

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Benson v. Day*,
2014 BCSC 2224

Date: 20141127
Docket: M136081
Registry: New Westminster

Between:

Robert Paul Benson

Plaintiff

And

Kim Trina Marie Day and Dana Andrew Paynter

Defendants

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:

P.G. Kent-Snowsell

Counsel for the Defendants:

D.C. Fong
P.W. Bruce

Place and Date of Trial:

New Westminster, B.C.
October 20 - 24 and 27 - 29, 2014

Place and Date of Judgment:

New Westminster, B.C.
November 27, 2014

Introduction

[1] This is an action for damages for personal injuries sustained by the plaintiff Robert Benson in a motor vehicle accident that occurred on July 16, 2009 at the intersection of 240th Street and Fraser Highway in Langley, British Columbia (the “accident”).

[2] Liability for the accident is admitted. However, the defendants take issue with the quantum of damages claimed by the plaintiff under various heads.

[3] The central issue in the case is the extent of the injuries sustained by the plaintiff as a result of the accident and the impact of those injuries on his personal life and his ability to fulfill his employment obligations. Another significant issue is whether the plaintiff properly mitigated his damages given his failure to pursue any meaningful treatment for his injuries.

Review of the Evidence

The Plaintiff

[4] Mr. Benson was born on April 12, 1957 and is currently 57 years old.

[5] He was raised in Ontario and has a grade 12 education. Following graduation from high school, he worked at a number of different jobs, including as a metal fabricator, in a wholesale sporting goods business, selling insurance, and as a drywaller.

[6] Mr. Benson is divorced with two adult children. He is currently in a relationship with Kimberley Carriere, who testified at the trial.

[7] He lives alone in a rented basement suite in Abbotsford.

Pre-Accident Employment and Activities

[8] Mr. Benson moved to British Columbia in 1997. Upon his arrival here, he worked for six years for the Neilson television ratings company but in 2003 he returned to the construction business.

[9] Initially he worked for himself, renovating and selling houses. At some point prior to the accident in 2009, he joined a company called Burnik Drywall (“Burnik”) where he worked as a steel stud framer, which involves erecting steel studs for the construction of internal walls on construction projects. Burnik subsequently changed its name to Artisan Interior Contracting (“Artisan”). He was working for Burnik at the time of the accident.

[10] Mr. Benson testified that prior to the accident, he enjoyed socializing with friends and golfing periodically. He said that he was a social person, for example he enjoyed being with the people from work. He also enjoyed going to movies and to restaurants with his girlfriend.

[11] According to Mr. Benson, before the accident he had no physical or emotional problems that interfered with his social life or his ability to do his work.

[12] Floyd Tayler is Mr. Benson’s current landlord and has known him for about ten years. Prior to the accident, Mr. Tayler occasionally socialized with Mr. Benson, along with their respective girlfriends. Mr. Tayler described Mr. Benson as a social and fun person.

[13] Mr. Tayler also did some work with Mr. Benson on some home renovation projects. He described Mr. Benson as a good worker who did meticulous work. He never observed Mr. Benson having any physical difficulties with the work nor did he observe any emotional or psychological issues.

The Accident

[14] The accident occurred at around 7:00 p.m. on July 16, 2009, which was a Thursday. Mr. Benson was driving a 1999 Chevrolet Venture van and was travelling from his then home in Langley to a friend’s house before continuing on to a new house that he was moving into.

[15] He was heading north on 240th Street and came to a stop at a red light at the intersection with Fraser Highway. According to Mr. Benson, he waited for the light to

change to green then he entered the intersection. On doing so, he saw a blur to the left then was struck by another vehicle. The force of the impact caused his van to spin around such that it ended up facing south east. According to the examination for discovery evidence of the defendant driver, she estimated that she was going about 80 km/h when she struck Mr. Benson's van.

[16] Emergency personnel attended the accident scene. Mr. Benson said that he spoke to a police officer, but cannot remember what he said. He said he was asked by a paramedic if he wanted to go by ambulance to the hospital, but he did not want to leave his van as it contained personal effects that he was in the process of moving to his new house. Ultimately he left the scene with the tow truck which towed his van to the friend's house that he had been intending to visit.

[17] Photographs entered into evidence show significant damage to the front driver's side corner of Mr. Benson's van. The van was ultimately determined to be a write-off.

Post-Accident Complaints

[18] Mr. Benson said that when the other vehicle struck him, he hit his head on the door frame of his van. In addition, his knee and thumb struck the console.

[19] He initially felt numb, but quickly began to experience headaches, and neck and back pain.

[20] The day after the accident, which was a Friday, he did not go to work as he was very stiff and sore in his head, neck, shoulders and back. He also continued to have headaches and felt confused. He thinks he went to a walk-in clinic that day.

[21] Mr. Benson rested over the weekend, but then did not go to work again the following Monday as he still had a headache, was sore all over and felt confused.

[22] He did return to work on the Tuesday but said that he was still experiencing headaches, neck, back and shoulder pain.

[23] According to Mr. Benson, he continued to experience pain for the next six months. Throughout that period, he had difficulty moving materials and had to have others do it for him. He said he also had trouble remembering important details, for example measurements taken off blueprints. Mr. Benson said that he had never had this problem before as he had always been a “numbers guy”.

[24] He also testified that he experienced dizziness and balance problems. As part of his work, he regularly had to step up onto a bench to do work above his head which he found difficult due to the balance issues.

[25] Mr. Benson said that these problems have continued largely unabated. He testified that he is constantly in pain. In his own words, he said that he “never gets a break”. He has daily headaches as well as pain in his neck, shoulders and back. He takes prescription and over the counter medications to deal with the pain, but says they offer only temporary relief. He believes that he has gotten worse since the accident.

[26] It was apparent from Mr. Benson’s testimony that the physical pain causes him considerable emotional distress.

[27] Mr. Benson said he continues to experience anxiety when he drives, which is particularly acute when he is near intersections or bridges. He said that he tries to avoid busy streets by travelling on back roads. He also said that he does not like to travel as a passenger as he gets very anxious about not being in control of the vehicle.

[28] Mr. Benson said that since the accident, he has also suffered from significant tinnitus or ringing in his ear. He says that he experienced this condition occasionally before but now it is much more constant and of a much greater magnitude. Some days it is so bad that he can barely hear.

Post-Accident Employment and Activities

[29] Mr. Benson continued to work for Burnik/Artisan after the accident and up until late 2012.

[30] He said that in the months following the accident, he was able to function at work by avoiding activities that would aggravate his condition. For example, he avoided lifting large bundles of construction materials, often having other labourers do that for him.

[31] In October of 2009 he was promoted to the position of foreman which generally involved lighter, supervisory work although he said that he still “put on his tools” periodically. He also did more touch-up or repair work which was similarly less physically demanding.

[32] Notwithstanding the lighter demands, Mr. Benson said that he missed work periodically or worked shorter hours due to his condition. I will address this in greater detail below when considering his claim for past wage loss.

[33] Mr. Benson also testified that he continued to have difficulty with some of the mental demands of the job, for example remembering dimensions or other figures found on drawings and plans.

[34] Mr. Benson left Artisan in November 2012 when the employer started bouncing payroll cheques. He went to work for another construction company called Rusco, again as a steel stud framer. He was working on the construction of a large luxury home being built on Point Grey Road in Vancouver. At Rusco, he was paid much better, receiving \$32.50 per hour as a framer, compared to the \$25.00 per hour he was paid by Burnik/Artisan as a foreman (\$23.00 per hour as a framer).

[35] When that project wrapped up, Mr. Benson says that he was told that Rusco had another project starting in North Vancouver, but he did not want to go to that project because he was unwilling to make the daily drive.

[36] While working for Rusco, on March 7, 2013, Mr. Benson injured his knee. In an incident report that he completed, Mr. Benson noted that he hit his right knee with a hammer and then about an hour later his knee gave out when walking on uneven ground. Included with the incident report is a list of 15 days during the period of March 8 to June 15, 2013 on which Mr. Benson claimed to have missed work due to problems with his knee. It is not entirely clear how those dates align with the period in which the Point Grey Road project completed and Mr. Benson declined to go to work at the North Vancouver project.

[37] In or around June of 2013, he was hired by Centurion Contracting, initially as a framer, but he was later promoted to foreman and then project manager. He held that position until March of 2014, when it ended for reasons that were not fully explained, but seemed to involve a dispute between Mr. Benson and one of the principals of the company. In June of 2014, he obtained employment with Inline Drywall ("Inline") as a steel stud framer, however he says he was laid off after about a month because he was too slow in his work. He was subsequently rehired and continued to work at Inline at the date of the trial.

[38] Mr. Benson testified that since the accident, he engages in virtually no social or recreational activities. He has been in a relationship with Ms. Carriere since early 2012 but he says that they do very little together because of his condition.

[39] He will often go to Ms. Carriere's house after work and have dinner with her. Occasionally he will stay the night, but more often than not he will go home because Ms. Carriere tells him that he is restless and talks in his sleep which keeps her awake. Mr. Benson says that he and Ms. Carriere do not have an intimate life as it is too painful for him.

[40] Ms. Carriere confirmed that while she and Mr. Benson are in a relationship, they rarely do anything together other than occasionally go out to dinner in the neighborhood. She said that Mr. Benson often has no energy and simply falls asleep watching television at her house. He also gets quite emotional, especially when discussing the accident.

[41] I note that Mr. Benson and Ms. Carriere have only been together since early 2012 so she has no knowledge of his pre-accident condition.

[42] As noted, Mr. Benson said that since the accident he has had difficulty driving in that it causes him to get anxious, particularly around intersections. He often takes back roads to avoid intersections.

[43] Mr. Benson said that he also has difficulty cleaning his basement suite, particularly doing anything that involves bending or twisting. He said that Ms. Carriere assists him with the cleaning, which she confirmed in her testimony.

[44] Mr. Tayler, who again is Mr. Benson's current landlord, testified that since the accident, Mr. Benson has become much more subdued and withdrawn and rarely wants to socialize. He has also witnessed Mr. Benson get emotional and frustrated, particularly about memory problems.

[45] In cross-examination, Mr. Tayler indicated that when Mr. Benson moved into the basement suite in his house in 2010, he was much more social and would regularly go out with Mr. Tayler, for example they had a fairly regular pub night on Mondays. According to Mr. Tayler, the most significant changes in Mr. Benson's personality have occurred since 2012 and it has been a steady decline since then.

Medical Evidence and Treatment History

1. Dr. Pardeep Rai

[46] Dr. Pardeep Rai is a general practitioner who treated Mr. Benson twice in 2011, on March 13 and March 27. Dr. Rai practices as part of a walk-in-clinic along with other family practitioners, some of whom saw Mr. Benson at other times. Dr. Rai wrote a report dated June 15, 2012 in which he stated that Mr. Benson exhibited signs and symptoms of soft tissue injury to his upper back and neck. He also indicated that Mr. Benson suffered from post-concussion syndrome and that he was developing signs and symptoms of mild post-traumatic stress or specific phobia disorder.

[47] In his notation concerning his first visit with Mr. Benson on March 13, 2011, Dr. Rai records that he discussed Mr. Benson's anxiety about driving and notes "advice regarding cognitive behavioral therapy for desensitizing patient's fear of intersections was advised and recommended".

[48] An earlier notation noted in the report, relating to a visit with a different doctor on August 8, 2009, shortly after the accident, states that Mr. Benson was diagnosed with muscle strain and "advised to take anti-inflammatory medications in addition to start physiotherapy".

2. Dr. Hendre Viljoen

[49] Dr. Hendre Viljoen is a psychologist who conducted neuropsychological assessments of Mr. Benson, the results of which are set out in reports dated October 11, 2012 and July 25, 2014.

[50] In terms of Dr. Viljoen's first report, the assessment took place over two days on June 11 and 12, 2012 and involved an interview with Mr. Benson, a review of available medical records and a number of different tests intended to measure such things as his intellectual abilities, academic skills, attentional functioning, memory and learning abilities, speech and language abilities and executive functions or higher-order cognitive abilities.

[51] Mr. Benson tested within the normal or average range on many of these tests with a mild impairment in his attentional functioning, which refers to the ability to maintain concentration or attention. Dr. Viljoen characterized Mr. Benson as exhibiting mild cognitive difficulties which, based on Mr. Benson's self-report, cause him some difficulty. According to Dr. Viljoen, those difficulties are principally with remembering details from blueprints and drawings, the same difficulties that Mr. Benson testified to at trial.

[52] Based on Mr. Benson's own description of his pre-accident functioning, as well as information gleaned from a telephone conversation with Mr. Benson's friend

Floyd Tayler, Dr. Viljoen thought it reasonable to conclude that the ongoing difficulties experienced by Mr. Benson are the consequence of the accident.

[53] Based on his assessment, Dr. Viljoen was of the opinion that Mr. Benson met the criteria for a Mild Traumatic Brain Injury (MTBI). He noted that most individuals recover from an MTBI within about two years with no lasting consequences, but a small percentage experience ongoing symptoms, particularly where there are secondary emotional symptoms relating to the initial incident or to some other cause.

[54] Dr. Viljoen noted that Mr. Benson exhibits significant emotional symptoms particularly when travelling by car. While he had a number of symptoms associated with a post-traumatic stress disorder, he did not meet the full criteria for that diagnosis. However, according to Dr. Viljoen, an appropriate diagnosis would be Adjustment Disorder with Anxiety.

[55] Of some note, Dr. Viljoen stated in his report that it was apparent that “certain avenues of treatment have not yet been fully explored and need to be aggressively pursued”. Specifically, he recommended counselling/psychotherapy to address Mr. Benson’s anxiety and emotional distress, a comprehensive physical rehabilitation program to address his pain complaints and occupational therapy to assist him in functioning at work with the identified mild cognitive issues.

[56] Dr. Viljoen did a follow up assessment on July 14, 2014, the results of which are set out in his second report dated July 25, 2014. His findings and opinions from the second assessment are generally consistent with those set out in his first report. Recalling his treatment recommendations from the earlier report, Dr. Viljoen stated:

Mr. Benson has not as yet had the opportunity to undergo appropriate treatment of his emotional, physical, and cognitive limitations, and it remains unclear to what extent his level of functioning can be improved through further appropriate treatment. However, given the extent to which his symptoms and level of dysfunction has remained constant over time would tend to suggest that significant improvement in function would be unlikely.

[57] Dr. Viljoen repeated his earlier treatment recommendations and recommended as well as a vestibular assessment to address Mr. Benson's reported difficulties with balance and dizziness when working on ladders and benches.

[58] In cross-examination, Dr. Viljoen agreed that the recommendations for aggressive treatment set out in his first report, again prepared in 2012, were premised on the notion that early treatment of physical, emotional and cognitive problems generally leads to better results.

3. Dr. Mark Adrian

[59] Dr. Mark Adrian is a specialist in physical medicine and rehabilitation who saw Mr. Benson on August 10, 2012 and August 8, 2014 at the request of his counsel. In his expert report prepared following the initial assessment, Dr. Adrian diagnosed Mr. Benson as suffering from chronic mechanical spinal pain, meaning pain stemming from the musculoskeletal structures of the spinal column. According to Dr. Adrian, this accounts for the pain in Mr. Benson's neck and mid and lower back.

[60] In terms of prognosis, Dr. Adrian opined that because Mr. Benson had continued to experience pain for over two years after the date of the accident, it was unlikely that his condition would improve significantly. However, he also stated that it was unlikely that the condition would further deteriorate.

[61] Like Dr. Viljoen, Dr. Adrian suggested that Mr. Benson would benefit from the involvement of a skilled physiotherapist to develop a proper fitness program.

[62] At the time of his follow-up assessment in August 2014, Dr. Adrian recorded Mr. Benson as continuing to experience daily headaches, neck pain and mid and lower back pain. Dr. Adrian reiterated his diagnosis of mechanical spinal pain as well as his prognosis that the condition is unlikely to improve given the passage of time since the accident. He also repeated his recommendation that Mr. Benson engage in a proper fitness program.

4. Dr. Michael Piper

[63] Dr. Michael Piper, an orthopaedic surgeon, examined Mr. Benson at the request of the defendant on July 3, 2014 and the results of his examination are set out in his report of the same date. Dr. Piper was not required to attend the trial for cross-examination.

[64] According to his report, Dr. Piper was of the opinion that Mr. Benson suffered from a degree of degenerative spondylosis involving both the cervical and lumbar spine which was apparently asymptomatic prior to the accident. He was further of the view that Mr. Benson probably suffered a mild to moderate soft tissue injury to both the cervical and lumbar spine as a result of the accident.

[65] Dr. Piper described the treatment received to date by Mr. Benson for his orthopaedic complaints as “woefully inadequate” and he recommended that Mr. Benson engage in an active rehabilitation program directed towards his neck and low back.

Physical Capacity Evaluation and Vocational Assessment

1. Katie Barr

[66] Ms. Katie Barr, who is a registered physiotherapist, conducted a physical capacity evaluation of Mr. Benson on July 7, 2014, the results of which are set out in a report dated July 23, 2014. The evaluation involved administering a number of tests intended to measure Mr. Benson’s physical strengths and limitations as they related to the job requirements of various occupations as defined by the National Occupational Classification (NOC).

[67] In her report, after setting out the results of the various tests, Ms. Barr states:

In my opinion, with consideration only to his present physical capacity, Mr. Benson is considered *non-competitively employable*, with the potential to work in limited and light strength occupations on at least a part-time basis (for example, 3 to 5 days per week, 4 to 8 hours per day). AS stated above, his ability to work on a full-time basis would be contingent upon the strength demands of his selected occupation being a good match to his physical abilities.

Mr. Benson is considered to be *non-competitively employable* because he has some physical limitations that restrict his access to the full range of occupations for which he would otherwise be qualified. These restrictions would require him to have modified job duties, extra rest breaks, part-time hours, or other environmental/ergonomic intervention, which may limit the number of job titles that he is able to obtain or maintain.

[68] Ms. Barr then went on to consider Mr. Benson's capacity to meet the demands associated with being a steel stud framer or a foreman of a steel stud framing crew:

Based on the NOC, he does not meet the strength demands of a steel-stud framer and given his other limitations, such as to standing, walking[,] bending, crouching/kneeling and reaching), he would not be expected to qualify for all jobs designated within this title.

However, based on Mr. Benson's self-reports, his specific job demands as a steel-stud framer are primarily of [a light] nature (i.e. requiring that he handle loads weighing 9.1 kilograms or 20 pounds or less), with the rare requirement for lifting/carrying of 18.2 kilograms (40 pounds). He also indicated that his job demands involve multiple limb coordination (that is, demands also include climbing and balancing) but minimal demands for crouching or kneeling.

Therefore, based on Mr. Benson's self-reports, he would be expected to qualify for some of the strength demands of the job but not all, i.e. potential restrictions apply to lifting from floor level, lifting 18.2 kilograms (40 pounds) and performing some strength activities on a frequent basis. He also presents with limitations to balancing and climbing...

With respect to his pre-injury role as a foreman of a steel-stud framing crew, this job title is defined in the NOC under the category of *Contractors and Supervisors, Metal Forming, Shaping and Erecting Trades (#7214)*. The NOC describes positions under this heading as requiring light strength (i.e. the ability to handle loads of up to 10 kilograms or 22 pounds) and the ability to work in other body positions (such as sitting, standing and walking) and perform upper limb coordination (such as reaching and handling).

Based on the NOC, Mr. Benson meets the strength demands of this aspect of his job, although he may have limitations to strength activities, if required on a frequent basis. He also demonstrates potential limitations to standing, walking, reaching and handling, as outlined above.

[69] When questioned in cross-examination about the fact that Mr. Benson had maintained fairly steady full time employment since the accident and whether that would affect her opinion about his capacity, Ms. Barr noted that, based on his self-report, Mr. Benson has had to rely extensively on pain medications to work and she also expressed concern about his safety given his balance and climbing issues.

[70] As with many of the medical practitioners, Ms. Barr noted that Mr. Benson had minimal treatment for his conditions and she recommended he pursue treatment, including physiotherapy, psychological therapy and occupational therapy.

2. Derek Nordin

[71] Mr. Derek Nordin is a vocational rehabilitation consultant who conducted a vocational assessment of Mr. Benson, the results of which are set out in a report dated July 25, 2014. The assessment involved an interview with Mr. Benson and various vocational tests, both of which took place on July 17, 2014, and a review of background information provided to Mr. Nordin.

[72] Based on his assessment, Mr. Nordin was of the opinion that Mr. Benson would likely have difficulty finding and maintaining work as a steel stud framer and, even more so, as a foreman in that field. However, given his age, Mr. Nordin also thought that vocational retraining was not appropriate for Mr. Benson. Rather, he suggested that Mr. Benson would likely continue to seek work as a framer but that he would be at significant risk for being let go and that he would likely experience longer periods of unemployment.

[73] Mr. Nordin's opinion is based in part on Mr. Benson's self-report that he lost his job with Inline because he was too slow. He does not account however for the fact, which he was unaware of when he wrote the report, that Mr. Benson was subsequently rehired by Inline and that he continues to work there.

Video Surveillance

[74] The defendant arranged for surveillance of Mr. Benson that took place at various times between August 2 to September 27, 2014. During some of that surveillance, Mr. Benson was filmed and a recording was produced and entered into evidence. By and large, the recording simply shows Mr. Benson arriving at or departing from a construction job site located at 999 Seymour Street in Vancouver.

[75] On three occasions, August 26, September 23 and September 25, 2014, Mr. Benson was observed driving on Highway 1. The investigative report notes the

investigators' observations that on those occasions, Mr. Benson was observed driving fast, in excess of 120 km/h on one occasion and 140 km/h on the other, and was seen making abrupt lane changes.

[76] The estimates of his speed were provided by the two investigators who conducted the surveillance, both of whom agree that they did not have calibrated speedometers in their vehicles nor did they have any training in estimating speeds.

Findings with Respect to the Plaintiff's Condition

[77] Before setting out my findings with respect to Mr. Benson's condition, I will touch first on his credibility.

[78] The defendants submit that Mr. Benson's evidence concerning his complaints of ongoing chronic pain, cognitive difficulties and anxiety lacks credibility and reliability. They say that he has overstated the impact of his injuries, particularly as they affect his employment.

[79] In contrast, counsel for Mr. Benson submits that Mr. Benson gave his evidence in an honest and straight forward manner and that, if anything, he understated the impact of his condition. Counsel submits that Mr. Benson was not seriously challenged in cross-examination about his complaints and that his evidence was largely corroborated by Ms. Carriere and Mr. Tayler.

[80] On balance, I found Mr. Benson to be a generally credible witness. He did not appear to embellish his complaints and in fact presented as quite a stoic individual, although occasionally he got emotional about the impact of the pain he experiences and I found him to be genuine in that regard.

[81] There was also a high degree of consistency in his evidence in terms of how he described his condition in court and how he described it to the various physicians who examined him. For example, he described his frustration about his memory problems given that he had always been a "numbers guy". That is the same way that he described the problem to the physicians.

[82] That said, there are reliability issues with some of his evidence, for example with respect to his claim for past wage loss where he has apparently included claims for lost wages on various weekends and statutory holidays even though he typically worked a Monday to Friday week. I will return to this below.

[83] Mr. Benson's claim of constant anxiety while driving is also belied somewhat by the surveillance evidence where the investigators witnessed him driving on Highway 1 at excessive speeds on three occasions in August and September, 2014. The surveillance evidence of course offers only a brief snapshot of Mr. Benson's activities over a relatively brief period of time, but it is some evidence that his driving anxiety is not as disabling as he claims, as is the evidence that he drove between Abbotsford and Vancouver daily to go to and from work.

[84] Turning to his condition, the evidence is uniform that Mr. Benson suffered soft tissue injuries to his neck and back as a result of the accident. I accept his evidence that he continues to suffer pain some five years after the accident and that his condition is chronic as found by Dr. Adrian. Dr. Adrian also expressed the view that Mr. Benson's condition is unlikely to improve, but is also unlikely to get worse over time.

[85] I accept as well that Mr. Benson continues to suffer from anxiety and emotional distress as a result of the accident. In this regard, Dr. Viljoen's diagnosis of Adjustment Disorder with Anxiety was not challenged.

[86] However, I do not accept that the anxiety is as disabling as Mr. Benson claims. Again, while accepting the limited value of the surveillance evidence, the fact that he is clearly able to drive to and from work, and to do so on a busy highway, diminishes somewhat his claim concerning the impact of the anxiety on his ability to drive.

[87] I also accept that Mr. Benson has experienced some cognitive issues resulting from the accident, most notably in terms of his memory. Again however, these difficulties are not as severe as claimed. Dr. Viljoen characterized Mr. Benson's cognitive issues as "mild" and "relatively subtle", noting that his neurological test results, including for memory and learning, were within normal

ranges. The impact of these “subtle” issues must also be considered in light of the fact that Mr. Benson was promoted to and functioned in a foreman’s job after the accident.

[88] Nonetheless, I find that Mr. Benson continues to experience some residual cognitive issues resulting from the accident.

[89] I also find that his injuries have impacted Mr. Benson in his personal life, in that he is less active than before the accident and his general enjoyment of life has been diminished. He has also been affected in his work, although, as I will discuss below, the impact on his ability to work is less than what he claims.

Analysis

Non-pecuniary Damages

[90] Non-pecuniary damages are awarded to compensate an injured person for pain, suffering, loss of enjoyment of life and loss of amenities. The principles governing the assessment of such damages are well known and have been discussed in numerous cases: see *Stapley v. Hejset*, 2006 BCCA 34 at para. 46.

[91] Awards of non-pecuniary damages in other cases provide a useful guide to the court, however the specific circumstances of each individual plaintiff must be considered as an award of damages is intended to compensate that individual for the pain and suffering that he or she has or will experience: see *Trites v. Penner*, 2010 BCSC 882 at para. 189. Moreover, the compensation award must be fair and reasonable to both parties: see *Miller v. Lawlor*, 2012 BCSC 387 at para. 109 citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

[92] Mr. Benson submits that an award of \$150,000 in non-pecuniary damages is appropriate in this case. He cites the following authorities in support of that position:

- a) *Brown v. Bevan*, 2013 BCSC 2136: The 63 year old plaintiff suffered soft tissue injuries to her neck and upper torso that resulted in her experiencing chronic pain some four and one-half years after the accident. While she continued to function both at home and work, she was in

constant pain and completes tasks at a level much lower than she used to. The court awarded her \$95,000.00;

- b) *Fadai v. Cully*, 2014 BCSC 290: The 28 year old plaintiff suffered soft tissue injuries to his head, neck, shoulder and wrist as well as severe headaches, all of which resolved about a year after the accident. In addition, he suffered a mild traumatic brain injury which caused short term memory problems for about two years. The court awarded him \$100,000.00;
- c) *Dunne v. Sharma*, 2014 BCSC 1106 [*Dunne*]: The 25 year old plaintiff suffered soft tissue injuries to her neck and back as a result of two accidents. The injuries interfered with her ability to perform her work and to engage in her usual recreational activities. She also experienced headaches and psychological distress as a result of the accidents. The court awarded her \$110,000.00;
- d) *Goguen v. British Columbia*, 2002 BCSC 1598: The 50 year old plaintiff suffered serious facial and wrist injuries as well as a mild traumatic brain injury when he was thrown from his bicycle while riding on the Alex Fraser Bridge. The wrist injury was permanent as were his disabling psychological and cognitive problems. He was awarded \$125,000.00;
- e) *Han v. Chahal*, 2013 BCSC 1575: The 38 year old plaintiff suffered a serious injury to her femur, requiring two surgeries, and a moderate injury to her wrist in the accident. While the injuries appeared to heal well, at trial she continued to complain of chronic pain as well as depression and anxiety. The court awarded her \$140,000.00;
- f) *Hill v. Murray*, 2014 BCSC 1528: The plaintiff suffered soft tissue injuries to her neck and shoulder resulting in headaches and chronic intermittent pain. She also experienced symptoms of post-traumatic stress disorder and a mild traumatic brain injury which caused her to suffer fatigue,

memory, concentration and balance problems. She was awarded \$120,000.00; and

- g) *McCarthy v. Davies*, 2014 BCSC 1498: The 47 year old plaintiff suffered soft tissue injuries to her neck, shoulder, upper back and lower back in the accident which exacerbated her pre-existing degenerative disc disease, and these symptoms continued to bother her four years after the accident. She also experienced mental distress associated with her chronic pain. The court awarded her \$100,000.00.

[93] The defendants submit that a more reasonable award of non-pecuniary damages is in the range of \$50,000.00 - 75,000.00. They cite the following cases:

- a) *Pichugin v. Stoian*, 2014 BCSC 928: The 57 year old plaintiff suffered soft tissue injuries to his neck and back as well as tinnitus. The injuries caused him pain and discomfort for approximately one and a half years after the accident. His symptoms largely resolved but he continued to experience ongoing periodic pain and discomfort related to physical activity. He was awarded \$48,000.00;
- b) *Sedor v. Snider* (1999), 93 A.C.W.S. (3d) 836: The 45 year old plaintiff suffered moderately severe soft tissue injuries to her neck, shoulders and lower back. The pain in her back resolved within a few months but her neck pain persisted along with regular headaches. She also suffered from depression as a result of the accident. The court awarded her \$50,000.00; and
- c) *Bansi v. Pye*, 2012 BCSC 556: The plaintiff, who was 37 at the time of the trial, suffered soft tissue injuries to his neck and back and related injuries in two accidents that occurred three years apart. At the time of the trial, almost four years after the second accident, he continued to experience back pain which the court characterized as chronic and unlikely to improve. He was awarded \$75,000.00.

[94] I have reviewed the various cases cited by the parties, keeping in mind again that each case is different and that damages must be assessed on the basis of the particular circumstances of the individual plaintiff. Given the chronic nature of Mr. Benson's physical injuries and his ongoing emotional and albeit minor cognitive difficulties, and the impact on his activities and general enjoyment of life, I find that a reasonable award of non-pecuniary damages is \$110,000.00.

Past Wage Loss

[95] Mr. Benson claims \$20,575.50 in past wage loss which he calculates based on the number of hours or days that he says he missed work due to accident related issues in the years 2009 to 2014 up to the date of trial. According to Mr. Benson, he typically submitted invoices to his employers for his work. In order to calculate his past wage loss claim, he reviewed his invoices and added up the number of hours or days missed, then multiplied that number by his applicable wage rate. The calculation was based on a standard eight-hour day. This approach was used for the 2009 to 2012 period.

[96] He does not advance a claim for 2013 because, as I understand it, he spent time in Ontario after the Rusco project on Point Grey Road completed. For 2014, he does not have invoices, but he calculates a loss of \$7,000.00 for the period of June 23 to August 8 when he said he was laid off for being too slow.

[97] The defendants point out a number of flaws in this approach. First, they say that the evidence establishes that Mr. Benson did not always work an eight hour day. Mr. Benson admitted in cross-examination that, depending on the project and the nature of the work, there may not be eight full hours of work in a day.

[98] Second, Mr. Benson's summary of days missed includes a number of weekend days and statutory holidays. While he did say that on some jobs they did work outside of the standard work week, he could not in fact say if the days in issue were ones that he would in fact have worked, but for his injuries.

[99] Third, the defendants point to a number of days in Mr. Benson's summary where he was in fact attending appointments and assessments related to the preparation of his legal case, for example he claims to have missed eight hours on each of June 11 and 12, 2012 when he was in fact being assessed by Dr. Viljoen. On this point, the plaintiff submits that even so, he was attending the assessment as a direct result of the accident caused by the defendant driver's negligence.

[100] Fourth, the defendants submit that Mr. Benson has not established that he was laid off in June of 2014 for being too slow because of his injuries. They say that if that were the case, it makes no sense the he was then re-hired shortly thereafter. They say further that this time period coincides exactly with when Mr. Benson was preparing for the litigation, for example attending various medical appointments as well as his examination for discovery.

[101] The defendants submit that the only proven past wage loss is \$400.00 for the two days of work Mr. Benson missed immediately after the accident.

[102] I agree that there are a number of flaws in Mr. Benson's approach. In addition to the above, I note that based on the summaries of payments made to Mr. Benson by Burnik/Artisan in the years 2009 to 2011 that were in evidence, there was no discernible decrease in Mr. Benson's annual income following the accident.

[103] That said, I am satisfied on the basis of Mr. Benson's evidence that he did miss work periodically in the period of 2009 to 2011 as a result of his injuries suffered in the accident. His calculation of the loss for that period is \$13,575.50. Taking account of the fact that, as noted, some of the days claimed were on weekends and statutory holidays and that there was no guarantee that he would have in fact work eight hours per day, I think a reasonable award for this period is 50% of that claimed, or \$6,787.75. I would not award any past wage loss for 2014 as I am not satisfied that Mr. Benson has proven a loss resulting from his accident related injuries.

Loss of Future Earning Capacity

[104] Mr. Benson seeks an award of damages for loss of future earning capacity in the range of between approximately \$195,000.00 and \$235,000.00.

[105] The lower figure assumes that Mr. Benson would earn \$45,000.00 per year until age 70 but for the accident. It further assumes that his capacity to work is diminished by 40%. Using calculations supplied by Robert Carson, an expert economist, the present value of Mr. Benson's loss under this scenario is \$195,138.00.

[106] The higher figure in the range uses the same methodology but assumes an annual income for Mr. Benson of \$54,242.00. This figure is the average of the annual incomes suggested by Mr. Nordin in his report, for a steel stud framer and a foreman in the construction industry, and was calculated using census data. Again, assuming that Mr. Benson would work to age 70 with a 40% reduced capacity, results in a present value loss of \$235,215.00.

[107] In support of his claim, Mr. Benson relies on the expert opinions of Dr. Viljoen, Ms. Barr and Mr. Nordin that ongoing effects of his injuries will limit his ability to fulfill his employment obligations in the future.

[108] Mr. Nordin succinctly stated his opinion in these terms:

... I believe the most likely vocational path for him will be to continue to seek employment as a framer. That being said, I am of the view that he is at significant risk for being let go and concomitantly experiencing longer periods of unemployment.

[109] The defendants submit that Mr. Benson has not proven that there is a real and substantial possibility that he will suffer any loss of capacity as a result of the accident. They note that he was promoted to a foreman position after the accident in which he was able to function and was paid at a higher wage rate. They say that the fact that Mr. Benson suffered no significant past wage loss, other than the two days immediately following the accident, is inconsistent with his claim to a future loss of capacity.

[110] The defendants submit further that the various expert opinions that discuss Mr. Benson's employability ignore the fact that he was rehired by Inline after a brief lay-off in the summer of 2014 and that he continues to be employed as a steel stud framer.

[111] They submit that the calculations on which Mr. Benson relies, which assume employment at a steady rate of pay to age 70, ignore the fact, based on census data, that a significant percentage of workers in the construction industry leave the work force after age 55 and that those who stay tend not to work full-time.

[112] In *Morgan v. Galbraith*, 2013 BCCA 305, the Court of Appeal, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, described the approach to be taken by the trial judge when assessing a claim for loss of future earning capacity. Madam Justice Garson stated at para. 53:

... in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach...or the capital asset approach, ...

[113] The earnings approach is generally appropriate where the plaintiff has some earnings history and where the court can reasonably estimate what his/her likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43 [*Pallos*]; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233 [*Gilbert*]. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment not mere calculation.

[114] The capital asset approach, which is typically used in cases in which the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff:

- i) has been rendered less capable overall of earning income from all types of employment;
- ii) is less marketable or attractive as a potential employee;
- iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and
- iv) is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8 [*Brown*]; *Gilbert* at para. 233.

[115] I find that Mr. Benson has established a real and substantial possibility that his earning capacity has been impaired. As noted, that is the opinion of many of the experts who have examined and assessed Mr. Benson, including Dr. Adrian who is of the view that Mr. Benson is “permanently, partially disabled as a result of the injuries suffered in the accident”. These opinions have not been contradicted.

[116] That said, I do not accept that the impairment of Mr. Benson’s earning capacity is as extensive as he claims. Given the fact that he has been able to function at work for over five years since the accident with minimal interruption or wage loss, the 40% diminished capacity proposed by Mr. Benson for the balance of his working life is excessive. I am also of the view that a steady and undiminished income to age 70 overstates the likely earnings that Mr. Benson would have achieved but for the accident. As submitted by the defendants, that fails to account for the exodus of older workers from the construction industry and the diminishment in their pay.

[117] In the circumstances, I think a reasonable award is the equivalent of two years’ income in his regular occupation as a steel stud framer. As noted by Mr. Justice Finch, as he then was, in *Brown* at p. 6, this approach reflects the diminished capacity but also acknowledges the uncertainty about how much work he is likely to miss and when that will occur.

[118] According to his filed income tax returns, Mr. Benson reported the following income for the years 2009 to 2013:

| | |
|------|-------------|
| 2009 | \$41,478.15 |
| 2010 | \$43,826.06 |
| 2011 | \$33,929.13 |
| 2012 | \$45,426.46 |
| 2013 | \$59,728.14 |

[119] The average of these figures is \$44,877.59.

[120] Each of these figures represents the gross business income claimed by Mr. Benson. His reported net income was significantly less each year after deducting expenses such as meals and entertainment, telephone and utilities and motor vehicle costs. However, I agree with Mr. Carson who testified that in calculating income loss, it may be more accurate to use the gross figures as they better reflect the wages earned by the employee.

[121] For example, an employee would not normally be entitled to claim motor vehicle expenses or meals and entertainment as a deduction from his employment income. Mr. Benson apparently did so because he functioned as an independent contractor, contracting his services to the various construction companies. Whether or not such a deduction would be permitted if Mr. Benson's income tax returns were audited, as Mr. Carson said, the real issue is what constitutes Mr. Benson's actual wage. In my view, it is the gross amount that he was paid for his work.

[122] I note as well that the average figure of \$44,877.59 is very close to the figure of \$46,532.00 identified by Mr. Nordin as the average earnings for a steel stud earner in 2013. This supports using the gross figures for the purpose of calculating Mr. Benson's actual income.

[123] Rounding his average earnings in 2009 to 2013 to \$45,000.00, two years' worth of income is \$90,000.00 which I find to be a reasonable and proper award for Mr. Benson's loss of earning capacity.

Cost of Future Care

[124] Mr. Benson advances a claim for the cost of future care in the amount of \$166,330.00. This figure represents the present day value, based on calculations provided by Mr. Carson, of the cost of treatments, services and equipment that Mr. Benson says he will require over the course of his lifetime. In support, he relies on the expert report of Ms. Barr who has provided a list of such treatments, services and equipment along with the anticipated costs.

[125] The defendants submit that \$5,000.00 is an adequate award of damages for the cost of future care. They say that the only required or recommended care established on the evidence is some treatment by a physiotherapist or Kinesiologist and some psychological counselling.

[126] As a starting point, the medical evidence is uniform that Mr. Benson has not had adequate treatment to date for his physical, emotional or cognitive problems resulting from the accident. Dr. Piper's characterization of his treatment as "woefully inadequate" is accurate. I will address this point in greater detail below when considering whether Mr. Benson properly mitigated his damages but for the present, it is useful to note that all of the medical experts agreed that he would benefit from treatment.

[127] Ms. Barr recommends a variety of different treatments including a multidisciplinary return-to-work treatment program, physiotherapy, kinesiology/fitness membership, psychological counselling, a psychiatric assessment, occupational therapy and vocational training.

[128] While I found Ms. Barr to be a very good witness, she was qualified as an expert in conducting physical capacity evaluations and not as an expert qualified to opine on all aspects of Mr. Benson's required future care, particularly in respect to his psychological and cognitive issues. Accordingly, I think it is useful to review the treatment recommendations provided by the medical experts:

- a) Dr. Rai's report recommends physiotherapy for Mr. Benson's soft tissue injuries and cognitive behavioural therapy to address his driving anxiety;
- b) Dr. Viljoen recommends cognitive behavioural therapy, physical rehabilitation with a qualified physiotherapist or kinesiologist, occupational therapy to deal with Mr. Benson's cognitive issues and to develop strategies for working with his pain and a vestibular assessment for his dizziness and balance issues;
- c) Dr. Adrian recommends treatment with a skilled physiotherapist or kinesiologist as well as psychological counselling;
- d) Dr. Learn recommends psychological counselling; and
- e) Dr. Piper recommends an active rehabilitation program directed toward Mr. Benson's neck and low back.

[129] Mr. Nordin, who again conducted a vocational assessment, did not provide any treatment recommendations but, of note, he recommended against vocational retraining on the basis that Mr. Benson's optimal career path was to continue as a steel stud framer.

[130] Turning then to the recommendations in Ms. Barr's report, the evidence in my view does not establish the need for either a multidisciplinary return-to-work program or vocational training. When Ms. Barr prepared her report, she was under the belief that Mr. Benson was unemployed and that he would benefit from a gradual return-to-work program. However, this ignores the fact that he did return to work in August of 2014 and has continued to work since. In any event, the services that comprise the return-to-work program appear duplicative of other services recommended by Ms. Barr. This is true of many of her treatment recommendations.

[131] In terms of vocational training, the vocational expert, Mr. Nordin, was again of the view that Mr. Benson should not retrain but should continue in his current

occupation. Thus there is no basis for awarding damages for the costs of such retraining.

[132] It is clear from the medical evidence that the central components of a future care plan for Mr. Benson are physiotherapy or kinesiology treatments for his physical complaints, cognitive behavioural therapy for his emotional problems and some occupational therapy to deal with his cognitive issues.

[133] In terms of physiotherapy, Dr. Adrian, who is the expert best placed to opine on treatments for Mr. Benson's physical issues, did not suggest a number or a duration for physiotherapy treatments. In the circumstances, I am prepared to accept Ms. Barr's recommendation of weekly treatments for a one year period. She calculates the cost of that course of treatment to be \$4,988.00 which I accept.

[134] She then goes on to recommend a further 24 treatments per year for as long as he is experiencing symptoms. In the calculations done by Mr. Carson, he anticipates physiotherapy costs being incurred for the balance of Mr. Benson's life. In my view, the evidence does not support such an approach. As suggested by Dr. Adrian, the purpose of physiotherapy would be to instruct Mr. Benson in developing an exercise program in order to optimize his fitness. In my view, a course of 52 physiotherapy treatments is more than sufficient to achieve that objective. I do accept, however, Ms. Barr's recommendation of \$1,000.00 for the purchase of exercise equipment in order to maintain the program developed by the physiotherapist.

[135] Ms. Barr's recommendation of additional kinesiology treatments is duplicative of the physiotherapy and exercise program, thus I would not award additional damages for those services.

[136] In terms of counselling, Dr. Learn, who assessed Mr. Benson and who has had one treatment session with him, is in my view best placed to consider his future treatment needs. In her opinion, Mr. Benson should have 24 additional counselling treatments at a cost of \$185.00 per session, for a total of \$4,440.00. She does note

that Mr. Benson's progress should be assessed at the end of those treatments and that further treatment may be required. I would allow a further \$2,775.00, or 15 treatments, to account for this possibility.

[137] With respect to occupational therapy, Dr. Viljoen makes this recommendation but does not indicate how many treatments would be required. On this point, I think Ms. Barr's recommendation of an initial assessment plus four to six two-hour sessions is reasonable. In her report, Ms. Barr provides a cost range of \$1,450.00 to \$2,125.00 for these treatments. I award the approximate mid-point of \$1,750.00.

[138] Ms. Barr goes on to provide cost estimates for equipment and supplies such as orthotics, a cervical pillow, hot/cold packs, epsom salts and a hand-held massager. In my view, the necessity of these items is not established by the evidence. None are recommended by a medical practitioner and, at best, Mr. Benson testified that he occasionally uses some of these and gets some benefit from them. They fall within the category of what Mr. Justice Williams in Dunne described as 'would be nice to have, as opposed to necessary' (at para. 176). I would not award damages for the cost of these items.

[139] Mr. Benson also claims approximately \$28,000.00 for the cost of prescription and non-prescription medication, again for the balance of his lifetime. This total is based on Mr. Benson's self-report to Ms. Barr about what he currently takes, her estimate of the cost of the medications and then the application of Mr. Carson's multiplier.

[140] The three prescription medications are:

- a) Emtec 30 which Mr. Benson says he takes for pain, 4 tablets per day;
- b) Apo-Ibuprofen which Mr. Benson also says he takes for pain, 2 tablets per day; and
- c) Nexium which Mr. Benson says he takes for heartburn, 1 tablet per day.

[141] The non-prescription medications are:

- a) Ibuprofen which Mr. Benson says he takes for pain, 3 - 4 tablets per day;
and
- b) Tylenol #1 also taken for pain, 9 - 12 tablets per day.

[142] The defendants take issue with the medical necessity of these medications as well as the cost. For example, on the cost issue, they note that Ms. Barr has estimated the cost of 120 tablets of Emtec 30 to be \$34.04 yet, in support of his claim for special damages, Mr. Benson has submitted a receipt from Costco for 120 tablets of Emtec 30 at a cost of \$16.97, of which he paid \$3.39 with Pacific Blue Cross paying the balance. There is however another receipt produced from a different pharmacy in which the price for 120 tablets is \$34.04, although Mr. Benson only paid \$14.61.

[143] There are a number of problems with Mr. Benson's claim under this head. For one, there is no evidence that the Nexium that he takes for heartburn is accident related. Mr. Benson testified that he thinks he gets heartburn from all of the pills he takes but there was no medical evidence to substantiate that. Similarly, there was no medical evidence explaining why he takes two different prescription medications as well as two different non-prescription medications. While the evidence did support a finding that his pain condition is chronic, it did not go so far as to establish that he will continue to need all of these medications at their current dosages for the balance of his life.

[144] On this point, it must be kept in mind that Mr. Benson was reporting the use of a large number of pain medications at a time when he had had virtually no treatment for his pain condition. It is to be expected that the physiotherapy and occupational therapy that he will receive according to my decision above will alleviate his symptoms, although as noted by Dr. Adrian, they are unlikely to cure him.

[145] I would add that there is no admissible evidence about the quantity of the medications he is currently taking. The numbers come from Ms. Barr's report where

she purports to rely on Mr. Benson's self-report to her, but he did not testify directly about the quantities that she relies on.

[146] In light of the above, I do not accept Mr. Benson's figure of approximately \$28,000.00 for the future cost of medication. However, I do accept that Mr. Benson will continue to use pain medications as needed. I consider that \$3,000.00 is a reasonable award under this head.

[147] In sum, I award \$17,953.00 for the cost of future care.

Cleaning Services/Loss of Housekeeping Capacity/In Trust Claim

[148] Included in Mr. Benson's cost of future care claim is a claim for approximately \$45,000.00 for cleaning services and he advances, as well, a claim for loss of housekeeping capacity in the amount of \$10,000.00 and an in trust claim for \$5,000.00. These items are properly considered together given that each of these claims is in essence a claim for loss of Mr. Benson's housekeeping capacity.

[149] It is well established that a plaintiff whose capacity to perform ordinary household tasks is diminished by reason of the defendant's negligent conduct is entitled to be compensated (*McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63). Madam Justice Huddart went on to say in *MacGillivray* that "The loss of the ability to perform household tasks requires compensation by an award measured by the value of replacement services where evidence of that value is available" (at para. 67).

[150] The \$45,000.00 figure submitted by Mr. Benson is based on Ms. Barr's calculation of 40 hours per year of replacement cleaning services which in turn is based on statistical information suggesting that males over the age of 15 spend 46 minutes per week performing housekeeping and other household chores. Ms. Barr accepted Mr. Benson's self-report that his girlfriend, Ms. Carriere, currently cleans his basement suite for him so she recommended replacement services for the entire 46 minutes, which works out to the figure of 40 hours per year. She further recommended an additional 12 hours per year for seasonal cleaning tasks.

[151] According to Ms. Barr, Mr. Benson should have housekeeping assistance for the first year while he focuses on his rehabilitation and these services should be continued until such time as he demonstrates a tolerance to performing the cleaning activities.

[152] Based on the prices charged by a commercial cleaning company, Ms. Barr estimated a cost of \$2,346.75 in the first year and \$2,262.00 each year thereafter. Mr. Carson's multipliers were then used to extrapolate that cost over Mr. Benson's lifetime.

[153] Ms. Barr's assessment of Mr. Benson's need for housekeeping assistance is based in part on the mistaken assumption that Ms. Carriere regularly cleans Mr. Benson's entire basement suite for him. That was not the evidence. She testified that she helps clean his kitchen and bathroom "when I see it needs doing". However, there was no evidence from Mr. Benson about the frequency with which he receives help from Ms. Carriere, although it was apparent that they spend most of their time together at her house. Given the evidence concerning Ms. Carriere, there is no basis for an in trust claim.

[154] Further, there is no evidentiary basis for a finding that Mr. Benson will continue to need cleaning services for the rest of the life.

[155] That said, as I have noted, the evidence does establish that Mr. Benson has a chronic pain condition that may make some types of housework difficult. In the circumstances, an award of \$5,000.00 is reasonable.

Special Damages

[156] Mr. Benson claims special damages of \$4,007.43 as follows:

- a) Medications - \$2,021.93;
- b) Six chiropractic treatments - \$240.00;
- c) Counselling session with Dr. Weibelzahl in December 2013 - \$165.00;
- d) Back massager, orthotics, support pillow - \$135.00; and

- e) Mileage in driving to medical appointments (\$0.50 per km/h) -
\$1,445.50.

[157] The defendants agree with the items claimed in b), c) and d) but take issue with the amount claimed for medications and for mileage.

[158] With respect to the mileage, the defendants say that many of the visits recorded were for unrelated medical issues such as Mr. Benson's knee issue. The defendants submit in reply that \$1,000.00 is a reasonable sum to compensate Mr. Benson for his mileage charges. I agree.

[159] With respect to the medication costs, the defendants submit that one of the medications claimed, Dexilant, is for heart burn and is thus unrelated to the accident. They also submit that Mr. Benson's estimates of \$826.00 for Tylenol and \$870.00 for Advil, which are based on \$200.00 per year estimates without receipts, are excessive.

[160] Subtracting the heart burn medicine and making a small adjustment for the fact that Mr. Benson has no receipts for the non-prescription pain medication, I think a reasonable amount is \$1,500.00.

[161] Accordingly, Mr. Benson is entitled to special damages in the amount of \$3,040.00.

Mitigation

[162] The defendants submit that Mr. Benson has failed to mitigate his damages in that he has not pursued treatment for his various problems notwithstanding the recommendations of numerous doctors. They submit that his damages should therefore be reduced by 30 - 40%.

[163] The plaintiff submits that the defendants have not satisfied the test for establishing a failure to mitigate, which was described by the Court of Appeal in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 as follows:

The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[164] The plaintiff notes that many of the treatment recommendations were made in medical-legal reports submitted directly to his counsel rather than to him and that there is no evidence that had he pursued the treatment, his condition would have improved sooner.

[165] As I have previously noted, the characterization of Mr. Benson's treatment as "woefully inadequate" is accurate.

[166] It is apparent on the evidence that he attended six chiropractic treatments - one in July 2009, two in August 2009, one in May 2010 and two in February 2011. He attended one counselling session with a psychologist Dr. Weibelzahl in December of 2013 and he has since had one additional counselling session with Dr. Learn.

[167] When asked in cross-examination about the recommendations for physiotherapy from Dr. Rai's office, Dr. Viljoen and Dr. Adrian, Mr. Benson said he did not recall those recommendations. He also said that he had only recently got a referral from his family doctor for physiotherapy.

[168] When asked about the recommended cognitive behavioural therapy for his anxiety, he said that he had seen a "couple of doctors," being Dr. Weibelzahl in December 2013 and Dr. Learn recently. He said he only went to Dr. Weibelzahl once because he had evening appointments and Mr. Benson was too tired at the end of the day.

[169] The picture that emerges is one of a plaintiff who has taken virtually no personal responsibility for pursuing treatment or seeking to improve his physical, psychological and cognitive condition. I do not accept that he was unaware of the

treatment recommendations. The fact is that he did seek some chiropractic treatment but it was sporadic and he did not follow up. Similarly, he did seek counselling from Dr. Weibelzahl but stopped after one session. His explanation that he was too tired to go is insufficient and there is no evidence that he sought alternate arrangements.

[170] I am satisfied that Mr. Benson acted unreasonably by failing to pursue the treatment recommended by the medical professionals. I am also satisfied that his condition would have improved with proper treatment. On this point, each of Dr. Viljoen, Dr. Adrian and Dr. Learn testified to the benefit of early treatment. None however went so far as to suggest that earlier treatment would have cured Mr. Benson's problems.

[171] I therefore find that the defendants have established that Mr. Benson failed to properly mitigate. That failure is not to the same degree however as in *Qiao v. Buckley*, 2008 BCSC 1782 and *Middleton v. Morcke and Lee*, 2007 BCSC 804 [*Middleton*], cited by the defendants, where the court reduced the plaintiff's damages by 30% and 40% respectively. In those cases, the evidence was that the plaintiffs disregarded quite specific treatment plans. In *Middleton*, the court characterized it as a case of "a patient thinking that she knows better than her health practitioners" (at para. 49).

[172] In Mr. Benson's case, he did not disregard specific recommendations, for example he did not fail to follow up on a referral for treatment.

[173] He did however fail to pursue or follow up on the consistent recommendations for physiotherapy and for cognitive behavioural therapy. Again, he took virtually no personal responsibility for his own medical treatment with the result that, at the time of trial some five years after the accident, his injuries remained largely untreated.

[174] In the circumstances, I would reduce his damages by 15% for a failure to mitigate. In *Zawadzki v. Calimoso*, 2011 BCSC 45, Mr. Justice Voith endorsed the

approach taken by Mr. Justice Sewell in *Penner v. Silk*, 2009 BCSC 1682 at para. 52 of considering the mitigation issue under each head of damages.

[175] Applying the same approach, the 15% reduction is properly applied to the awards for non-pecuniary damages, past wage loss and loss of future earning capacity as the complaints underlying these claims were directly affected by his failure to seek treatment. In contrast, it would be unreasonable to reduce his damages for the cost of future care or his special damages as those damages relate to treatments recommended by the physicians. In other words, they encompass costs that he would have incurred in any event had he sought treatment, albeit he would have incurred them earlier.

Summary and Conclusion

[176] In summary, Mr. Benson is entitled to the following:

- a) Non-pecuniary Damages - \$93,500 (\$110,000 less 15%)
 - b) Past Wage Loss - \$5,770.00 (\$6,787.75 less 15%)
 - c) Loss of Future Earning Capacity - \$76,500 (\$90,000 less 15%)
 - d) Cost of Future Care - \$17,953.00
 - e) Loss of Housekeeping Capacity - \$5,000.00
 - f) Special Damages - \$3,040.00
- Total: \$201,763.00

[177] Unless there are matters that I am not aware of, Mr. Benson is entitled to his costs at Scale B.

“Skolrood J.”