IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Manky v. Scheepers,
2017 BCSC 1870

Date: 20171020
Docket: M1343913
Registry: Prince George

Between:

Matthew William Manky

Plaintiff

And

Eugene Scheepers

Defendant

Reasons for Judgment
of the Honourable Mr. Justice N.P. Kent

Counsel for the Plaintiff:	Dick Byl
Counsel for the Defendant:	Justin L.W. Haines
Place and Dates of Trial:	Prince George, B.C. December 12–16, 2016; April 6–7, 2017
Place and Date of Judgment:	Prince George, B.C. October 20, 2017

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Introduction and Overview

[1] This action is a claim for damages for personal injuries and related financial loss arising from a motor vehicle accident on January 22, 2013. At approximately 5:00 p.m. on that day the plaintiff was driving to work in his Chevrolet pickup truck when he was involved in a head-on collision with a Mercedes SUV driven by the defendant. Liability for the accident has been conceded but the nature and extent of the plaintiff's injuries and the entitlement to and quantification of damages are very much in issue.

[2] The case went to trial in Prince George during the week of December 12, 2016, and continued for a further two days on April 6–7, 2017. Judgment was reserved. For health reasons the trial judge has been unable to complete the judgment. On September 11, 2017, Chief Justice Hinkson ordered ex mero motu that the matter be assigned to me to render the written judgment.

[3] In preparing this judgment, I have had the benefit of the Trial Record, all documents marked as exhibits, the recording of the trial proceeding as well as written transcripts of same, the written submissions of the parties, the trial notes and an early draft of the judgment prepared by the trial judge. In preparing these reasons, I have read and considered all of this material, as well as the closing arguments and books of authorities submitted by counsel.

The Plaintiff's Testimony

[4] Mr. Manky was born on March 5, 1976. He was 37 years old at the time of the motor vehicle accident and is 41 years old today. The accident occurred three years and 11 months before the commencement of trial.

[5] Mr. Manky was raised in Quesnel and continues to live in that community. After graduating from high school, he married and had two children. He has been separated for some years and now lives with his girlfriend and two of her three children.

[6] Mr. Manky graduated grade 12 from Correlieu Secondary School (Quesnel Secondary School) in 1994. He obtained a Class 1 driver's licence in 1995, after completing a driving course through Shawnee Driving School in Langley. Most of his work skills have been learned informally on the job over the years as a welder, mechanic's helper, sawmill equipment operator, truck driver and heavy equipment operator. In addition to sawmill and welding equipment, he has learned how to operate logging trucks, dump trucks, low bed trucks, snowplows and heavy equipment such as loaders, Caterpillars, excavators and backhoes.

[7] From 2011 to 2014, Mr. Manky worked as a truck driver and heavy-equipment operator for D. Goodwin & Sons, a logging road maintenance contractor. In 2014, he worked as a logging truck driver for Inwood Trucking, doing inter-mill hauling at the West Fraser Mill in Quesnel. He left that job after approximately six weeks to join his current employer, Godsoe Contracting working as a logging truck driver.

[8] Mr. Manky frequently works for up to 14 to 15 hours a day and sometimes more than five days a week, except during the spring break-up period when his hours of work are approximately eight hours a day.

[9] Mr. Manky's pre-accident recreational activities included fishing and hunting when he had the time, taking out his four-wheeler, using his compound bow, and playing drums at the church. Household tasks included shovelling snow, chopping firewood, mowing the lawn, clearing weeds and helping out in the garden, as well as some contribution towards doing the dishes and laundry. These activities have been mostly curtailed, if not eliminated, because of knee and hip pain.

[10] As a result of the collision, the airbag in Mr. Manky's truck was deployed, hitting him in the face. He testified that he immediately felt excruciating pain in his right knee as well as pain in his right hip, chest, ribs and face. He was taken by ambulance to the G.R. Baker Memorial Hospital in Quesnel but thereafter was transferred to the University Hospital of Northern B.C. in Prince George so that surgery could be performed on his knee. He had sustained a comminuted fracture

of his right tibial plateau. This was surgically reduced and then fixated with a locking plate.

[11] Following the knee surgery, Mr. Manky was non-weightbearing for approximately six weeks. He recuperated at home where a hospital bed, wheelchair and specialized equipment for toileting and bathing were installed for him. He was also provided with some housekeeping services during this period to assist with meal preparation and cleaning. He mainly used crutches to move around, although he testified that initially he spent most of the time in his living room. He used Tylenol 3s and Advil for pain. The surgical staples were removed at the Prince George hospital approximately four weeks following the surgery.

[12] With the benefit of physiotherapy and exercise, Mr. Manky gradually began to place weight on his right leg. When doing so, he often experienced a painful "popping" phenomenon in his hip, similar to cracking one's knuckles, something that continues to this day. He received six physiotherapy sessions but did not continue physiotherapy because, he says, he was unable to afford it.

[13] Mr. Manky returned to work in June 2013 driving a gravel truck and backhoe for his previous employer, Goodwin & Sons. That employer had a contract with West Fraser Mills to perform maintenance on logging roads. He testified that it was harder to return to driving than he expected. Initially he was somewhat scared to drive but gradually overcame these feelings.

[14] Mr. Manky said he found it physically challenging to work with his knee and hip pain; sitting for long periods and operating a backhoe was hard on his hip, low back and neck/shoulders. Some of the logging roads on which he was performing maintenance work were very rough. He had a discussion with his boss about working fewer hours during the period June to September of 2013; however in the fall and winter he resumed his pre-accident regime of 14 to 15 hours per day at least five days a week. On cross-examination, Mr. Manky acknowledged that the pay records from his employer indicate that he earned at least as much if not more than usual in the initial period following his return to work.

[15] In early 2014 the employer's contract with West Fraser Mills was curtailed. Mr. Manky immediately went to work driving for Inwood Trucking at the West Fraser Mill. In May 2014 he commenced employment with his present employer, Godsoe Contracting, another logging contractor in Quesnel for whom he drove (and continues to drive) a logging truck.

[16] Driving a logging truck requires Mr. Manky to drive to and from remote logging blocks, not infrequently some 500 to 600 kilometres per day. The long hours of driving cause pain in both the right knee and hip, pain which by the end of the workday he says is "unbearable". The winter is worse than the summer as the cold weather seems to intensify the pain. The knee is also unstable and has "given out" on several occasions, which makes an already dangerous job even more dangerous. Performing heavier duties such as repeatedly installing wrappers and chains is difficult.

[17] Mr. Manky has continued to work full time notwithstanding the pain and limitations caused by his right knee and right hip. He confirmed that his tax returns accurately reflect his annual income:

Taxation Year		Taxable (T4) Income
2008	$	62,727.00
2009	$	63,257.00
2010	$	62,893.00
2011	$	82,224.00
2012	$	92,732.00
2013 (year of MVA)	$	62,998.00
2014	$	76,824.00
2015	$	96,890.00
2016	$	100,000.00 (est.)

The 2016 tax return was not produced at trial. However, Mr. Manky's October 31, 2016 paystub, which formed part of Exhibit 2 at the trial, stated a YTD earnings figure of $84,442.73. This reflects average monthly earnings of $8,400 and hence estimated earnings for 2016 in the amount of $100,000 is an appropriate and possibly conservative figure.

[18] The implications of Mr. Manky's injuries for his future employment are a major concern to him and are the major issue in dispute in this trial. They are neatly summarized in his testimony on the first day of trial:

> ... And now with my right knee and my right hip, this has turned into an extremely dangerous job for me and especially in the logging block ... Due to the ... instability of my knee and also my hip. I've had my knee give out on several occasions. It seems to be getting worse as time goes on. The hip pain and the right knee pain are getting worse ... these injuries have put me into a position where I am very scared and uncertain about my future, especially in the logging industry and for the amount of time that I will be able to even continue doing this job.... It is a huge concern for me. Even at this point right now, almost four years after this accident, I know how difficult it is, like for the pain in my knee, the pain in my right hip. I know how difficult it is to keep doing this job. The future is scary. I am 40 years old and I am going to have to work until, you know, 60, 65, 70 years old. I can't imagine being able to do that with these injuries over the next 20 plus years.

[19] Mr. Manky was extensively cross-examined both generally and also with respect to statements made at his examination for discovery conducted in September 2015. In the cross-examination Mr. Manky stated or confirmed:

- he has had neck pain a few times a month ever since a previous motor vehicle accident when he was 15 years of age, pain that sometimes takes two or three days to go away;
- he experiences low back pain a few times a month, which can also last for a few days. The main cause of the back pain is driving;
- insofar as his knee and hip pain is concerned, he has good days and bad days but generally speaking the condition has plateaued and does not appear to be getting worse;
- his future work plans are to keep going with his present logging truck driving job as long as he can;
- knee and hip pain has not prevented him from doing the job to date. If everything stays the same or his condition gets better, he will continue driving a logging truck;
- he does, however, have concerns about being able to do the job indefinitely;
- at one point while he was driving trucks for Goodwin & Sons before the motor vehicle accident, he was thinking about leaving the job for a driving

job with reduced driving hours, more like a 9:00 a.m. to 5:00 p.m. arrangement, because the long hours were impacting his home life and leaving no time for family, chores and recreational pursuits;

- he experiences knee and hip pain on a daily basis but some days are less painful than others and the pain is more likely to be aggravated by prolonged driving;

- it is usually the morning portion of the day when there is no pain in the hip;

- when he was working the mill hauling job at Inwood, he noticed less knee issues and less hip issues and working 40 hours a week in that job was not a concern other than some difficulties wrapping the load or removing debris;

- presently he is able to do the same amount of driving both in terms of frequency and duration as he did before the accident and in the last two years has earned more money than before because he is working more hours and getting paid more;

- while he has talked with his girlfriend about other options such as being a police officer or a wildlife officer, he does not consider such positions to be practical given his knee and hip condition;

- he has not taken any steps to look into or seek out retraining of any sort;

- the Ministry of Transportation and Infrastructure has legislated time limits on drive times for logging truck drivers—maximums for driving in any 24-hour or one-week period—however, "You can drive more than that but you are not supposed to";

- notwithstanding his injuries, he has been able to do some physical work assisting with renovations to his girlfriend's home, tubing behind a boat while on vacation, using a snowblower to clear snow, and hunting;

- he did not continue with physiotherapy, nor did he use a knee brace as recommended by Dr. McKenzie; and

- he finds that taking Advil three times a day does just as good as or even better of a job of relieving pain than the anti-inflammatory ointment recommended by the doctor.

Lay Witnesses

Sonny Moulson

[20] Mr. Moulson also drives logging trucks for Godsoe and works the same shift as Mr. Manky. He has known the plaintiff for 18 years and also worked with him before they were both at Godsoe. Mr. Moulson has 19 years' experience as a logging truck driver.

[21] He described the nature of the work as being fast-paced, as the mill only pays the contractor set amount for the runs from the log sort to the mill. He said that they currently leave for the work around 12:30 at night and return back at 3:30 in the afternoon the next day. He said that work sites are dangerous places—the roads are uneven when it freezes and slippery when it is muddy. Most drivers he has met do the work for the money or because it is what they have grown up doing.

[22] He testified that he has observed that the plaintiff has slowed down considerably since the MVA and referred to his taking longer to put on tire chains and that his truck is not as pristine as it used to be. He has seen him stretch at the logging blocks, but said the plaintiff has not asked for longer breaks or other accommodations from the employer.

[23] In cross-examination, Mr. Moulson said that some older workers do two runs instead of three runs, which is the number of runs that he and the plaintiff do presently. He noted that the number of runs that the drivers can do will also depend on where the driver is hauling from.

[24] He said that he bads behind the plaintiff and has not seen him fall, although he has seen him stretch. He confirmed that it is the standard in the industry, and for Godsoe drivers, to be in the truck cab while the bad is being baded for safety reasons, and because the driver has to communicate with the bader regarding the logs in the bad. Once baded, the driver "hooks up and flips up the stakes". They also get out of the truck when they enter "the hammer" to have the logs stamped.

[25] Mr. Moulson said that he also has a back injury and uses medication for the pain.

Robert Manky

[26] Mr. Robert Manky is the plaintiff's father. He is 64 years old and owns three logging trucks. He no longer drives but hires drivers for his trucks. He has been involved in the log-hauling business for some 22 years. He has had a contract with West Fraser Mills for hauling logs for over 20 years.

[27] Mr. Manky testified as to some of the physical work and the dangers involved in log hauling. He also testified as to certain differences that he has observed in his son since the accident; he is not is not quite as agile, he sometimes has to sit down because his leg is hurting, he is less energetic and he appears discouraged by his condition.

[28] On cross-examination, Mr. Manky stated that he would have no problem with his son coming back to work with him if he wished to. It might also be a possibility for him to take over from his father in due course although he stated that he did not take a lot of money out of the company and he did not think his son would want to live on that level of income.

[29] On cross-examination, Mr. Manky also confirmed that his son had done some welding for him — probably 8 to 10 times — since the accident and had been able to do the work required.

Expert Witnesses

Dr. Gerard McKenzie (Orthopedic Surgeon)

[30] Dr. McKenzie gave evidence at the request of the plaintiff. Dr. McKenzie is an orthopaedic surgeon who examined the plaintiff in 2014 and 2016. His reports are dated January 22, 2014, November 25, 2015, and April 21, 2016. He also prepared a rebuttal report, dated September 27, 2016.

[31] In his January 2014 report, Dr. McKenzie's diagnosis was that the plaintiff suffered a comminuted fracture to the lateral tibial plateau of his right knee. He stated that because the injury was intra-articular and comminuted, the plaintiff was at significant risk for developing osteoarthritis in his knee and there was also a risk of his requiring a total knee replacement, although this would likely be decades away. He found the sole cause of his right knee problem was the MVA.

[32] Dr. McKenzie noted that the plaintiff also reported intermittent right hip pain, occurring for to six times a month and lasting a day or two. Dr. McKenzie stated he could not provide a specific diagnosis and wanted a bocalanesthetic injected into the hip as a diagnostic block. That said, Dr. McKenzie stated that, in his opinion, the likely cause was the MVA.

[33] In between Dr. McKenzie first and second examination of the plaintiff, the plaintiff underwent two MRIs with injections—one with an anesthetic injection and one without anesthetic. Based on the first MRI, which was without anesthetic, Dr. McKenzie opined in November of 2014 that the likely source of the plaintiff's hip pain was extra articular. However, after reviewing the second MRI with anesthetic and the plaintiff's reports of pain reduction following the injection, he opined in his April 2016 report that the source of the pain was intra-articular in nature and that there was likely chondral damage to the hip. On this assumption, Dr. McKenzie concluded that the plaintiff was at risk of having some deterioration of the hip in the future and developing osteoarthritis in the hip, which was attributable to the accident. Dr. McKenzie noted that the plaintiff reported that he thought that the pain in his hip was worse than before. He described it as intermittent; present for three quarters of the day, best in mornings and worst in evenings.

[34] In his April 2016 opinion, Dr. McKenzie confirmed his earlier diagnosis with respect to the knee; that the intra-articular fracture to his right knee affected the lateral tibial plateau. He identified early osteoarthritic changes to the knee and said it was likely that the progression of the osteoarthritis would be slow due to the amount of joint space remaining.

[35] Dr. McKenzie noted that the plaintiff reported to him that the right knee pain was irritating and constant, and was aggravated by physical activities. It was Dr. McKenzie's opinion that the plaintiff's knee pain was attributable to the patellofemoral pain, a small osteophyte in the patella, early degenerative changes to the joint, and the hardware that had been used to rebuild knee. He recommended removal of the hardware, which may provide some pain relief in the short term. He also recommended a knee brace, weight reduction and strengthening of the quadriceps, as well as a course of treatment for his pain with anti-inflammatory medication such as ibuprofen. In the long term, Dr. McKenzie noted the plaintiff remains at risk for a total knee replacement, which he confirmed based on the recent x-rays would likely be 15 or 20 years away.

[36] With respect to the plaintiff's complaint of low back pain, it was Dr. McKenzie's evidence that he had this pain prior the accident and it was not causally related to the accident.

[37] In cross-examination, Dr. McKenzie testified that the removal of the hardware in the knee is straightforward surgery that will allow the plaintiff to use and walk on his leg relatively quickly, but he would require four to six weeks off work.

[38] Dr. McKenzie also testified it was his understanding that the plaintiff had not followed recommendations with regard to a knee brace, quadriceps exercises, and physiotherapy. In Dr. McKenzie's opinion the plaintiff would benefit from trying a four-to six-week course of anti-inflammatory medication for the analgesic as well as for the anti-inflammatory effect. He stated there are anti-inflammatory medications that are easier on the stomach than Advil.

[39] Dr. McKenzie emphasized that while exercise is generally beneficial, the plaintiff needed to ensure that the exercises do not aggravate his injuries. He recommended that he use a physiotherapist to design a home exercise program for the plaintiff and a dietician to assist with a weight reduction program.

[40] Dr. McKenzie rejected the suggestion put to him on cross-examination that referred back pain, which had been reported by the plaintiff to his family physician prior the accident, was a source of his current hip pain. In his opinion, the results of the block with the anesthetic strongly indicated that the intra-articular pain was from the hip joint and that it was consistent with chondral damage. Dr. McKenzie also rejected the suggestion that the anesthetic from the block had an analgesic effect on the soft tissue around the hip rather than the joint itself.

Dr. Michael Piper (Orthopedic Surgeon)

[41] Dr. Piper is an orthopaedic surgeon retained by the defence to prepare a medical legal report on the plaintiff. He examined the plaintiff on August 24, 2016 and reviewed the medical and related reports on the plaintiff's condition. His report is dated August 24, 2016.

[42] In his interview with the plaintiff, Dr. Piper recorded that the plaintiff told him that he had a very bad memory. The plaintiff nevertheless recounted what he recalled from the accident, which included the plaintiff reporting that his knee was struck by the dashboard and that immediately following the accident he felt discomfort in his right knee and hip. He told Dr. Piper that he returned to work in approximately June of 2013 as he was not getting any funds from ICBC to meet his obligations. The plaintiff told Dr. Piper that he returned to driving a backhoe and dump truck and was allowed to take breaks from his work when needed.

[43] The plaintiff reported to Dr. Piper that (i) he tried to take Advil and anti-inflammatory medicine but finds them too hard on his stomach; (ii) he is working so many hours that he is too fatigued to exercise; (iii) he has not hunted or fished as much as before the accident; and (iv) he helps with some of the heavier work around the house.

[44] Dr. Piper reported that the CT scan taken at the time of the accident shows a comminuted and lateral tibial plateau fracture to the knee with depression on the articular surface and noted that the most recent x-rays leave no doubt that the plaintiff shows early evidence of osteoarthritis in the knee. He opined that the

symptomatology of the knee condition will become progressively limiting as it deteriorates and may require a knee replacement between the ages of 50 and 60. Dr. Piper stated that if the plaintiff did undergo knee replacement surgery he would be able to return to his work as a truck driver.

[45] Currently, Dr. Piper noted that on examination the plaintiff had full range of motion in both knees and he had normal power and reflexes in his legs.

[46] He found no pathology associated with the right hip. In his opinion, the plaintiff's hip pain may be associated with the back pain he experienced prior to the accident and the accident may have aggravated his symptomology. However, in cross-examination he acknowledged that it is "very possible" for the force of a significant blow to the knee to travel up the femur, impact the hip joint, and injure the bone surfaces in the hip joint.

[47] On cross-examination Dr. Piper also agreed that it is common for cold weather to increase discomfort felt by people with arthritic joints and that it is common for people with knee and hip pain to develop chronic pain. He further agreed that sitting for extended periods can aggravate pain symptoms in the knee and hip.

[48] Dr. Piper acknowledged that prosthetic knees do not last forever and they typically have to be replaced every 10 to 15 years. He agreed that in the years leading up to knee replacement, the knee becomes progressively more painful.

[49] Dr. Piper agreed with Dr. McKenzie's recommendation that the plaintiff would benefit from weight loss.

Dr. Duncan Laidlow (Physiatrist)

[50] Dr. Laidlow is a physiatrist who gave expert evidence for the defence. He conducted an independent medical evaluation on March 7, 2016, and his report is dated September 15, 2016. He prepared a supplementary report dated November 30, 2016, to further address the cause of Mr. Manky's right hip pain.

[51] In his first report Dr. Laidlow reviewed the plaintiff's prior medical history, the January 22, 2013, head-on collision, immediate symptoms, treatment and prior investigations, current symptoms and vocational and general limitations, as well as his own examination findings. He provided an opinion respecting the plaintiff's right knee, numbness in the right lower leg, and right hip pain.

[52] Dr. Laidlow confirmed that the plaintiff had suffered a comminuted distal tibial plateau fracture to the knee in the collision, which was surgically repaired and fixated with the insertion of hardware. Dr. Laidlow noted the plaintiff's mobility has been restored to his right knee but he continues to report daily pain, which Dr. Laidlow attributes to mechanical changes to the joint surface. In his opinion, the plaintiff has signs of osteoarthritis in his right knee and will likely require a knee replacement in 10 to 15 years, and possibly a second knee replacement later in life. He also recommended that the plaintiff obtain advice from an orthopaedic surgeon regarding the removal of the hardware for short-term improvement in the level of knee pain.

[53] In Dr. Laidlow's opinion, the plaintiff's numbness in his right leg was caused by injury to the cutaneous sensory nerves at the time of the knee surgery. He reports that the altered sensation experienced by the plaintiff is a result of the motor vehicle accident but has not resulted in a loss of strength in the leg.

[54] With respect to the plaintiff's right hip, Dr. Laidlow opines that while it is possible that his right hip pain was caused by the strain on the abnormal knee, he considers that the great majority of the pain relates to his pre-existing low back and groin pain and not due to the accident.

[55] Dr. Laidlow testified that because the plaintiff had a "pristine" MRI arthrogram (e.g., no signs of wear and tear in the joint), normal x-ray, and no limitations on physical examination (e.g., normal flexion, rotation and abduction, no impingement and no signs of tenderness, instability, or osteoarthritis), there is no basis for concluding that the plaintiff had suffered an injury to his right hip in the accident. He disagrees with the opinion of Dr. McKenzie that the diagnostic block administered by the radiologist, Dr. Cafferty, suggests that the plaintiff's right hip was injured in the

accident. Dr. Laidlow considers that procedure to have been flawed: the plaintiff's reports of numbness in his foot two hours following the injection of anesthetic indicate that it spread beyond the hip joint into the surrounding structure, including the sciatic nerve. Dr. Laidlow testified that the foot would have been more sensitive to the anesthetic than other nerve fibres in the leg.

[56] Further, Dr. Laidlow does not accept that the plaintiff's report of 1/10 pain early the following morning would be attributable to the anesthetic as it would only last approximately five hours. He suggested that Dr. McKenzie ought to have arranged for a further diagnostic block. In Dr. Laidlow's opinion the pain experienced by the plaintiff is more likely referred pain from the low back or sacroiliac joint and due to pre-existing symptoms.

[57] Dr. Laidlow testified that he does not consider the plaintiff should retrain, as had been proposed by Mr. Powers, because the plaintiff has been able to continue to work 50 to 70 hours a week as a logging truck driver—it is a job he knows and can manage—albeit with some discomfort when performing the heavier work. In cross-examination, Dr. Laidlow acknowledged that the plaintiff has chronic pain but maintains that it has not yet affected his ability to work long hours driving logging trucks. He said he is not aware of the plaintiff falling or hurting himself at logging work sites, and there is no indication of knee instability on examination.

[58] He noted that the plaintiff will be able to do this type of work until his osteoarthritis worsens, but should be able to resume his work after he recovers from knee replacement surgery. He observes that there is an 80–90% success rate with such surgery. He recommended against activities requiring long periods of standing. In Dr. Laidlow's opinion, the plaintiff is fully capable of performing household chores, except the heavier tasks, as his osteoarthritis worsens, until after knee surgery.

[59] He recommended continued rehabilitation, with a trainer, to strengthen the plaintiff's knee, core and flexibility.

Dr. Anthony Ellison

[60] Dr. Ellison was a general practitioner in the same clinic as Dr. Smit. He saw Mr. Manky on two occasions in April 2011. Subjective complaints on both occasions included back ache with pain radiating to the hip and groin. The back had a full range of motion and all tests were normal.

Dr. Morne Smit

[61] Dr. Smit was Mr. Manky's general practitioner from 2010 to 2015. His clinical records respecting Mr. Manky's attendances at his office were marked as an exhibit. He confirmed various subjective complaints made by Mr. Manky during his attendances at the office as well as some of the investigations undertaken.

[62] In September 2010 Mr. Manky was complaining of pain in the sacroiliac area of the back and radiating into the groin. This had been going on for one year. X-rays showed no abnormalities. In March 2011 Mr. Manky complained of occasional back pain. At the end of September 2013, eight months after the accident, Mr. Manky attended for an ICBC physical examination. He complained of ongoing neck and upper back pain as well as right-sided knee pain.

[63] In February 2014 Mr. Manky was again reporting chronic lower back pain. In September 2014 Mr. Manky was complaining of hip pain. MRI results were negative.

[64] In August 2015 Mr. Manky again reported right knee and hip pain as well as instability, something which he had been experiencing since his accident two years earlier.

[65] In February 2016, Mr. Manky attended for a driver's medical examination. This included a full physical examination including investigation of deficiencies or weakness in the joints. A follow-up visitation respecting pain in the knee occurred on February 24, 2016. At that time Mr. Manky noted that the pain in the knee was ongoing, and that it was made worse by walking, sitting and driving. He also

complained of hip pain flaring up. He stated he had been struggling with these conditions for more than three years.

Natalie Hull (Consultant Occupational Therapist)

[66] Ms. Hull is a registered occupational therapist and a certified functional capacity evaluator. At the request of plaintiff's counsel, she performed a functional capacity evaluation of Mr. Manky on March 17, 2016, and prepared a detailed report dated March 18, 2016, respecting her findings and opinions.

[67] In Ms. Hull's opinion, Mr. Manky was cooperative and participated in the functional capacity testing with high levels of effort. She is confident his test results are an accurate measure of his present physical capacity.

[68] The testing involved in a variety of tasks designed to measure coordination, strength and tolerance for various activities such as bending, kneeling, lifting, carrying, pushing, pulling, sitting, standing, walking and other motor functions. Mr. Manky's self-reporting of functional capacity was largely consistent with the clinical measures of his functional abilities and limitations determined by the testing.

[69] Based on the results of her evaluation, Ms. Hull is of the opinion that Mr. Manky meets the minimum essential job demands for working as either a heavy-equipment operator or a logging truck driver. In both cases, however, she expressed the opinion that he is not well-suited to the prolonged sitting demands of either occupation.

[70] Ms. Hull stated:

> Mr. Manky's job requires extensive sitting demands given that shifts typically exceed 12 hours in duration. Based on the results of testing, Mr. Manky is best suited for seated work activity that allows him opportunities to stand and walk about every hour. Based on the history, Mr. Manky makes attempts in his current job as a logging truck driver to limit prolonged sitting to a maximum of 75 minutes, but notes that due to the nature of his work, this is not always possible. Based on his reports, he experiences significant symptom aggravation and fatigue, both of which are more pronounced by the end of a work week. The results of this assessment are supportive of Mr. Manky's concerns (i.e. he was found to show signs of symptom

> aggravation from prolonged sitting demands). For this reason it is my opinion, that although he can perform his job he is not well-suited to the job, and in particular periods when he is not able to take sufficient breaks from sitting. He is also not well-suited to working very long shifts, i.e. shifts longer than 10 hours in duration due to the amount of sitting involved. His current job is likely to cause symptom aggravation which will reduce his tolerance for a vocational activities such as household responsibilities and leisure pursuits.

Dean Powers (Vocational Rehabilitation Consultant)

[71] Mr. Powers has been a vocational rehabilitation consultant and vocational therapist since 1980. At the request of plaintiff's counsel, he conducted a "vocational diagnostic interview" and vocational testing of Mr. Manky on March 16, 2016. He had a follow-up session with Mr. Manky on June 22, 2016. The only medical material he was provided for the purposes of his assessment were three medical reports from Dr. McKenzie and the Functional Capacity Assessment of Ms. Hull. He prepared his own expert report respecting Mr. Manky on June 22, 2016, and he also provided a rebuttal report dated October 5, 2016, in which he expressed his "strong disagreement" with some of the conclusions reached by the defendant's vocational rehabilitation expert, Mr. Trainor.

[72] Mr. Powers noted the various symptoms, limitations and restrictions indicated by Mr. Manky during his interview to include constant right knee pain aggravated by driving, walking and lifting, as well as intermittent right hip pain aggravated by sitting and driving for extended periods. He also noted Mr. Manky's reporting of occasional low back pain that was aggravated by driving.

[73] Mr. Powers expressed the view that the injuries sustained by Mr. Manky as a result of the 2013 motor vehicle accident have "significantly compromised" his employment options. He noted that while Mr. Manky continues to work full time as a logging truck driver, he does so with constant pain and in a reduced capacity compared with his pre-injury status. He also opined that Mr. Manky's ability to retrain and elevate his education standing is limited and that his particular labour market supports a limited number of industries and reduces the number of alternate jobs available to him, mostly at low wages.

[74] Mr. Powers noted that the logging truck driver occupation is considered a "medium industrial strength" job that requires a significant amount of sitting, something which aggravates Mr. Manky's right knee pain and triggers his right hip pain. He is "guarded" about Mr. Manky's ability to sustain his current occupation for the foreseeable future, suggesting Mr. Manky will "likely require a career change to a less physically demanding occupation at some point in the foreseeable future due to unresolved physical restrictions and limitations". He anticipates that:

> Mr. Manky's ability to perform his job as a logging truck driver will likely continue to decline significantly to the point where absences from work occur more frequently placing him at high risk for job loss and unemployment.

[75] In Mr. Powers's opinion, Mr. Manky's "physical diminishment" impedes post-injury earning capacity. He will be restricted to a few hours of work because of pain and limitation respecting full work strength demands. He will also likely require some level of accommodation at his current or, indeed, any other occupation for the duration of his working life, e.g., flexibility in positions, taking breaks as required, and the like. This has the potential to place him at a competitive disadvantage to employment competitors.

[76] According to Mr. Powers, Mr. Manky has a narrow range of transferable skills and limited education such that he will likely require re-training in order to access lighter duty employment, e.g., sedentary light-strength demand jobs. Given Mr. Manky's strong interests for physically demanding occupations, Mr. Powers is "guarded" about Mr. Manky's prospect for success in these types of jobs.

[77] In cross-examination, Mr. Powers was confronted with his conclusion that Mr. Manky "has yet to return to [his] pre-accident income level", something which he said "seems unlikely in the future considering his medical prognosis". He acknowledged that he did not have up-to-date information respecting Mr. Manky's income in 2015 and 2016 but, rather, was relying on the reduced income levels reflected in Mr. Manky's 2013 and 2014 tax returns.

[78] Mr. Powers conceded that there were legislative requirements for commercial drivers to undergo a "driving medical assessment". He did not inquire into Mr. Manky's status in that regard and whether he had passed such an exam.

[79] Mr. Powers also acknowledged that he was strictly relying on the accuracy of the information given by Mr. Manky and that he did not have any discussions with Mr. Manky's employer about the former's work performance or any unique requirements respecting same.

[80] Mr. Powers agreed with defence counsel's suggestion that a commercial driving job with reduced hours would also be an option for Mr. Manky going forward. He noted, however, that this would likely involve a substantially lower wage and that in some commercial driving there is frequent lifting and unloading that may not be feasible.

[81] In his rebuttal report, Mr. Powers strongly disagreed with Mr. Trainor's opinion that there was no need for Mr. Manky to change careers. He maintained that Mr. Manky's occupation is "likely unsustainable", that osteoarthritis and surgery will likely emerge during Mr. Manky's working life, and that he will be "competitively unemployable" as a truck driver or a heavy-duty equipment operator "unless his medical condition substantially improves". He stated:

> Mr. Manky has little choice at this point in time but to continue in this occupation [logging trucker] until he is no longer capable in light of his limited education standing, limited transferable skills, limited ability to upgrade his education as well as cope [sic] with a post MVA unresolved medical condition and pain symptoms. The fact that he has few options given his labour market and acquired skills are poor reasons to suggest the man continue to work in pain and/or seek employment as a delivery driver (suggested by Mr. Trainor) making substantially less money as a result and likely with unabated pain symptoms.

Niall Trainor (Vocational Rehabilitation Consultant)

[82] Mr. Trainor undertook a comprehensive assessment of Mr. Manky's "employability" on March 8, 2016. The previous month he was supplied by defence counsel with a letter setting out various "background facts" and supporting

documents. The latter included various clinical records but no formal medical-legal reports. On September 8, 2016, he was provided by defence counsel with updated clinical records as well as the medical-legal reports of Dr. McKenzie, the Functional Capacity Assessment Report of Natalie Hull and the Vocational Assessment Report by Mr. Powers. On September 16, 2016, defence counsel provided Mr. Trainor with the medical-legal reports of Drs. Laidlow and Piper. Mr. Trainor's report is dated the same day: September 16, 2016.

[83] In his report, Mr. Trainor defined "employability" as follows:

> Employability means a worker's ability to find and keep employment. In part, it is a function of whether an individual meets the prerequisites for given occupations that are formally and informally established within a labour market. While individual employers have their own unique set of requirements, generally speaking whether a person qualifies for a particular occupation is a function of factors such as his education, specific skills training including work experience, physical capacity, values and interests, temperaments, intellectual skills, perceptual abilities and other work skills. Employability is also a function of labour market factors, i.e. the supply and demand for various types of employment and the individual's own resourcefulness for developing job leads and promoting himself to prospective employers.

[84] Insofar as Mr. Manky's "pre-morbid employment potential" is concerned, Mr. Trainor noted that he had an established career as a truck driver and heavy-equipment operator, that he intended to remain working in that capacity for the foreseeable future, and that Mr. Manky "had good potential to succeed with this objective". He also noted that Mr. Manky had a number of viable employment alternatives such as low- and semi-skilled occupations in the fields of trades, transport and equipment operating. Such alternate occupations involve significant physical capacity in the medium- to heavy-strength command range with relatively unrestricted capacity for other body positioning and activity in addition to sitting, standing and walking.

[85] In his report, Mr. Trainor stated that as a result of the accident, "It is assumed that Mr. Manky sustained significant injuries to his right knee, neck and back that have resulted in chronic pain and functional limitations." He noted that the residual

symptoms and limitations stemming from the accident raise "important employment barriers", however given the fact that he is working 40 to 70 hours per week as a truck driver ("an excellent outcome considering his ongoing pain") and also "predicated on the medical opinions reviewed, it is assumed that he will remain feasible for this employment for the remainder of his working life, though he may need to take a temporary absence from work in order to receive a knee replacement in the distant future".

[86] Mr. Trainor stated that "although there is no need for [Mr. Manky] to change occupations, it is noteworthy that he still does have several alternatives available to him".

[87] In cross-examination Mr. Trainor acknowledged that people who suffer from chronic pain are generally less productive than those without such pain and have higher levels of absenteeism from work and may need some accommodation from employers in order to perform their occupation. He conceded that Mr. Manky's pain condition renders him less capable overall from earning income from all types of employment and makes him less marketable or attractive as an employee to potential employers. He also acknowledged that if the court accepts that Mr. Manky can no longer work as a logging truck driver because his pain is that significant, then he would have to consider other occupations in the trucking industry that are less demanding and/or whether he should reduce his hours of work to a more regular and "normal" 40 hours a week, by way "job sharing" or otherwise. Since Mr. Manky is currently in the 90th percentile of trucking income earners, Mr. Trainor acknowledged that such changes would likely result in a reduction of income.

[88] Mr. Trainor stated in cross-examination:

> If his pain problem worsens, so then he ends up reducing his hours, working 40 rather than 70 hours in a week, that's going to have economic repercussions to this man. If, for example, he decides his pain problem is too significant, he can no longer tolerate bouncing up and down logging roads, got to get into something else. Potentially he shifts to a different type of truck driving, but the hourly rate that he earns may not be as much as he is currently earning. So there are a lot of ways in which his ability to earn an income have potentially been impacted by this.

[89] Mr. Trainor also acknowledged that both Drs. McKenzie and Piper have diagnosed the presence of arthritis in Mr. Manky's knee joint. He confirmed that arthritis is a progressive degenerative disease, which, quite apart from the necessity for any knee replacement in due course, can have implications for employability.

[90] Mr. Trainor agreed that if a person is no longer able to pursue his current career or another related career that would capitalize on his training and work experience, then re-training would be necessary. Furthermore, it would be better for such re-training to occur sooner rather than later "because it gives them the opportunity to move into that new occupational area and build their work experience and therefore their competitive employability in an entirely new field". He also noted, "Older workers potentially have a lot more difficulty changing occupations later in life" because of various assumptions employers make about a lack of computer literacy and higher wage expectations.

[91] Lastly, Mr. Trainor acknowledged that in every assessment he performs, he considers whether the person being assessed is attempting to pursue "secondary gain", i.e., an "agenda to receive a benefit from their litigation other than legitimate entitlements arising from the injuries sustained". He confirmed that no such secondary gain motivation existed with respect to Mr. Manky. He also noted that Mr. Manky had displayed some difficulty sitting through the testing on account of his right knee and hip pain but he saw no evidence that Mr. Manky was in any way attempting to dramatize or exaggerate his pain behaviour.

Darren Benning (Consulting Economist)

[92] Mr. Benning is a consulting economist who prepared a report dated August 15, 2016 estimating "future income loss multipliers" applicable to Mr. Manky. The purpose of such multipliers is to determine the present value of a future income loss stream, expressed in "real" (net of inflation) dollars over a specified period.

[93] In Mr. Benning's report, multipliers are expressed per thousand dollars of annual income loss in year 2016 dollars through to Mr. Manky's age 67 years. This is in accordance with a request to that effect by plaintiff's counsel.

[94] Mr. Benning provided two separate multipliers. The first was an "actuarial multiplier" that calculated the present value of a future income stream based on the specified rate of investment return and factored in only the contingency of premature death. The second was the "economic multiplier", which performed the same calculation but also factored in certain negative labour market contingencies, namely, non-participation in the labour force, unemployment, part-time work and part-year work.

[95] Mr. Benning attached a table to his report setting out the resulting cumulative multiplier values from the date of trial (December 12, 2016) to the date of Mr. Manky's 70th birthday, a period of some 30 years. The actuarial multiplier for a constant stream of income loss over that period is 20,918 and the economic multiplier for that period is 15,529.

Causation, Pre-existing and Indivisible Injury, and the Assessment/Allocation of Damages in a Negligence Case

[96] In Kallstrom v. Yip, 2016 BCSC 829, I summarized the law in this area:

> [316] A claim for personal injury damages arising out of an MVA is, of course, a claim in tort (negligence). As with any negligence claim, in order to succeed, the plaintiff must prove on a balance of probabilities the following constituent elements of the tort:
>
> 1. the defendant owed the plaintiff a duty of care (to avoid acts or omissions which might be reasonably foreseeable to cause injury to the latter);
> 2. the defendant's acts or omissions breached the standard of care applicable to that duty;
> 3. the plaintiff suffered damage of a sort that is recognized and compensable in law; and
> 4. the defendant's breach was causative, in both fact and law, of the plaintiff's damage.
>
> (See Hill v. Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41 at para. 96; Mustapha v. Culligan of Canada Ltd., 2008 SCC 27 at para. 3; Ediger v. Johnston, 2013 SCC 18 at para. 24.)
>
> [317] Where the plaintiff's damage is caused by the negligence of two or more persons (possibly including the plaintiff herself), the court must determine the degree to which each person is at fault. The apportionment of liability as between such at-fault persons is governed by the Negligence Act. The apportionment is determined on the basis of the degree to which each

person was at fault, not on the extent to which each person's fault caused the plaintiff's damage: Bradley v. Bath, 2010 BCCA 10 at para. 24; Chambers v. Goertz, 2009 BCCA 358 at para. 55. By virtue of the Negligence Act:

- the amount of damage or loss and the existence or degree of fault are questions of fact (s. 6);
- except where the plaintiff is contributorily at fault, persons whose fault has caused the plaintiff's loss or damage are jointly and severally to the plaintiff for same (s. 4);
- however, no person is liable for damage or loss to which their fault did not contribute (s. 1).

[318] The basic legal principles respecting causation are found in the seminal case of Athey v. Leonati, [1996] 3 S.C.R. 458, repeated many times since, and which include:

1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is it is part of the cause of an injury, the defendant is liable; and
4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.

[319] The above paradigm addresses principles of liability. It does not address principles related to the assessment of damages in tort. The latter requires consideration of conditions or events unrelated to the tort(s) which occurred either before or after the plaintiff's injury and which impact the nature or extent of the compensation that should be awarded for the tort. In such situations, Athey reminds us to consider first principles:

> [32] ... The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence ("the original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position" which is the plaintiff's loss. ... [Emphasis in original.]

[320] In Blackwater v. Plint, 2005 SCC 58, the Court put it this way:

> [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway. ...

[321] It is in the above context that the so-called doctrines of "thin skull" and "crumbling skull" come into play. In that regard A they held:

> [34] 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.
>
> [35] 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 <u>better</u> 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. [Emphasis in original.]

[322] In T.W.N.A. v. Canada (Ministry of Indian Affairs), 2003 BCCA 670, a unanimous decision from a five-member panel of the Court of Appeal reviewed the principles outlined in A they, and addressed pre-existing medical conditions and how they affect the assessment of damages. The A they case

articulated the notion of a "measurable risk" or "realistic chance" of a subsequent medical problem occurring at some point in the future, even without the accident that is the subject matter of the law suit, noting on that account

> [48] … a reduction of the overall damage award may [be] considered. This is because the plaintiff is to be returned to his "original position", which might have included a risk of spontaneous disc herniation in the future [in any event]. …
>
> (See also: T.W.N.A. at para. 34-35)

[23] The court in T.W.N.A. held that a defendant need not prove on the balance of probabilities that the pre-existing condition would have actually caused the subsequent loss regardless of the accident. It noted:

> [48] … a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood. [Emphasis added.]

[24] If the said "measurable risk" or "realistic chance" can be demonstrated on the evidence, then "the net loss attributable to the tort will not be as great and damages will be reduced proportionately" (T.W.N.A. at para. 36 citing A they paras. 31-32).

[25] Similar principles are articulated in Moore v. Kyba, 2012 BCCA 361 at paras. 32-37, and where the court also described the operation of the "crumbling skull" rule as follows:

> [43] … if the plaintiff had a pre-existing condition and there was a measurable risk that that condition would have resulted in a loss anyway, then that pre-existing risk of loss is taken into account in assessing the damages flowing from the defendant's negligence. …

[26] A they also addressed the concepts of "divisible" and "indivisible" injury:

> 24 The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): Fleming, supra, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, supra, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.
>
> 25 In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant

found to have negligently caused or contributed to the injury will be fully liable for it.

[327] This concept of "indivisible" injury and the apportionment of damages between multiple accidents was reviewed in detail by our Court of Appeal in the seminal decision of Bradley v. Groves, 2010 BCCA 361. In that case, it was argued that aggravation of a pre-existing tortiously-caused injury is not the same as indivisible injury and that trial judges must identify and disentangle discrete injury so as to assess damages separately. That contention was bluntly rebuffed by the Court of Appeal which held:

- "[d]ivisible injuries are those capable of being separated out and having their damages assessed independently. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes." (para. 20);
- "...indivisible injuries, whether occasioned by a combination of non-tortious and tortious causes or solely by tortious causes, result in joint liability for tortfeasors." (para. 24);
- "There can be no question that *Athey* requires joint and several liability for indivisible injuries. Once a trial judge has concluded as a fact that an injury is indivisible, then the tortfeasors are jointly liable to the plaintiff. They can still seek apportionment (contribution and indemnity) from each other, but absent contributory negligence, the plaintiff can claim the entire amount from any of them." (para. 32);
- "If an [indivisible] injury cannot be divided into distinct parts, then joint liability to the plaintiff [for that indivisible injury] cannot be apportioned either. ...[T]ortfeasors causing or contributing to a single, indivisible injury are jointly liable to the plaintiff. This in no way restricts the tortfeasors' right to apportionment as between themselves under the Negligence Act, but it is a matter of indifference to the plaintiff, who may claim the entire amount from any defendant." (para. 34).

[328] The Court of Appeal also addressed the interplay between "indivisibility" and aggravation of a pre-existing injury:

> [37] We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach ... if the injuries cannot be distinguished from one another on the facts ... It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

Findings as to Mr. Manky's Injury and Disability

[97] The accident in this case was a head-on collision. The impact was severe and the front end damage to both vehicles was substantial. The forces involved were very significant.

[98] As a result of the collision the airbag in Mr. Manky's truck deployed, striking him in the face. He sustained contusions to his chest, ribs and face. It is possible the rib injury involved some displacement or fracture. All of these injuries physically resolved within a matter of months.

[99] The most significant injury was to Mr. Manky's lower body. He sustained a comminuted fracture of the tibial plateau in his right knee which required surgical reduction and fixation with a locking plate. After discharge from hospital he was non-weight bearing for approximately six to eight weeks while he recuperated at home. The surgical staples were removed approximately four weeks following the surgery.

[100] With the benefit of some physiotherapy and exercise, Mr. Manky gradually began to place weight on his right leg and he returned to work in June 2013. This return to work was earlier than the physicians expected but was motivated in large part by Mr. Manky's pressing financial circumstances.

[101] The pain in Mr. Manky's right knee was excruciating immediately following the accident. The level of pain has since diminished but it remains a constant, daily phenomenon, one which is aggravated by the prolonged sitting required by his occupation as a logging truck driver. The injury to the knee has also resulted in the development of early osteoarthritis. This is a progressive disease that will cause increasing pain and limitation in movement, more likely than not necessitating knee replacement surgery in 10–15 years when Mr. Manky is somewhere between 50 and 60 years of age.

[102] Mr. Manky has reduced sensation and some numbness in some parts of the right leg below the knee joint and extending halfway down to the ankle. This was

caused by damage to the cutaneous sensory nerves around the knee at the time of the surgery, a common and often unavoidable occurrence. There is no pain or disability associated with this phenomenon.

[103] The main physical injury issues in dispute between the parties relates to the pain in Mr. Manky's right hip. Here there exists a difference of opinion between the assessing physicians, particularly orthopedic surgeon McKenzie and physiatrist Laidlow. The former believes that the accident resulted in chondral damage (an articular or cartilage injury) to the hip, a condition which may well deteriorate in the future including the development of osteoarthritis in the hip. The latter acknowledges that an intra-articular abnormality is a possibility and that abnormal knee mechanics might well be placing additional strain on the hip joint area. His "overall feeling" is that the great majority of Mr. Manky's hip pain relates not to the accident but, rather, to his pre-existing back problems which had previously resulted in pain in the back radiating into the groin area.

[104] As an aside, I note that while the doctors might engage in a genuine medical debate respecting etiology, the difference of opinion may not have substantial legal significance given the causation principles discussed earlier in this judgment. There is no doubt from Mr. Manky's evidence, which I accept, that the frequency and severity of his hip pain has substantially increased following the accident.

[105] As Dr. Piper acknowledged, the significant force of the impact between Mr. Manky's knee and the truck dashboard would have travelled up the femur and impacted the hip joint (and logically, the spine as well). Even if this did not cause a separate and discrete injury to the hip, aggravation of a pre-existing injury or vulnerability gives rise to liability on the part of the defendant for the resulting damage in any event (subject to any contingency discount reflecting any measurable risk or realistic chance that such aggravated injury would have occurred in due course regardless of the accident).

[106] I prefer and accept Dr. McKenzie's opinion and find that the predominant source of Mr. Manky's ongoing hip pain is intra-articular in nature and was caused by

the accident. I accept the criticisms articulated by plaintiff's counsel respecting Dr. Laidlow's assessment and I accept counsel's submissions respecting both Mr. Manky's credibility generally and the results of the diagnostic block performed upon him. This conclusion is reinforced by any pragmatic, common sense and robust assessment of the likelihood that injury to the bone surfaces in the hip joint would be caused by the significant force of the blow to Mr. Manky's knee.

[107] In the result, I find as a fact that the accident caused an intra-articular injury to Mr. Manky's right hip that has resulted in the pain he is experiencing in that area and which also puts him at risk for further deterioration in the future, including the development of osteoarthritis in the hip. Combined with Mr. Manky's knee condition, the hip problem will very likely contribute to chronicity of pain and progression of physical movement/mobility limitations to some degree.

[108] I also find as a fact that Mr. Manky had pre-existing medical conditions in both his neck and lower back that may have been aggravated by the accident and will contribute to his ongoing medical issues. He sustained an injury many years ago that has resulted and will likely continue to cause recurrent neck pain. He also experienced low back pain, which is also aggravated by prolonged driving. Unfortunately, there is essentially no evidence before the Court respecting any physical or anatomical cause of these pre-existing complaints and, in particular, what were the prospects for their deterioration and any resulting limitation on Mr. Manky's employment or recreational activities in the future.

[109] One negative contingency in this case is the possibility that and extent to which Mr. Manky's pre-existing medical condition would have progressed to affect his employment status and/or employability generally. The onus was on the defence to adduce evidence on this point sufficient to allow the weighing of such possibility and to assign some degree of likelihood to the eventuality. Absent such evidence, allocation of only a very modest negative contingency is warranted in this case.

Non-Pecuniary General Damages

[110] The purpose of a non-pecuniary award of general damages in a personal injury case is to compensate the plaintiff's intangible losses such as pain and suffering, and loss of enjoyment of life. There is no tariff for any particular amount to be awarded for any particular type of injury, although the Supreme Court of Canada has imposed a rough upper limit for such awards which, adjusted for the effects of inflation, now sits at approximately $375,000.

[111] It is not just the severity of the injury that determines the amount of the award in any particular case. It is also the effect the injury has had and will continue to have on the particular plaintiff's life that must be taken into account. Having said that, however, the overall fairness and reasonableness of the award amount can be assessed, at least in part, by reference to other awards made in similar cases.

[112] In Stapley v. Hejslet, 2006 BCCA 34, the court noted that while an award of non-pecuniary general damages will vary to meet the specific circumstances of each case, a non-exhaustive list of factors, commonly influencing the award includes:

(i) age of the plaintiff;

(ii) nature of the injury;

(iii) severity and duration of pain;

(iv) nature and extent of disability;

(v) emotional suffering;

(vi) loss or impairment of life;

(vii) impairment of family, marital and social relationships;

(viii) impairment of physical and mental abilities;

(ix) loss of lifestyle; and

(x) the plaintiff's stoicism (a factor that should not, generally speaking, penalize the plaintiff).

[113] As invariably happens in these types of cases, counsel for the parties have each provided a list of cases involving a range of awards of non-pecuniary damages for injuries that are roughly similar to the present case. As is also invariably the case, the examples provided by the plaintiff represent the upper end of the spectrum, here $125,000–$190,000 and the cases presented by the defendant represent the lower end of the spectrum, here $50,000–$80,000 (although the defendant concedes that if the plaintiff's hip complaints are accident related, then the award should be at the upper end of their suggested range).

[114] In this particular case, the plaintiff suffers from chronic pain in his knee and hip, pain which waxes and wanes depending upon the time of day and the length of time he has been driving his truck. The pain is a daily phenomenon. He has already developed arthritis in the knee and he is exposed to possible arthritis in the hip, a progressive medical condition that is will cause increasing levels of pain and disability for at least another decade following which joint replacement surgery will be required. He has already experienced one significant surgery to his knee and he will be obliged to undergo at least two more, one in the near future to remove the hardware currently in place and the other many years down the road to replace the knee joint. The first will likely provide some symptomatic relief and, if successful, the latter should also have a positive effect.

[115] Mr. Manky is a stoic individual with an impressive work ethic. He endures his pain when it occurs and continues to work long hours notwithstanding the pain that those hours trigger and exacerbate. He is to be commended for his stoicism and should not be "penalized" in that regard in terms of any general damages award in this case.

[116] While Mr. Manky has persevered in his work, his injuries have to some degree impaired the quality of his life outside work and will continue to do so. He has little time for recreational activities given his current work schedule but because of his injuries he is less able to hunt or fish or work about the home as he did before the accident. He has sold his ATV. He no longer plays the drums in church. He

uses a snowblower instead of shoveling snow. Such recreational activities as he has will very likely be further impaired as his arthritis progresses.

[117] I take into account the case law provided by the parties to assess the overall fairness and reasonableness of the award in this case. Having regard to the case law as well as the Stapley factors and Mr. Manky's personal circumstances, I award non-pecuniary general damages in the amount of $125,000.

Loss of Past and Future Earning Capacity

[118] In personal injury cases plaintiffs will commonly claim damages for loss of past and future income that would have been earned, had the defendant's negligence and the resulting injuries not occurred. In Kallstrom v. Yip I reviewed some of the principles applicable to the assessment of damages in such cases:

> [88] ... Since Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, it has been acknowledged that, technically speaking, it is not loss of earnings for which compensation is being made, but rather it is for loss or impairment of a capital asset, namely, the plaintiff's capacity to earn income.
>
> [89] Valuation of the loss may be measured in different ways depending on the circumstances of each particular case. Generally speaking, the value of a particular plaintiff's capacity to earn is equivalent to the value of the earnings that he or she would have received, whether in the past or in the future, had the tort not been committed. The essential task of the court is to compare what would have been the plaintiff's past and future working life if the accident(s) had not happened with the plaintiff's actual past and likely future working life after the accident(s). The difference between the two scenarios represents the plaintiff's loss and the resulting monetary award is thus consistent with the basic principle of tort law compensation, which is to restore the injured plaintiff to the position he or she would have been in but for the defendant's negligence, at least insofar as a monetary award is capable of doing so.
>
> [90] Determining how a plaintiff's life would have proceeded had the accident(s) not occurred is an exercise in the hypothetical. So too, of course, is any determination of how the plaintiff's post-accident(s) future life will unfold following the trial.
>
> [91] In the 1978 trilogy of cases of which the Andrews decision was part, the Supreme Court of Canada itself referred to this exercise as "crystal ball gazing" inasmuch as it involves an inquiry into future events. However, it involves more than mere speculation; rather, it must be informed speculation firmly grounded in the evidence and the particular facts of each case.
>
> [92] The standard of proof for such future events is not the traditional "balance of probabilities" applicable to most civil cases; rather, future or

hypothetical possibilities are taken into consideration, so long as they are real and substantial and will be given weight according to their relative likelihood: A they, supra, para. 27.

[393] There is a discrete, two-step process that is required with respect to these past and future loss of earning capacity claims:

1. the court must first determine whether, as a result of the injuries sustained in the accident(s), the plaintiff's past or future earning capacity has been or will likely be impaired, such that there has been an actual loss of income in the past and/or a real and substantial possibility of a loss of income in the future; and

2. if so, then the court must then determine the amount of past loss that has been incurred to the date of trial and, on a present value basis, assess the amount to be awarded for any possible future financial loss.

[394] The first question deals with entitlement and the second with quantum.

[395] Some cases are relatively simple. For example, where a plaintiff is engaged in steady, long-term, likely permanent employment, and sustains injury which makes her unable to work both before and after the trial, a past and future loss of capacity to earn income is clearly established and a relatively simple arithmetical approach to valuation may be appropriate, e.g. doing the obvious calculation on past loss, albeit adjusting for contingencies, and for future loss, present valuing the stream of income that would have been received from that employment from trial to the date of retirement, taking into account appropriate discount rates and contingencies affecting the plaintiff's personal circumstances.

[396] Most cases are not as simple as the scenario described above. Young persons who have not settled into a career, those with an irregular or no history of employment income, self-employed entrepreneurs, and those involved in unconventional income-earning enterprises are all examples where any past or future loss of earning capacity can be very difficult to both establish and measure. So too where an injured plaintiff has returned to work (usually with a sympathetic employer), but whose future remains uncertain.

[397] In these difficult cases, step one in the analysis, entitlement, is often informed by the factors listed in Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8, namely whether,

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;

2. The plaintiff is less marketable or attractive as an employee to potential employers;

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

4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market,

bearing in mind that mere inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss: Perren v. Lalari, 2010 BCCA 140.

[398] Evidence from experts in the fields of work capacity testing, occupational assessment and vocational rehabilitation is often helpful, as is expert evidence from economists respecting valuation of employee benefit programs, discount rates and present value of future income streams, labour force and marketplace contingencies, and the like.

[399] In some of these difficult cases, valuation is challenging and the result can appear somewhat arbitrary. For example, in the frequently cited case of Pallos v. Insurance Corp. of British Columbia, [1995] 3 W.W.R. 728, the court concluded the plaintiff had permanent pain resulting from his injuries that limited his activities and his income earning capacity. The loss of income earning capacity was found to exist even though the plaintiff was still employed by his pre-accident employer and would continue to be so employed indefinitely. The question was what award ought to have been made under such circumstances and how it should be assessed. The court stated:

> [43] The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. In all the circumstances, I would regard a fair award under this head to be the sum of $40,000.

[400] There is nothing in the judgment to expressly indicate how the amount of $40,000 was determined. It was an arbitrary figure, likely reflecting one or two years income, but one the court felt was fair in the circumstances of the particular case.

[401] Even where mathematical calculation is involved, our Court of Appeal has repeatedly reminded us that the assessment of damages is a matter of judgment, not calculation. The court must still use careful judgment in weighing all substantial possibilities and the overall fairness and reasonableness of the award must be considered, taking into account all of the evidence.

[402] At the end of the day, instead of simply adverting to general principles and "plucking a number from the air", the court is obliged to make a "reasoned analysis to explain and justify the award" and in doing so expressly relate the findings of fact in the case to the actual assessment of damages: Schenker v. Scott, 2014 BCCA 2003. See also Morgan v. Galbraith, 2013 BCCA 305; Meghji v. British Columbia (Ministry of

> Transportation and Highways), 2014 BCCA 105; Gillespie v. Yellow Cab Company Ltd., 2015 BCCA 450; Tsalamandris v. McLeod, 2012 BCCA 239.

[119] In Knapp v. O'Neill, 2017 YKCA 10, the Court of Appeal unanimously endorsed the following approach to assessing loss of earning capacity:

> [17] Both the capital asset and earnings approaches are valid methods of assessing the loss of earning capacity. However, in my view, even where a judge determines the capital asset approach is indicated on the record, the court should ground itself as much as possible in factual and mathematical anchors. Adopting the capital asset approach does not justify an undisciplined approach.
>
> [18] It can be helpful under either approach for the judge to consider the quantum of the award in light of the range of possibilities indicated by economic analysis. Mathematical aids and economic analysis facilitate a "bracketing" exercise that indicates the high and low extremities of possible awards in a given case ...
>
> [19] Courts, where they can, should endeavor to use factual and mathematical anchors as a foundation to quantify loss of future earning capacity, including economist reports and a plaintiff's pre-accident employment history, training, and capabilities. In addition, a plaintiff's personality, work ethic, and attitude should all be considered where possible; it may constitute an error to ignore such factors.
>
> ...
>
> [21] In my view, it is generally preferable to first assess past income loss, then move on to assess loss of future earning capacity. Although assessing either involves hypotheticals, proceeding in this manner involves moving from something generally better known and understood (i.e., historical income loss) to something generally less well known and understood (i.e., loss of future earning capacity).
>
> [Internal citations omitted.]

Loss of Past Earning Capacity

[120] Mr. Manky returned to full-time work in June 2013, some 4 ½ months after the accident. While the physicians consider that such a return might have been premature, various accommodations were employed and Mr. Manky's earnings at his pre-accident level resumed almost immediately.

[121] There was no loss of income in 2014 that was attributable to the accident. Mr. Manky's employer lost its contract to grade logging roads and Mr. Manky was out of work as a result. He picked up temporary work at lower wages but within a

couple months moved on to more remunerative (and physically demanding) work as a logging truck driver with his current employer.

[122] The claim for past loss of earning capacity is therefore limited to the period extending from the day of his accident to the time he returned to work in June. At the time of the accident the winter logging season was at its most productive and Mr. Manky would undoubtedly have worked full time until spring break-up around the first or second week of April 2013, at which time plowing, clearing and sanding logging roads would have ceased. Given his work ethic, however, there is little doubt that Mr. Manky would have found work, albeit likely at a more "normal" 40 hours per week, at Godsoe Contracting or elsewhere.

[123] In the year before the accident Mr. Manky earned approximately $93,000. In the year of the accident, he earned approximately $30,000 less. That number represents a fair value of Mr. Manky's loss of earning capacity in 2013, however ss. 95, 97 and 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, combine to require the loss to be assessed on a "net income" basis. Mr. Manky's payslips substantiate deductions on account of tax, EI premiums, et cetera, in the amount of approximately 24% of his gross pay. Applying that percentage to the estimated $30,000 gross loss results in an award for past loss of earning capacity in the rounded up amount of $23,000 together with pre-judgment interest under the Court Order Interest Act, R.S.B.C. 1996, c. 79.

Loss of Future Earning Capacity

[124] Plaintiff's counsel submits that the award for future loss of earning capacity in this case should be in the range of $700,000–$900,000.

[125] Defence counsel argues there is no real and substantial possibility that the plaintiff will not be able to continue in his present line of employment as a logging truck driver, and that any requirement for a change of employment in the future does not rise above the level of a "bare possibility". The defendant argues that any award for loss of future earning capacity should be limited to four to six months' net salary subject to a 5% negative contingency for the possibility of surgery being required

after the plaintiff's working life and subject also to discounting for present value at a 1.5% discount rate.

[126] I disagree with both propositions. The submissions of both counsel overreach by a wide margin.

[127] The simple fact is that the plaintiff is currently working more than full-time hours as a logging truck driver and intends to continue doing so for as long as he is able. The "crystal ball-gazing" issue to be determined is how much longer can the plaintiff continue to work in this fashion and, if employment status change is to occur, what will happen and what will be the employment income consequences?

[128] It will be recalled that there is a discrete, two-step process work in determining future loss of earning capacity claims. The court must first determine whether, as a result of the injuries sustained in the accident, Mr. Manky's future earning capacity will likely be impaired, such that there is a real and substantial possibility of a loss of income on his part in the future. If so, the court must then assess on a present value basis the amount to be awarded for that possible future financial loss.

[129] I have already found that Mr. Manky sustained significant orthopedic injury to his right knee and also likely to his right hip, both of which have resulted in chronic pain (albeit presently waxing and waning in intensity). This pain is exacerbated by the prolonged hours of driving involved in his current, physically demanding job. The orthopedic surgeons agree that Mr. Manky has developed arthritis in his knee that will continue to progress and will increase the level of pain that he experiences in the future, at least until such time as the inevitable knee replacement occurs in 10 to 15 years. The same may occur with Mr. Manky's hip condition, although that is much less certain. Based on these factors and applying some robust common sense to the analysis, there is not only a real and substantial possibility that Mr. Manky will not be able to sustain his current level of employment activity, it is highly probable that a change in his employment status will occur and that his income will be reduced as a consequence.

[130] Putting the matter more broadly and in the context of the four factors listed in Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 (S.C.), the defendant's own vocational rehabilitation consultant, Mr. Trainor, acknowledged that Mr. Manky's pain condition renders him less capable overall from earning income from all types of employment, makes him less marketable or attractive to potential employers in a competitive labour market, and will reduce Mr. Manky's ability to take advantage of all job opportunities that might otherwise have been available had he not been injured.

[131] In my view, entitlement to an award for loss of future earning capacity is clearly established in this case. The problem is determining quantum.

[132] There are significant gaps in the evidence that are problematic in the assessment of Mr. Manky's pre- or "no-accident" earning capacity from trial to the date of retirement, i.e., in tort language, his "original position". There is no statistical information before the court respecting the average retirement age of logging truck drivers or, indeed, truck drivers generally. While I accept Mr. Manky's evidence that he would have worked (and indeed, will work) as a logging truck driver as long as he is able, there is no evidence before me respecting the age at which such drivers usually "slow down", i.e., reduce the long hours of work or transition into a less demanding form of driving or transportation-equipment-related work. Anecdotal evidence in this case suggests that some older drivers in their 50s have reduced the number of "runs" that they perform for Mr. Manky's present employer and, indeed, Mr. Manky's own father transitioned away from truck driving well before any "traditional" retirement age of 65.

[133] I have also not been provided with any meaningful evidence respecting the health of the logging industry generally or in the Quesnel/Prince George region of the province in particular. Such information respecting the historical performance of the industry and expert prognostications as to its future might have helped to inform the assessment of industry-related employment contingencies, whether positive or negative.

[134] All in all, however, having regard to Mr. Manky's upbringing, his employment history, training, and heavy-equipment skillsets as well as his considerable work ethic, I am satisfied that it is highly probable that he would have continued to work in the trucking and heavy-equipment occupations until at least the age of 65, although he would likely have curtailed overtime and worked a "normal" 40-hour week once he reached his mid-50s.

[135] Mr. Manky's "post-accident" future employment picture is likely much different. First, it is highly probable that he will lose four to six weeks' income in the near future when he is recuperating from the surgical removal of the hardware from his knee and another four to six months' recuperation from knee replacement surgery in his 50s. At his present level of earnings, this represents a loss of income in the vicinity of $50,000 (before present valuing).

[136] Second, it is far more than just a real and substantial possibility that the progression of arthritic pain in the knee (and possibly the hip) will compel Mr. Manky to reduce the number of hours he currently works. Whether it be only two "runs" a day as a logging truck driver or a less punishing driving job of the sort he obtained at Inwood Trucking, a reduction of income from his present level is likely inevitable much earlier than would have occurred in any "without accident/original position" scenario. Just 10 years' loss of annual income in the amount of $30,000 amounts to a $300,000 loss before present value discounts and application of other positive or negative contingencies particular to the plaintiff.

[137] Plaintiff's counsel submitted various actuarially calculated future loss scenarios as "useful benchmarks" for framing the assessment of quantum in this case. Both Knapp and Grewal v. Naumann, 2017 BCCA 158, have endorsed the use of such scenarios in assessing what might be fair and reasonable in the context of any capital asset evaluation.

[138] Using a pre-accident capacity of $90,000 per annum for modelling purposes, plaintiff's counsel proposes scenarios where Mr. Manky works for a further 5, 10 or

15 years before stopping work altogether. Applying the applicable multiplier to each scenario generates numbers ranging from $400,000 to $1.1 million.

[139] Other more realistic scenarios were also generated by adding a further variable to the model, namely, three years out of the workforce to retrain and assumed annual income of $50,000 as residual earning capacity following such retraining. Using the same multipliers the numbers generated by this modified model for assumed 5, 10 or 15-year current employment continuation vary from approximately $400,000–$680,000.

[140] Perhaps not surprisingly defence counsel provided no actuarial modelling. He argued, probably correctly, that if the plaintiff's injuries prevented his current level of employment from continuing, the likelihood is that the plaintiff would pursue reduced hours driving a logging truck with his current employer or another employer, or that he would pursue driving employment such as that which he performed for Inwood. He acknowledged that this would result in a reduced level of income but did not quantify it.

[141] Defence counsel submitted that even if Mr. Manky is eventually precluded from his current line of employment as a truck driver, he still retains a significant residual earning capacity. He further submitted that any future income loss award must take into consideration a "significant negative contingency" that the plaintiff would have reduced working hours in any event of the motor vehicle accident. Again, no numbers were provided purporting to quantify either the contingency or the value of the claim.

[142] It will be recalled that in Palos v. Insurance Corp. of British Columbia, [1995] 3 W.W.R. 728, the Court of Appeal awarded one or two years' income to a plaintiff who had a loss of income earning capacity as a result of chronic pain but who was still employed by his pre-accident employer and would continue to be indefinitely. The Court of Appeal acknowledged that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so, even if the amount awarded

cannot be assessed with any sort of mathematical precision and is somewhat arbitrary in nature.

[143] There are many cases where the court has followed such a "Palbos approach" and where awards have been made in amounts equivalent to one, two or even three years' salary: Miller v. Lawlor, 2012 BCSC 387; Raikou v. Spencer, 2014 BCSC 1; Hoy v. Williams, 2014 BCSC 234; Ali v. Rai, 2015 BCSC 2085; Deol v. Sheikh, 2016 BCSC 2404. Adopting a two years "Palbos approach" to assessment in this case would generate an award of roughly $180,000.

[144] At the end of the day, I am satisfied that a significant difference exists between Mr. Manky's pre-accident and post-accident future loss of income earning capacity. His pain condition will worsen over time and in due course he will likely be obliged, voluntarily or otherwise, to reduce his hours of work to a less punishing schedule and/or a less punishing environment. This will result in a reduction of income that he would not otherwise have incurred but for the accident. Further and in any event, all of the Brown v. Golaiy factors are engaged in this case, just as they were in Palbos, and must be reflected in the award.

[145] In my view, the most realistic hypothetical loss of future income scenario confronting Mr. Manky is continuation of his current employment and related income for a period of 5 to 10 years, at which point the deterioration of his pain condition will compel a change of work or schedule until knee replacement surgery is performed. The prospect of successful surgery eliminating or substantially reducing chronic pain is high but is not guaranteed, meaning there remains to be recognized a negative contingency associated with the substantial possibility of continued impairment of post-surgical residual earning capacity.

[146] Employing the economic multiplier identified by Mr. Benning, an income reduction of $30,000 per annum beginning five years from now and continuing for 10 years yields an "arithmetical" present value award of approximately $208,000. To that number is added an award reflecting a net 20% negative contingency of post-surgical continued reduced earning capacity (e.g., present value of annual, say,

$15,000 loss from age 55 to 65 is approximately $64,000, 20% of which approximates $13,000), for a total present value of $221,000. The same model based on an annual $30,000 loss of income beginning eight years from now, continuing for five years, and followed by the same post-surgery continued impaired income-earning capacity contingency until age 65 yields approximately $119,000.

[147] It is impossible to predict exactly what Mr. Manky's future working life is going to look like. It is clear, however, that the accident has significantly impaired Mr. Manky's long-term income earning capacity. Making a fair assessment of damages on that account is difficult, however both the "Pallos approach" and the more arithmetical actuarial approach to assessment indicates an appropriate award is in the range of $125,000 to $225,000. In the result, I award Mr. Manky $175,000 for future loss of earning capacity, a sum that, in my view, is fair and reasonable to both parties.

Loss of Domestic Capacity

[148] This head of damages is discussed in Kallstrom v. Yip:

> [455] Our Court of Appeal instructs us that, properly considered, homemaking costs are awarded for loss of capacity, are distinct from future cost of care claims, and thus require separate assessment: Westbroek v. Brizuela, 2014 BCCA 48. In that case the court stated:
>
> > [74] ... An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the accident. This is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered <u>to</u> the plaintiff rather than <u>by</u> the plaintiff. [Emphasis in original.]
>
> [456] Westbroek and other appellate decisions regarding this head of damages have instructed trial courts to adopt a "cautionary approach" to assessment "lest it unleash a flood of excessive claims" (at para. 77) but (conservative) awards can, and should, be made where the evidence at trial substantiates the loss in a meaningful way.

[149] The plaintiff submits that an appropriate award for lost domestic capacity to date would be $10,000 and for future such loss the sum of $20,000. He submits:

- he was almost totally incapacitated for the first two months after the accident;
- he is a workaholic and his long hours do not leave much time to be devoted to household issues;
- he has been unable to shovel snow and do other heavier homemaking tasks to the same degree as before; and
- future knee replacement surgery, and possibly hip replacement surgery, will impair his ability to do tasks about the home for up to four to six months.

[150] The defendant submits that the evidence in this case is insufficient to substantiate the existence of any meaningful past loss of housekeeping capacity. He does not address the future.

[151] I accept that the plaintiff's accident-related medical problems have had some small negative impact on his housekeeping capacity and likely will continue to do so in the future. In the end, however, I make no award for any loss of domestic capacity in this case. I have already factored that loss of capacity into the assessment of general damages, a factor that has served to modestly increase that particular award beyond what I might otherwise have been inclined to favour.

Special Damages and Future Care

[152] The plaintiff advises that "all but $64 in special damages have been paid by the defendant". I assume this refers to out-of-pocket expenses other than loss of earnings. I have no evidence before me supporting any claim for special damages, whether in the amount of $64 or otherwise, and any claim for such damages must be dismissed.

[153] The plaintiff also makes half-hearted submissions in support of a claim for future care costs "in or around the time of the knee and/or hip replacement surgery". He also submits there will be "some costs for various modalities of pain management, especially when the deterioration of the hip joint becomes severe".

[154] The principles applicable to the assessment of claims and awards for the cost of future care are summarized in Kallstrom v. Yip, but I will not repeat them here. Suffice it to say admissible evidence must be tendered to substantiate not only the amount that will be incurred but also the medical justification and the reasonableness of items claimed. No such evidence has been tendered and no award is made under this heading.

Summary of Award and Costs

[155] In summary, I award the plaintiff the following amounts as damages against the defendant:

Non-pecuniary general damages	$	125,000.00
Loss of past earning capacity (plus pre-judgment interest to be calculated)	$	23,000.00
Loss of future earning capacity	$	175,000.00
Loss of domestic capacity		Nil
Special damages and cost of future care		Nil
Total	$	323,000.00

[156] Absent any further submissions from the parties respecting costs, costs will follow the event and are awarded to the plaintiff to be assessed under scale B of Appendix B to the Supreme Court Civil Rules. Should either party wish to apply for a different disposition of costs, that party is at liberty to make submissions in writing within 21 days of the date of this judgment. Those submissions must be filed and served forthwith upon the other party and the latter is at liberty to file response submissions in writing no later than 10 days from the date of service.

"KENT J."