggered" by pressure and movement of the neck and that he had noted a ringing in his ears that began approximately six months after the MVA. None of this evidence was given at the trial.

[157] The defendants also point to the fact that the plaintiff told Dr. Salvian that he had numbness and tingling in the fourth and fifth fingers 75% of the time. This can be found in Dr. Salvian's medicolegal report of November 14, 2013. This is the first time that there is a mention of numbness in the fourth and fifth fingers to any of the plaintiff's treating physicians.

[158] The defendants also point to the fact that Dr. Salvian commented that the plaintiff "walks with a normal gait and sits in a normal fashion" as a result of his physical examination of the plaintiff. Dr. McKenzie made a similar finding in his medicolegal report.

[159] The defendants argue that the plaintiff's evidence that he was not aware of his family's finances because his wife took care of them is contradicted by his wife's evidence. She appeared to have little knowledge of the family finances. Also, the plaintiff's and his wife's evidence contradict each other as to what household chores the plaintiff currently does. Mrs. Curry testified that she did all the household chores.

[160] The defendants argue that the plaintiff's hip injury is what currently restricts him from working. The defendants say that there should be a 35% deduction from any award for damages based on the fact that there was a measurable risk that the plaintiff would have ultimately developed symptoms of a labral tear.

[161] This argument is based on the fact that Dr. Shuckett testified that there was a reasonable chance that the plaintiff had some damage to the labrum prior to the MVA. She further opined that a person with an asymptomatic labral tear and FAI had a 30% to 40% chance of having symptoms of a labral tear by the time he was 45.

[162] The defendants argue that, upon a review of the WCB records, it is clear that the plaintiff is likely to have suffered a labral tear. He complained of groin symptoms, was off work and had a number of treatment modalities between 2000 and 2002.

[163] The defendants say that the range for non-pecuniary damages in these circumstances is $65,000 - $85,000 less any deduction for failure to mitigate.

[164] The defendants rely on the following cases for non-pecuniary damages: Griffith v. Larson, 2014 BCSC 1687, Murphy v. O'brien, 2013 BCSC 339, and Sage v. Renner, 2007 BCSC 1357.

[165] The defendants argue that the plaintiff has not discharged his burden of proving that he suffers from TOS. The defendants argue that all of the experts that have provided a diagnosis in regards to the TOS diagnosis have agreed that neurological symptoms can be attributed to myofascial pain.

[166] The defendants say that it is troubling that Dr. Shuckett, who initially did not find TOS on her examination of the plaintiff, testified that it was more likely than not that the plaintiff had TOS. The defendants say that she has become an advocate for the plaintiff. The defendants argue that Dr. Dost's opinion should be preferred.

[167] The defendants argue that there should be a 20% deduction from any award for damages based on the plaintiff's failure to mitigate his damages. Specifically, the defendants argue that the plaintiff's hip injury is his main impediment from returning to work. The plaintiff has received recommendations that he should try injections into his right hip to alleviate the pain and this treatment has not been pursued. Also, the plaintiff has received referrals to surgeons who can perform hip surgery if that is warranted. He has not pursued these treatment options.

[168] The defendants also argue that, with regard to past wage loss, the plaintiff could have worked repairing computers during the time that he has been off work. They say that even at $10 per hour he could have earned at least $1000 per month and, more realistically, $1500 per month. The defendants say any award for past wage loss should include a deduction of $1500 per month for each month that the plaintiff has been off work.

[169] The defendants also argue that the plaintiff has not proven that he has suffered a loss of future earning capacity. In the alternative the defendants argue that an appropriate award for loss of future earning capacity would be the equivalent of two years of earnings. Based on $36,000 per year this would amount to $72,000

before any deduction for the measurable risk that the plaintiff would have ultimately developed a symptomatic labral tear in his hip even if the MVA did not occur.

[170] With respect to domestic capacity, the defendants submit a nominal award of $8000 would be fair.

[171] With regard to the pain clinic, the defendants submit the plaintiff's reluctance to continue with psychological counseling should be taken into account when considering whether this treatment would be pursued.

Discussion

Credibility

[172] This case is complicated not only because of the nature of the plaintiff's injuries but also by the plaintiff's presentation during testimony and the evidence of the many expert witnesses called on this matter.

[173] In particular, the plaintiff's evidence regarding his hip injury and the manner in which he now walks causes me great concern. The plaintiff specifically demonstrated a very pronounced and obvious abnormality in his gait while giving his direct evidence. Indeed, a number of the medical practitioners who examined him commented on this. However, Dr. McKenzie, a highly experienced orthopedic surgeon, and Dr. Salvian, a highly experienced neurosurgeon, both specifically commented that the plaintiff's gait was normal.

[174] The plaintiff also gave evidence under cross-examination that he was not aware of his household's financial situation as his wife looked after those affairs. A financial stressor is significant in this case as the plaintiff is claiming that he is suffering from depression as a result of the MVA.

[175] It became clear during the cross-examination of Mrs. Curry that their household was under a great deal of financial stress prior to the MVA. This was in part due to Mrs. Curry's gambling problem. Mrs. Curry was not forthcoming initially

as to her family's financial situation; however, I do accept that she ultimately told the plaintiff about these financial problems.

[176] The plaintiff also gave evidence that he did some household chores such as cleaning and laundry. Mrs. Curry testified that he did not do any of these things around the house.

[177] Dr. Levin noted that the plaintiff seemed to adopt a "sick role". As I understand Dr. Levin's evidence, he did not mean this in a pejorative sense but rather it was a coping mechanism for the plaintiff.

[178] During cross-examination, the plaintiff agreed that sometimes he would for instance smile when he was not happy if that is what he felt the person he was communicating with wanted to see.

[179] As Madam Justice Dillon noted in Bradshaw v. Stenner, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, regarding credibility generally:

> [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.); Faryna v. Chorny (1951), [1952] 2 D.L.R. 354 (B.C.C.A.) [Faryna]; R. v. S. (R.D.), [1997] 3 S.C.R. 484 (S.C.C.) at para. 128). 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 (Faryna at para. 356).

[180] In Stull v. Cunningham, 2013 BCSC 1140 at paras. 71-73, Mr. Justice MacKenzie, in reviewing the law on assessing the credibility of the plaintiff, stated the following:

> [71] On this issue, it is helpful to recall the comments of N.H. Smith J. in Carvalho v. Angotti, 2007 BCSC 1760. At para. 15 he states:

> The attack on the plaintiff's credibility is based, in part, on various contradictions and inconsistencies within her evidence at trial and between that evidence and her discovery evidence, documents she prepared for other purposes, or statements recorded in clinical records. It is a rare case of this kind where such inconsistencies cannot be found. By the time a personal injury case gets to trial, the plaintiff typically will have provided information to a number of people – including doctors, adjusters and disability insurers – on a number of occasions over a period of years. This provides fertile ground for cross-examination precisely because very few people will have perfect and identical recollection on each of those occasions.

[72] On this point, I agree with Smith J. that inconsistencies in what the patient says to a medical practitioner sometime prior to testimony at trial will not, in and of itself, determine the credibility of any particular plaintiff.

[73] Similarly, many years ago in Diack v. Bardsley, (1983) 46 B.C.L.R. 240, McEachern C.J.S.C., had this to say at para. 30:

> I wish to say that I placed absolutely no reliance upon the minor variations between the Defendant's discovery and his evidence. Lawyers tend to pounce upon the semantical differences but their usefulness is limited...

[181] In this case, the plaintiff clearly has objective injuries to his neck and hips. My concerns about the plaintiff's evidence relates to his credibility as to the severity of his injuries such as his right hip more so than whether or not he was injured.

[182] Keeping in mind the comments in Stull, I recognize that minor inconsistencies are expected in cases of this nature. However, the plaintiff, in my view, has demonstrated that he is prepared to embellish his evidence with regard to the severity of his injuries. He is also prepared to minimize the effects of any possible contributing factors to his injuries.

[183] The plaintiff's evidence has to be viewed carefully especially where there are no objective findings.

Non-Pecuniary Damages

[184] The plaintiff seeks damages for TOS, depression, chronic pain, and for the injuries he sustained to his neck and hips.

[185] The plaintiff argues that the defendants' negligence caused or materially contributed to his injuries.

[186] The defendants argue that the plaintiff suffered from pre-existing conditions in particular with regard to his right hip and psychological state and that they should only compensate the plaintiff for the additional damage done by the MVA.

[187] In awarding damages in an action for tort, compensation is intended to return the plaintiff to his or her original position and there is no obligation on the defendant to put the plaintiff in a better condition than he or she was in: Dhaliwal v. Tomelden, 2010 BCSC 612 at para. 148; Athey v. Leonati, [1996] 3 S.C.R. 458 at 473-474.

[188] In Athey at 473-474, the Court stated:

> The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
>
> The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, supra, at pp. 779-780 and John Munkman, Damages for Personal Injuries and Death (9th ed. 1993), at pp. 39-40. Likewise if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: Graham v. Rourke, supra; Malec v. J.C. Hutton Proprietary Ltd., supra; Cooper-Stephenson, supra, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[189] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The framework for the assessment of non-pecuniary damages was outlined by the Court of Appeal in Stapley v. Hejslet, 2006 BCCA 34:

> [46] The inexhaustive list of common factors cited in Boyd [v. Harris, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;

> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff): Giang v. Clayton, 2005 BCCA 54.

[190] The defendants accept that the MVA caused or materially contributed to the plaintiff's neck injury which resulted in surgery. While the plaintiff did have some pre-existing compromise of that area, Dr. Shuckett opined that it took the MVA to convert the plaintiff into a patient with neurologic symptoms and the need for neurosurgery of his neck.

[191] The issue of whether or not the plaintiff suffers from TOS is complicated. Dr. Salvian and Dr. Caillier diagnosed the plaintiff with TOS as did the chiropractor, Dr. Krell. Dr. Dost criticized Dr. Salvian's physical examination of the plaintiff and Dr. Caillier's nerve conduction study techniques.

[192] Dr. Shuckett, in her physical examination, did not find any compelling evidence of TOS. Despite that finding, she was prepared to say during her evidence at trial that there was a probability that the plaintiff was suffering from TOS.

[193] All of the expert witnesses did agree that in order to diagnose TOS there has to be a physical examination, a history taken from the patient, and nerve conduction studies.

[194] All of the expert witnesses also agreed that the plaintiff suffers from MPS.

[195] The onus is on the plaintiff to prove on a balance of probabilities that he not only suffers from TOS but that it was caused by the MVA. Many of the factors that

lead to a diagnosis of TOS are subjective and come from the patient. In my view, as I said, the plaintiff's evidence with regard to his subjective complaints has to be viewed with caution. I do not say this because the plaintiff is deliberately fabricating evidence but rather that he is prepared to tell the experts what they want to hear. In particular, the evidence relating to the numbness in the plaintiff's 4th and 5th fingers which is important to a diagnosis of TOS is first mentioned by the plaintiff to Dr. Salvian on August 21, 2013 some 18 months after the MVA.

[196] While I accept that Dr. Salvian and Dr. Caillier were in a better position to diagnose TOS than Dr. Dost because they performed physical examinations on the plaintiff, I am not satisfied that the plaintiff's history which he gave to them was accurate.

[197] I accept that the plaintiff is suffering from MPS as a result of the MVA. I do not accept that he is suffering from TOS.

[198] Shortly after the MVA, the plaintiff began to complain to Dr. MacLeod about symptoms relating to his psychological state. Dr. Anderson diagnosed the plaintiff as suffering from a major depressive disorder as well as persistent somatic symptom disorder.

[199] Dr. Levin, on cross-examination, conceded that the plaintiff was suffering from depression (albeit mild).

[200] In his medicolegal report, Dr. Levin initially opined that the plaintiff was not suffering from any mental disorders. However, he was not in possession of all the documents relating to the plaintiff's injuries prior to his examination of the plaintiff.

[201] In my view, Dr. Anderson's opinion is based on a full review of the available records as well as an interview whereas Dr. Levin's opinion initially was not. I prefer Dr. Anderson's evidence for that reason.

[202] I find that the plaintiff is suffering from a major depressive disorder as well as a persistent somatic symptom disorder as a result of the MVA.

[203] Both Dr. Shuckett and Dr. McKenzie opined that the plaintiff's right hip injury was caused by the MVA.

[204] Between July 27, 2000 and October 9, 2002, the plaintiff had three separate WCB claims. While the majority of the WCB documentation refers to lower back injuries, there are also a number of notations relating to the plaintiff's hips as well as pain down his right leg.

[205] There is no other documentation or evidence that the plaintiff was suffering from any hip problems after October 9, 2002 and prior to the MVA. The evidence does disclose that the plaintiff was working as a locksmith after October 9, 2002 as well as for approximately 15 months as a tow truck driver before the MVA. This evidence suggests that the plaintiff was not having any symptoms relating to his hips.

[206] Dr. Shuckett does comment on the deformity in the plaintiff's hips. She opined that there is a reasonable chance that the plaintiff had some damage to his labrum prior to the MVA. She also opined that a person with an asymptomatic labral tear and this deformity (FAI) has a 30% to 40% chance of developing symptoms of a labral tear by the time they are 45 years of age.

[207] Dr. Connell provided a medicolegal report reviewing the imaging of the plaintiff's hips. He did not testify. His report is not clear as to whether the percentages he provided are for individuals with FAI who will develop a labral lesion in any event over time or whether these percentages apply to a person with an asymptomatic labral lesion which will then become symptomatic.

[208] Based on all the evidence, I find that the plaintiff's right hip injury was caused by the MVA.

[209] The evidence does not reveal that the plaintiff had a labral tear prior to the MVA. I do not find that there is a measurable risk that the pre-existing condition of FAI would have detrimentally affected the plaintiff in the future.

[210] As a result of the MVA, the plaintiff suffered a significant neck injury which required surgery, a significant injury to his right hip which will likely require surgery, MPS, chronic pain, and depression. Based upon the cases provided by both parties and the factors as outlined in Stapley, the appropriate amount for non-pecuniary damages is $100,000.

Past Wage Loss

[211] The plaintiff has not returned to work since the MVA.

[212] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury that was sustained: Rowe v. Bobell Express Ltd., 2005 BCCA 141 at para. 25; M.B. v. British Columbia, 2003 SCC 53 at para. 27. Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages only for his or her past net income loss. This means that in the ordinary course, the court must deduct the amount of income tax payable from lost gross earnings: Hudniuk v. Warkentin, 2003 BCSC 62. In addition, a plaintiff has an obligation to take all reasonable measures to reduce his or her loss: Graham v. Rogers, 2001 BCCA 432 at para. 35.

[213] Both parties agree that the appropriate figure based on the evidence would be that the plaintiff on average would earn approximately $3000 per month as a tow truck driver. The parties have also agreed that a 20% deduction for income tax and other compulsory deductions would be appropriate.

[214] From the date of the MVA to the date of the trial is approximately 28 months. Calculating a loss of $3000 per month in income multiplied by 28 months results in a loss of past income of $84,000.

[215] The defendants have argued that the plaintiff has failed to mitigate his losses by not taking all available treatment modalities and that he could have been earning some income from repairing computers.

[216] The defendants argue that there should be a 20% discount for the plaintiff's failure to mitigate his losses.

[217] I do not accede to the defendants' argument that the plaintiff has acted unreasonably in the manner in which he has approached and accepted medical treatment. The plaintiff had a significant neck injury which required invasive surgery. He is also suffering from depression which, despite the fact that he was complaining of this depression shortly after the MVA, his family doctor did not refer to a treating psychiatrist until May 2014. He suffers from MPS and has a significant hip injury. The plaintiff is also on strong narcotic pain medicine.

[218] Based on all the evidence, I do not find that the plaintiff has acted unreasonably in the manner in which he has approached and accepted medical treatment. I also did not find that the defendants have proven that the plaintiff's damages would have been reduced had he acted reasonably.

[219] Given the injuries that the plaintiff has been dealing with, there is no question that he could not have returned back to work as a tow truck operator. I accept that he could have earned some money repairing computers since the MVA. Based on the functional capacity report of Ms. Tencha, the plaintiff had mild observed functional limitations with regard to sitting. He was noted to be able to sit continuously for approximately 90 minutes and overall throughout the assessment to be able to sit for approximately 180 minutes.

[220] Based on all the evidence, in my view, the plaintiff could have worked approximately two hours a day repairing computers at even a nominal rate of $10 an hour. This would amount to approximately $400 a month. Over the 28 months this would amount to $11,200 in income.

[221] The plaintiff's gross income over the 28 months would have been $84,000. The plaintiff could have made $11,200 in that time frame. Deducting that amount from the $84,000 results in a past wage loss of $72,800. Applying a 20% deduction

for income tax and other compulsory deductions results in a net wage loss of $58,240.

[222] I award the plaintiff the amount of $58,240 for past wage loss.

Loss of Future Earning Capacity

[223] The plaintiff's prognosis with regard to his depression is guarded.

[224] Dr. McKenzie has recommended that the plaintiff be referred to a specialist for possible surgery on his right hip. Dr. Shuckett has opined that the plaintiff may require hip replacement surgery in the future because of the injury to his right hip caused by the MVA.

[225] While I accept that the plaintiff injured his right hip in the MVA, the fact that Dr. McKenzie and Dr. Salvian noted his gait to be normal clouds the actual severity of the right hip limitations. At this point, the prognosis with regard to the plaintiff's right hip is unclear.

[226] In Sendher v. Wong, 2014 BCSC 140 at paras. 174-176, Mr. Justice Verhoeven summarized the two possible approaches to the assessment of loss of future earning capacity:

> [174] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from Palos and the "capital asset approach" in Brown. Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: Perren v. Lalari, 2010 BCCA 140, at para 12.
>
> [175] The earnings approach involves a form of math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: Palos; Gilbert, at para 233.
>
> [176] The capital asset approach involves considering factors such as whether the plaintiff (i) has been rendered less capable overall of earning income from all types of employment; (ii) is less marketable or attractive as a potential employee; (iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) is less valuable to herself as a person capable of earning income in a competitive labor market: Brown; Gilbert, at para. 233

[27] The plaintiff is presently not able to work at his job as a tow truck operator. If surgery on his hips is a realistic option that may resolve most of his functional limitations. There is evidence that the wait to see a specialist could be anywhere from three months to two years.

[28] There is evidence from Dr. Wallace and Ms. Tencha that the plaintiff has vocational limitations and has been rendered less desirable in the marketplace as a result of his injuries from the MVA.

[29] There is also evidence that the plaintiff will likely require hip surgery and possibly a hip replacement in the future.

[30] These factors have to be tempered by the fact that, in my view, the plaintiff has been less than forthright about the severity and impact of his right hip injury. I am specifically referring to the glaring discrepancy between the plaintiff's presentation as to his ability to walk and the evidence of Dr. McKenzie and Dr. Salvian.

[31] I also consider that the plaintiff persisted with his locksmith business venture for a number of years despite the fact that it was a failing enterprise.

[32] Taking into account the above noted factors, the plaintiff has established a diminished capacity to earn income. In my view an appropriate award would be two years annual income or $72,000.

Loss of Housekeeping Capacity

[33] The loss of housekeeping capacity is an established head of damages. See Dykeman v. Porohowski, 2010 BCCA 36 at para. 28.

[34] I had considerable difficulty with the evidence of the plaintiff and his wife with regard to household chores. In my view, they contradicted each other as to what their respective roles were. I can accept that the plaintiff is no longer able to perform some of the outside household maintenance. A nominal award of $8,000 is appropriate.

Future Care Costs

[235] The purpose of an award for future cost of care is "to compensate for a financial loss reasonably incurred to sustain or promote the mental and/or physical health of an injured plaintiff": Erickson v. Sibble, 2012 BCSC 1880 at para. 316. The basis for such an award is what is medically justified and reasonable based on the evidence: Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.); Spehar (Guardian ad litem of) v. Beazley, 2002 BCSC 1104 at para. 55.

[236] Dr. Shuckett and Dr. Caillier recommend that the plaintiff attend a pain clinic. This is reasonable given the depression, neck pain, MPS, and hip pain that the plaintiff is experiencing. Exhibit 7 in this proceeding is a notice to admit with regard to the cost of the pain clinic. This has gone unchallenged by the defendants. I order that the defendants pay to the plaintiff $20,543.68 for his attendance at a pain clinic.

[237] Beyond the cost of the pain clinic, the plaintiff has suggested that additional future care costs should be left to the parties to determine which costs are compensable in this action because some – though not all – are covered by Part 7 of the Insurance (Vehicle) Regulations and therefore not compensable through the tort process.

[238] I will accede to this suggestion. The parties have leave to apply to me to determine the appropriate additional costs of future care if an agreement cannot be reached.

Conclusion

[239] The plaintiff is entitled to the following award for damages:

a) Non-Pecuniary Loss:	$100,000
b) Past Wage Loss:	$58,240
c) Loss of Future Earning Capacity:	$72,000
d) Loss of Housekeeping Capacity:	$8,000

e) Pain Clinic:	$20,543.68
Total:	$258,783.68

[240] The plaintiff shall have his costs at scale B.

"R.S. Tindale, J."