IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Midgley v. Nguyen,*
2013 BCSC 693

Date: 20130422
Docket: M115224
Registry: Vancouver

Between:

Scott Midgley

Plaintiff

And

Tan Hai Nguyen and Tan Trung Nguyen

Defendants

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

Counsel for Plaintiff:	D. Osborne
Counsel for Defendants:	J. Lindsay, Q.C. D. M. Jeffrey P. Tung
Place and Date of Trial:	Vancouver, B.C. November 21-25, 28-30, 2011 December 1-2, 5-9, 2011 February 20-24, 2012 May 1-4, 2012 June 14-15, 2012 July 6, 2012
Place and Date of Judgment:	Vancouver, B.C. April 22, 2013

INTRODUCTION

[1] The plaintiff, Scott Midgley, alleges he was injured in a motor vehicle accident on March 26, 2004 (the "2004 Accident"). The defendants have admitted liability for the 2004 Accident. At issue in this action is the assessment of Mr. Midgley's claim for damages.

[2] The defendant, Mr. Tan Nguyen, hit the rear end of the motor vehicle driven by Mr. Midgley. While there is an allegation that the defendants' vehicle sustained some damage, it is uncontroversial that there was no damage to Mr. Midgley's vehicle.

[3] In 2011, Mr. Midgley was diagnosed with a torn labrum in his right hip, which injury he alleges he sustained in the 2004 Accident. He also alleges that, as a result of the 2004 Accident, he continues to suffer from a lumbar spine injury, chronic pain disorder, depression and anxiety. The principal controversy is whether there is a causal connection between the 2004 Accident and Mr. Midgley's current complaints. The primary contention of the defendants is that Mr. Midgley has failed to prove his case; their submissions are anchored in an attack on Mr. Midgley's credibility.

[4] This case, which was heard over 27 days, was hard fought on all fronts. The parties are far apart in the various heads of damages, including non-pecuniary damages, loss of past and future earning capacity, cost of future care and special damages.

[5] Mr. Midgley sustained personal injuries in a subsequent motor vehicle accident on October 10, 2006 (the "2006 Accident"). In this action, Mr. Midgley is not seeking damages in relation to the 2006 Accident; his lawsuit in relation to that accident settled prior to the commencement of this trial. Mr. Midgley takes no issue with the defendants' submission that the injuries he sustained in the 2006 Accident are indivisible and that the appropriate manner to assess damages in this action is to assess damages globally and to deduct any settlement arising from the 2006 Accident from any damage award: *Ashcroft v. Dhaliwal*, 2008 BCCA 352; *Bradley v. Groves,* 2010 BCCA 361.

[6] The complexity of this case was compounded by the fact that witnesses were recalling material events more than seven years after those events occurred.

[7] Before addressing the damages analysis, I turn to the facts established on the evidence. I will address the facts in the following order:

- General Background;
- Preliminary Comments on Mr. Midgley's Evidence;
- The 2004 Accident;
- Mr. Midgley's Return to Work at Weyerhaeuser after the 2004 Accident;
- The 2006 Accident;
- The 2006 Accident to Date of Trial;
- Expert Medical Evidence;
- Conclusions on Mr. Midgley's Condition.

My findings on these matters will then guide the determination of Mr. Midgley's damages.

FACTS

General Background

[8] Mr. Midgley lives in Rosedale, British Columbia, with his wife, Maxine Midgley. Mr. Midgley is currently operating a gym in Chilliwack, but at the time of the 2004 Accident he was employed as a mill worker at the Trus Joist Weyerhaeuser plant on Annacis Island, B.C. ("Weyerhaeuser").

[9] As a teenager, Mr. Midgley became very accomplished in martial arts; he became a professional kickboxer at age 17. He rose to become world-ranked in that field and when he retired at the age of 21, he was ranked fourth in the world in his category. He was named athlete of the year in Chilliwack in 1986.

[10] Mr. Midgley worked throughout his high school years. After completing high school, he was employed in a variety of jobs, including in the bakery department of a

grocery store and as a security doorman for a Chilliwack businessman, Mr. Yates, who had been a supporter of his kickboxing career. In 1987, Mr. Midgley obtained his certification for underwater welding, but other than performing demonstrations at Expo 86, he never obtained any employment in that field. In approximately 1988, Mr. Midgley moved to Calgary where he worked in various capacities, including at a grocery store, as a deliveryman and as an entry-level office worker for an oil company. He also took some night school post-secondary courses in pipe-design at a vocational institute in Alberta.

[11] In 1988, he was in a motor vehicle accident in Calgary, in which he sustained an injury to his left shoulder. He recovered from his injuries, although his shoulder injury continues to be aggravated intermittently by certain activities such as shoulder-checking when he is driving.

[12] In 1993, Mr. Midgley returned to Chilliwack. For approximately four years he worked as a sprinkler system installer, which was very physically demanding work. From approximately 1993 to 1996, Mr. Midgley seriously pursued body-building but he ultimately decided to quit that pursuit. While he was pursuing body-building, for a two-year period, he took steroids under the supervision of his doctor. From 1997 to 2001, he worked in various sales positions and pursued various entrepreneurial ventures, all of which eventually failed.

[13] On June 1, 2001, Mr. Midgley began to work as a mill worker with Weyerhaeuser. The company manufactures multi-strand wooden polymeric structure elements for use in residential and industrial construction.

[14] At Weyerhaeuser, prior to the 2004 Accident, Mr. Midgley worked 12-hour shifts, four days per week, as a green end/veneer operator. In the almost three years he worked at Weyerhaeuser, prior to the 2004 Accident, Mr. Midgley never missed a shift.

[15] Prior to the 2004 Accident, Mr. Midgley was very physically active and pursued various sporting activities with his wife, such as baseball, golf, skiing and

water sports. He took great pride in maintaining his physical fitness and regularly attended the gym. He enjoyed a happy marriage and an active social life. The evidence shows that he was an outgoing and gregarious individual who had a positive outlook on life.

Preliminary Comments on Mr. Midgley's Evidence

[16] The defence provided extensive submissions regarding Mr. Midgley's credibility.

[17] While initially suggesting that Mr. Midgley was "less than careful when giving evidence under oath", in final submissions, the defendants urged this Court to find that Mr. Midgley fabricated aspects of his evidence. They allege a multitude of inconsistencies in the way Mr. Midgley described the 2004 Accident, his kickboxing instruction, his income, and his return to work at Weyerhaeuser after the 2004 Accident. According to the defendants, Mr. Midgley's testimony "largely depends on what he was asked and what information he was trying to convey".

[18] Mr. Midgley's counsel, *contra*, says that Mr. Midgley was a sincere witness, who genuinely tried to provide accurate testimony. He emphasized that Mr. Midgley's evidence was supported by the credible testimony of other witnesses. Mr. Midgley strenuously asserts that the accusations made by the defence that he engaged in fabrication and enlisted others to do so, was without foundation.

[19] The assessment of Mr. Midgley's credibility and reliability is key in determining the causation of his injuries and the nature and severity of those injuries. This assessment is also critical to the weight to be given to the various medical opinions to the extent that they are predicated upon Mr. Midgley's reporting of material facts.

[20] The court summarized the factors to be considered in the assessment of credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

> 186 Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[21] When a plaintiff is accused of deliberate deceit, more than mere speculation and innuendo is required. As the court aptly observed in *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 9, "[a] charge of deliberate deceit under oath is a serious attack on an individual's integrity which should not be lightly treated or lightly made". Moreover, fairness requires that a plaintiff be afforded an opportunity to address the allegations upon which the attack on his or her credibility is based: *Browne v. Dunn* (1893) 6 R. 67 (U.K.H.L.); *Hardychuk* at para. 11; *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at paras. 31-33. While this principle has been described in the jurisprudence as a "sound principle of general application", it is not an absolute rule. Ultimately, the extent of its application is "within the discretion of the trial judge after taking into account all of the circumstances of the case": *R. v. Lyttle*, 2004 SCC 5 at para. 65.

[22] I will endeavour to outline below some aspects of Mr. Midgley's evidence which were highlighted by the defence, but I do not propose to address each of the alleged deficiencies of Mr. Midgley's evidence. I will address what I have found to be the most pertinent allegations in my reasons in the context in which they arise.

[23] Mr. Midgley testified that he served as an auxiliary officer with the RCMP in Chilliwack and that he was invited to attend "depot". He testified that he wore a uniform and carried a gun. The defence asserts that this evidence is "incredible and not believable". However, the defence did not call any evidence to refute

Mr. Midgley's testimony. I am not persuaded that this Court can take judicial notice of the fact Mr. Midgley would not have been permitted to carry a gun in 1988, when he says he served as an auxiliary RCMP officer. The defence also says that Mr. Midgley's testimony that he received papers to attend "depot" in Ottawa was untrue because the RCMP "depot' is not located in Ottawa. However, Mr. Midgley's evidence was that depot was "in Ottawa or back east".

[24] I do not find that Mr. Midgley's description of the hiring process and the physical demands of his Weyerhaeuser job was an exaggeration, as is alleged by the defence. In fact, Mr. Bill Paul, the human resources manager at Weyerhaeuser, confirmed that Mr. Midgley's description of the competitive hiring process was accurate.

[25] The defendants submit that Mr. Midgley's evidence regarding his kickboxing instruction is not reliable, cannot support his claim, and dramatically changes. Mr. Midgley testified that he has given private lessons periodically, to both children and adults, from the time he first became an accomplished kick-boxer. In cross-examination, he clarified that he "seriously began teaching after the Accident", when he started teaching and training out of his garage in Chilliwack. However, because of his injuries, it became too painful for him to demonstrate his kicks and he eventually had to shut down that operation. He was forthright in acknowledging that he was unsure of the time frame in which he eventually ceased his kickboxing instruction. I note that he readily acknowledged that he continued providing instruction in weight-lifting and personal training after he ceased his kickboxing instruction.

[26] After the 2004 Accident Mr. Midgley sustained an injury to his left foot while trying to demonstrate a "round kick". The defendants suggest that Mr. Midgley's ability to demonstrate a kick confirms that he was continuing to kick box and "likely able to pivot on his right leg or support himself on his right leg while striking with his left leg at the level of an adult's elbow". Mr. Midgley was not cross-examined on this incident. The evidence does not show the circumstances in which Mr. Midgley sustained this injury, including on whom Mr. Midgley was performing his kicks –

adult or child – nor whether this particular activity afterwards caused Mr. Midgley pain in his hip and back.

[27] I accept Mr. Midgley's evidence that after the 2004 Accident, he tried to work through what he genuinely believed was a soft tissue injury from which he would recover. Sometime later, he came to the realization that certain activities were causing him severe pain and he came to terms with the reality of his limitations, including how those limitations related to instructing and demonstrating kickboxing.

[28] In assessing the plausibility of Mr. Midgley's evidence, I have kept in mind that as a former professional athlete, he is a "grin and bear it" type of individual. In a kickboxing match, after sustaining a compound fracture to his jaw in the first round, Mr. Midgley continued to fight a further six rounds. In my view, this demonstrates his capacity for enduring considerable physical pain.

[29] The defence points out what they allege is an inconsistency in Mr. Midgley's evidence regarding his description of his training of various individuals in kickboxing. I am not persuaded that Mr. Midgley's evidence regarding his kickboxing "speciality" was inconsistent. It was apparent from his testimony that his speciality in teaching differed in some aspects from the type of martial arts he competed in. In my view, defence counsel has misconstrued his evidence on this point. In any case, any discrepancy in Mr. Midgley's evidence regarding his speciality in kickboxing is of no moment.

[30] The defence spent considerable time in cross-examination reviewing Mr. Midgley's tax returns, starting from 2001. He readily acknowledged that he could not recall the details of his income and expenses. Mr. Midgley stated in cross-examination that he had not reviewed these income tax returns for several years. I have also considered that Mr. Midgley did not prepare his own income tax returns; he relied upon his accountant - to whom he provided the pertinent information - to prepare the returns. I cannot conclude that Mr. Midgley's imprecise memory in recalling his income and expenses from several years earlier was a deliberate

attempt to mislead the court on his activities or income, either prior to or after the 2004 Accident. It is more likely that he was genuinely mistaken.

[31] On a related point, it clearly emerged on Mr. Midgley's cross-examination that his estimates of his earnings from his kickboxing instruction before the 2004 Accident were inaccurate or his stated income and related expenses were not accurately reflected on his income tax returns. If Mr. Midgley failed to accurately report his income from kickboxing or any other income or inaccurately claimed expenses on his income tax returns, he cannot be excused. However, I am not persuaded that any failure on his part in this regard diminishes the credibility of his evidence on the central issues at trial.

[32] The defence also points out that Mr. Midgley gave inconsistent evidence regarding his ability to "work out" in the gym following the 2004 Accident.

[33] Mr. Midgley testified regarding the importance to him, prior to the 2004 Accident, of exercising and maintaining an active lifestyle. He had worked out regularly since he was 14 years old and derived considerable enjoyment and positive emotional benefit from maintaining a high level of physical fitness.

[34] In his examination in chief, Mr. Midgley testified that there was a period – "a good year plus" – after the 2004 Accident, that he was not able "to work out". The defence points out that his entries in his pain diary, which were admitted by agreement at trial, show that in fact he attended the gym on a few occasions in 2004 and then on a more regular basis in February through May 2005, prior to his graduated return to work in June 2005.

[35] On cross-examination, Mr. Midgley explained that his doctor had recommended that he attend the gym for rehabilitation purposes, in order to attempt to return to work. The preponderance of the evidence supports a finding that his attendances at the gym were focused on rehabilitation efforts and did not constitute the strenuous "work-outs" he routinely performed prior to the 2004 Accident. The fact that he had a faulty recall of precisely when he may have attended the gym for this

purpose some seven years earlier does not undermine his credibility. Nor do I find the fact that he was providing personal training and weight-lifting instruction after the 2004 Accident inconsistent with his evidence on his physical limitations.

[36] The defence points out that Mr. Midgley went on a motorcycle trip to the Kootenays with his friends in 2010 and has taken vacations with his wife since the 2004 Accident. During the motorcycle trip, Mr. Midgley stopped frequently to rest and, because of his pain symptoms, left his friends to go home early. His wife corroborated that he can only ride his motorcycle for short periods of time. In any case, there is no medical evidence that a person with his injuries would be incapable of either the motorcycle trip or the vacations. The court was left with the impression that Mr. Midgley suffered through pain and discomfort during his vacations with his wife, in order to avoid any further strain on his marriage.

[37] I found it troubling that Mr. Midgley admitted telling his family physician, Dr. Klassen, that he was well enough to try to return to his regular duties at Weyerhaeuser, when in fact he was not. However, the fact that Mr. Midgley told his doctor this does not cause me to disbelieve his evidence at trial. At the time, Mr. Midgley may have convinced himself that he would be able to resume work and he clearly made this representation in a determined effort to keep his job at Weyerhaeuser.

[38] During his testimony, Mr. Midgley sometimes struggled to maintain his train of thought and remain focused. On occasion, he had faulty recall or only partial recall of dates and specific events. On the other hand, he was forthright when he could not remember details about any particular matter and he readily acknowledged when he was mistaken. Given that he was being asked to recall matters over a time frame of many years, his mistakes in the chronological order of events did not cause me to generally disbelieve him. I am not persuaded Mr. Midgley engaged in any deliberate attempts to be misleading. Overall, he left the court with the impression that he was genuinely attempting to answer questions truthfully and endeavouring to provide a forthright account of pertinent events.

[39] In the final analysis, despite the frailty of some aspects of Mr. Midgley's testimony, I conclude, on the evidence as a whole, that Mr. Midgley's general credibility under oath on key matters was not successfully impugned. His evidence was largely consistent with the testimony of the non-party lay witnesses. On some points Mr. Midgley was not given an opportunity to address the allegations upon which the attack on his credibility was based. I found some of the criticism of his evidence levelled by the defence unpersuasive. While I find that there were shortcomings and inconsistencies in Mr. Midgley's evidence, I am not persuaded that they were particularly significant in the context of the evidence as a whole.

The 2004 Accident

[40] On March 26, 2004, Mr. Midgley, while driving his subcompact vehicle to work at the Weyerhaeuser mill, was rear-ended by a full-size sports utility vehicle operated by the defendant, Mr. Nguyen. Mr. Midgley was wearing a seatbelt. Mr. Midgley's vehicle did not sustain any damage in the collision.

[41] There is a conflict on the evidence as to whether the defendants' vehicle sustained any damage in the collision. Mr. Nguyen maintains that there was no damage to the vehicle. In contrast, Mr. Midgley says he observed "black plastic pieces" on the roadway, in front of the defendants' vehicle and damage to the front bumper of that vehicle. There was no opinion evidence tendered at trial that the force of the impact in this case could not have produced the injury alleged by Mr. Midgley. In absence of such evidence, it is not necessary for me to make a finding as to the extent of the damage, if any, to the defendants' vehicle.

[42] Mr. Midgley's body position at the time of impact is the subject of considerable controversy. The defence forcefully asserts that Mr. Midgley has fabricated his evidence on this point.

[43] Mr. Midgley testified that at the moment of impact, he had loosened his seat belt with his left hand and was leaning forward to the right to retrieve his water bottle on the passenger's side of his vehicle. His water bottle had slid off the front passenger's seat as he stopped for an amber traffic control light at the intersection.

He stated that the impact knocked his baseball hat off his head. He sat back up and pulled his car over to the side of the road. When he got out of his car, he realized that he was in shock and that “there was something wrong”; he felt pain down to his knees and it was painful for him to walk.

[44] It is uncontroversial that, after the collision, Mr. Midgley exchanged information with Mr. Nguyen. He immediately proceeded to attend the emergency department at Surrey Memorial Hospital. He was discharged after being assessed and given a prescription for pain medication. The next day, he described his hips and lower back “aching like a toothache”.

[45] Mr. Midgley was thoroughly cross-examined on the statement prepared by an ICBC employee on April 5, 2004, regarding the 2004 Accident (“the Statement”), as well as on a diary entry he prepared shortly after the 2004 Accident .The Statement was admitted by agreement.

[46] The defence forcefully asserts that there are significant inconsistencies between the Statement he gave shortly following the 2004 Accident and his evidence in trial. For the reasons that follow, I do not agree.

[47] Prior to impact, Mr. Midgley testified that he had been talking to his wife on his cell phone. He says he was holding the cell phone and releasing his seatbelt at the same time. The defence points out that, in the Statement, he states that he was holding his cell phone in his right hand and at trial he stated that he was holding it in his left hand. I find that nothing turns on this discrepancy.

[48] The defendants also say there is a significant discrepancy between his Statement and his evidence in trial, in that the Statement refers to him travelling at 10 to 15 kph and that he was slowing down for a yellow light when he was hit. At trial, Mr. Midgley maintains that he was stopped. Notably, this accords with the defendant, Mr. Nguyen’s testimony at trial. In any case, this is not a discrepancy to which I attach any weight.

[49] The defence points out that his Statement did not refer to his body position at the time of impact. He maintained that when he provided the Statement it did not occur to him that his body position was a relevant detail. I found his explanation entirely plausible.

[50] In cross-examination, Mr. Midgley was referred to and adopted the portion of the Statement in which he stated that "as soon as I went to get out of the car, I felt like I was twisted. My mid-back and lower hips were sore." I also note the fact that his hat dropped off his head is consistent with him leaning over to the right at the time of impact.

[51] I cannot conclude that the hand-written entry in his diary that Mr. Midgley prepared shortly after the 2004 Accident reveals any inconsistencies that are significant in the context of the evidence a whole. That entry states in part:

> I was hit and screamed probably because I didn't know what was happening. I pulled over onto King George HWY. I found myself stumbling around to organize things on the front seat, water bottle was now on the floor, lunch, nuts, hat, was knocked off my head to the floor. ...

[52] I do not find Mr. Midgley's testimony, that he was reaching for the water bottle at the time of impact, inconsistent with his notation that, after the impact, the water bottle was in fact on the floor.

[53] I reject the defence contention that Mr. Midgley fabricated his evidence regarding his body position, after he was told in January 2005 that a CT scan had revealed a mild protrusion on his left lumbar spine. According to the defence, he viewed this scan as "his ticket".

[54] On my review of the medical records, the first time Mr. Midgley reported his body position to a health care professional was on July 25, 2005. In the assessment form for the Fraser Valley Physiotherapy and Rehabilitation Centre Ltd., he reported that he was rear-ended in "odd position (slammed on brakes), 1 hand on wheel, 1 hand reaching for H_2O bottle." Notably, the first medical-legal report that refers to any causal link between his body position and the injuries he sustained in the 2004 Accident is that of Dr. O'Connor, which was not prepared until 2011.

[55] Mr. Midgley struck me as a somewhat unsophisticated individual, who lacked sufficient guile in 2005, before he received any medical opinion of a causal connection between his body position and his injury, to fabricate his evidence regarding his body position.

[56] In short, I accept Mr. Midgley's evidence that he was bent forward and twisted to the right, reaching to the passenger's side when his vehicle was struck from behind. In reaching this conclusion, I have considered the entire body of evidence and, in my view, it best harmonizes with the probabilities of this case.

Mr. Midgley's Return to Work at Weyerhaeuser after the 2004 Accident

[57] There was considerable trial time spent on Mr. Midgley's return to work at Weyerhaeuser after the 2004 Accident.

[58] Prior to the 2004 Accident, Mr. Midgley worked at Weyerhaeuser as a "green end/veneer dryer" operator. He worked 12-hour shifts four days on/four days off with two-day shifts per week. Mr. Midgley worked on what is typically described as the "green end" or "green chain" on a variety of machines. His job entailed feeding and unloading sheets of eight-foot veneer sheets from the dryer machine. When working on "the dryer infeed", he shifted the veneer from a conveyer onto the dryer belt. On the "dryer outfeed", he removed the dried veneer off the belt and placed it on a cart. Once the veneer cart was loaded it would have weighed approximately 1,500 pounds. He then pushed the loaded cart into position for pick-up by a forklift. Several times per shift, Mr. Midgley was also required to clear jams in the dryer outfeed machines. He also performed regular maintenance work in the mill as was required.

[59] The work on an assembly line as a dry-operator was repetitive and machine-paced and required long hours of standing, twisting and turning, lifting, stooping, as well as occasional heavy maintenance work. The evidence as a whole, including that of Mr. Roger Williams, Mr. Ryan Simonson, and the job function analysis commissioned by Weyerhaeuser, supports a finding that the work was physically demanding. To the extent that the defence asserted otherwise, I reject those submissions.

[60] Although the evidence was confusing on this point, on balance, the evidence shows that after the 2004 Accident, Mr. Midgley took approximately three weeks off work, including a week of previously scheduled vacation time. Mr. Paul confirmed that the initial period after the 2004 Accident was recorded as short-term disability (up until April 12, 2004) and thereafter, Mr. Midgley took his scheduled vacation.

[61] The central dispute is whether in April 2004, Mr. Midgley returned to working his regular shift on the green chain on a sustained basis. This is a pivotal issue in this lawsuit, because of Mr. Midgley's reports to the various health care professionals who assessed him that he was not able to return to his "regular job" after the 2004 Accident.

[62] Mr. Midgley maintains that in May 2004, shortly after he returned to Weyerhaeuser, he was chosen to be the summer relief worker in the remanufacturing department at Weyerhaeuser. The regular crew members in the remanufacturing department vote as to who they would like to elect to be temporary holiday replacement workers, primarily based on what they perceive to be a worker's compatibility with the "reman" team. The various witnesses who testified referred to the work in the remanufacturing department as "reman" and therefore, for convenience, I will refer to it as "reman" in these reasons. It is not disputed that this work, which involved packaging the finished work product, was considerably lighter work than the green chain work that Mr. Midgley had performed prior to the 2004 Accident.

[63] Mr. Midgley explained that, although he was assigned to "reman" for summer relief, he nonetheless reported first to the green chain on each shift before he would be called to reman. He stated that during the time he was temporarily assigned to reman, he would perform relief work on the green chain for 25 minutes, up to three times per day. He says that during the pertinent period, he may have done the "odd shift" at the green chain but that he never did a full four-day rotation. In October 2004, when he was required to return to his regular shift rotation on the green chain, he could not perform those duties on a sustained basis.

[64] In October-November 2004, Mr. Midgley attended the mill and performed light or restricted duties for some period of time. However, he found that attendance at the mill aggravated his injuries and he discontinued working. He attempted a graduated return to work in September-October 2005, which was unsuccessful. His last day of work at Weyerhaeuser was October 26, 2005.

[65] The defendants say that Mr. Midgley fabricated his evidence about his return to work. They rely on the Weyerhaeuser time cards and assert that when Mr. Midgley returned to work in 2004, he continued to work at his regular on-call job, on the shifts assigned to him, in the areas that were assigned to him, without accommodation, until October 21, 2004. They strenuously argue that he was never assigned to "reman" as he alleges, but rather that he continued to work his regular rotations on the green chain. They do not dispute that, from time to time, he would be moved to the reman area and that the time cards may not accurately reflect each and every time that happened.

[66] Mr. Paul, who is the human resources manager at Weyerhaeuser, was called by the defence. He acknowledged in cross-examination that when completing pertinent documentation he indicated that Mr. Midgley's condition appeared to first affect his work in April 2004, within days of the 2004 Accident. He also confirmed that, as a result of his condition, Mr. Midgley's performance on the job changed and, for some period of time, he was temporarily assigned to light duties. Mr. Paul confirmed that green chain workers routinely perform vacation relief work in the reman department and that, in particular, in 2004, Mr. Midgley provided vacation relief in the reman department.

[67] I turn to address the Weyerhaeuser time cards which were produced after Mr. Midgley was examined for discovery. According to Mr. Paul, the time cards were produced by the time card entry system for hourly production workers. This information generated the payroll for the production workers. The hours were entered by the associates and approved by the supervisors.

[68] Mr. Paul testified regarding the different coding for the reman department and the green end. Insofar as the reliability of the department coding, Mr. Paul explained that “any time entry system is subject to errors”. According to Mr. Paul, it was more probable that Mr. Midgley’s work in a pertinent period was coded incorrectly in the green end, when he was actually working in the reman department than “vice versa.” This was because the green end was Mr. Midgley’s regular assignment and changing it would require someone to manually amend the department coding. The tenor of Mr. Paul’s evidence was that, although it was the associate’s responsibility to enter the correct hours into the correct department and the supervisor’s responsibility to approve an accurate time card, there was clearly room for error in the time card entries.

[69] In cross-examination, Mr. Paul candidly acknowledged that there were “glitches” in the payroll system that had been installed shortly before the 2004 Accident. He further clarified that any issues would have been compounded by the fact that the system called upon the various supervisors and associates to actually specify or itemize which department they were working in on any given day.

[70] The defence also called Mr. Duane Postles, who is currently the safety manager with Weyerhaeuser. Prior to being promoted to safety manager, he was a shift supervisor. He was Mr. Midgley’s shift supervisor when Mr. Midgley had worked “on call” and periodically rotated through his shift. I note parenthetically that Mr. Postles acknowledged in cross-examination that prior to the 2004 Accident, Mr. Midgley was well-liked and a highly capable worker with a good attitude. He also described Mr. Midgley as very dynamic, driven and reliable. Mr. Postles has no recollection of working with Mr. Midgley in October 2004, when Mr. Midgley was assigned to his shift.

[71] In cross-examination, Mr. Postles admitted that, although the time cards and shift lists suggest that Mr. Midgley was working on the green chain after the 2004 Accident, it was “quite possible” he was in fact working doing summer relief in the reman department during that time.

[72] On the totality of the evidence, I cannot conclude that either the time cards or the shift list roster are determinative of whether Mr. Midgley was assigned as a holiday relief worker "in the reman department" after the 2004 Accident. I note that the shift list dated June 17, 2004, has a "VR" placed next to Mr. Midgley's name. It can reasonably be inferred that this refers to Vacation Replacement or Vacation Relief.

[73] Contrary to the defence assertions, the evidence falls short of establishing that the fact that Mr. Midgley worked some night shifts and performed some overtime in this period, is inconsistent with him having been assigned summer relief work in the reman department.

[74] In assessing the evidence on this point, it is important to appreciate that Mr. Midgley was recalling his work schedule in 2004, some seven and a half years prior to trial. As a general observation, Mr. Midgley was clearly confused at certain points with respect to the time frames in which he was on a graduated return to work program, working light duties, or when he was performing his duties on a regular shift. He candidly admitted when he could not recall dates and time frames. Moreover, when a document showed that he had been inaccurate in his recollection as to specific dates or time frames, he readily acknowledged any inaccuracies in his testimony.

[75] Initially in his evidence, Mr. Midgley testified that he had been posted on a regular shift in the spring of 2004, but a review of his employment record shows that he was not placed on shift on any permanent basis until October 19, 2004. I find that Mr. Midgley was genuinely mistaken as to when he was permanently placed on shift. This is not surprising, as it was established through the evidence of Mr. Paul and Mr. Postles that Mr. Midgley in fact, by June 1, 2004, had been placed on "shift 2" temporarily, to replace another shift member who was on leave. Mr. Midgley worked on that shift through to October 2004.

[76] During cross-examination, Mr. Midgley was also referred to his "pain diary". Some of the pain diary entries clearly refer to "at work" or "back to work". The

defendants contend that if Mr. Midgley had not been working on the green chain through the summer of 2004, he would have recorded that in his diary. According to Mr. Midgley, when he made those notations, his reference to "work" meant attending at the Weyerhaeuser mill. I found his explanation plausible.

[77] Mr. Midgley steadfastly maintained in cross-examination that after the 2004 Accident, he did not resume working regular rotations on the green chain on any sustained basis. In cross-examination, Mr. Midgley testified as follows as to what he meant when he explained his return to "work" to the various health care professionals who assessed him:

> Q Do you acknowledge that you did not tell any of the doctors who have seen you about your injuries in this accident that you were working for six months after the accident?
>
> A Well, I wasn't working in my job for six months afterwards is what I'm trying to say. Reman is not my permanent position, I can't stay there. I wish I could. I might still be there today. But not in my job.
>
> Q You didn't tell them that you were working for that six-month period?
>
> A That's not working to me, I'm not in my - - it's an easy, light duty job, that's not what my job entitled. They asked me what my job entitled, it's a hard labour job. That's my job. The green - - or the Reman is not my job, it's not a permanent position. You wish it was but it's not.

[78] I found the evidence of Mr. Simonson, who was called as a witness by Mr. Midgley, persuasive. He testified regarding working with Mr. Midgley at the same shift in the summer of 2004 in the reman department at Weyerhaeuser. He was a credible and objective witness who provided clear and convincing testimony. I accept his evidence.

[79] According to Mr. Simonson, Mr. Midgley held the summer relief position from the end of April/early May 2004 for five or six months. The team within which he worked in the reman department chose Mr. Midgley for the summer relief position because of his likeability and compatibility.

[80] He recalled that Mr. Midgley worked with him on "shift 2", doing packaging and that Mr. Midgley, during the summer of 2004, was not required to do any heavy lifting. He described packaging the lumber packages on a conveyer belt like

wrapping a large Christmas present. Mr. Midgley could stand or sit as he preferred. He had a clear recollection that Mr. Midgley wore a back brace and a belt during this period. He also corroborated Mr. Midgley's evidence that members of the reman department performed break-relief work on the green chain and that working in the reman department was nowhere near as strenuous as working on the green chain. The employees could move around freely, they had longer breaks and it did not involve machine-paced repetitive work, which Mr. Simonson described as "extremely physical". In short, the work in the "reman department" was preferred to the green chain by all workers because it was considerably less physically demanding work.

[81] Despite his imprecise recall of the dates, on balance, I found Mr. Midgley's evidence regarding his return to employment to be credible. In my view, Mr. Midgley's answers at trial did not appear to be tailored. If indeed he had fabricated his testimony at trial one would have expected his evidence on this point to be more honed. I cannot conclude that he deliberately intended to deceive or mislead the court as is alleged by the defence.

[82] In summary, the preponderance of the evidence supports a finding that in the period following the 2004 Accident until October 2004, Mr. Midgley did not resume working regular shift rotations on the green chain on a sustained basis; shortly after his return he was assigned summer relief work in the reman department. Thereafter, until October 2004, he worked for the most part in the reman department, routinely wearing a back brace and a weight-lifting belt for support.

[83] On this point, I find no significant inconsistencies or inaccuracies in what he reported to the various health professionals who assessed him. In my view, none of the doctors who assessed him demonstrated any significant misunderstanding of Mr. Midgley's return to work after the 2004 Accident. In reaching this conclusion, I have considered the entire body of evidence and, in my view, it best harmonizes with the preponderance of probabilities of this case.

The 2006 Accident

[84] Mr. Midgley sustained injuries in a motor vehicle accident which took place on October 10, 2006. After a passing truck dropped cargo onto Highway 1, his vehicle spun and hit a barricade and then slid off the highway into a median. He was taken from the scene in an ambulance but was released from the hospital the same day. Notably, at the time of the 2006 Accident, Mr. Midgley was not working.

[85] As a result of the 2006 Accident, Mr. Midgley suffered from headaches and the prior injury to his left shoulder was aggravated. He also sustained an aggravation of his low back pain. The headaches and aggravation of his back and shoulder injuries subsided a year or so after the 2006 Accident; Mr. Midgley eventually recovered to his pre-2006 Accident condition.

2006 Accident to the Date of Trial

[86] After he left Weyerhaeuser Mr. Midgley worked in various positions. He worked in an investment office for approximately two to three months. He also worked for Mr. Miller in a steel company for one month and worked as a personal trainer for Mr. Miller's staff and family for eight months. He also worked for Mr. Yates in a private liquor store in Sardis for some six weeks. I note parenthetically that both Mr. Miller and Mr. Yates testified at trial and I will refer to their evidence later in these reasons.

[87] Mr. Midgley sought counselling in 2006 for his psychological issues through an employee assistance program.

[88] Mr. Midgley opened a gym facility in Chilliwack on January 5, 2009. Since that time, he has operated the gym as a sole proprietorship with three employees. He greets clients and offers limited personal training sessions.

[89] In late 2011 Mr. Midgley was involved in a motor vehicle accident in which he rear-ended another vehicle. He did not sustain any injuries in that accident.

Expert Medical Evidence

Plaintiff's Experts

[90] Mr. Midgley relied on the expert evidence of Dr. Klassen, Dr. Shuckett, Dr. McKenzie, Dr. Hamm, Dr. O'Breasail and Dr. O'Connor. Dr. Klassen, who was Mr. Midgley's family doctor, died tragically while on vacation in 2009. Each of the other doctors attended for cross-examination at trial. The key portions of their reports are summarized below:

(i) Dr. Klassen

[91] Dr. Klassen prepared a report dated May 17, 2006, five months before the 2006 Accident. It was his opinion that Mr. Midgley, as a result of the 2004 Accident, sustained an injury to his lumbar spine, which caused him pain, tenderness, spasms and limitation of movement. As of May 2006, Mr. Midgley's condition had not improved. He opined that Mr. Midgley was unable to return to his former job at Weyerhaeuser and that Mr. Midgley demonstrated probable "permanent disability". However, he was of the view that Mr. Midgley could perform a job which did not strain his lumbar spine.

(ii) Dr. Shuckett

[92] Dr. Shuckett, a rheumatologist, assessed Mr. Midgley on October 2, 2007. In her report dated October 23, 2007, she states that her diagnoses, as a result of the two motor vehicle accidents in 2004 and 2006, included right sacroiliac joint dysfunction with tenderness and stress pain and mechanical low back pain, "which is likely musculo-ligamentous in origin". She also noted that an acetabular labral tear of Mr. Midgley's right hip should be ruled out.

[93] Insofar as prognosis, she states that Mr. Midgley likely had made "maximum medical recovery" by October 2007.

(iii) Dr. Gerard McKenzie

[94] Dr. McKenzie is an orthopedic surgeon who assessed Mr. Midgley on October 3, 2007. In his report dated October 7, 2007, he states his diagnosis was "unspecific low back pain", which was triggered by the 2004 Accident. He opined

that even prior to the 2006 Accident, Mr. Midgley's pain had become chronic and that Mr. Midgley suffers from chronic pain syndrome.

[95] In his view, the prognosis for Mr. Midgley's lower back pain is poor and that there is a very high likelihood that he will continue to suffer persistent discomfort.

(iv) Dr. Douglas Hamm

[96] Dr. Hamm, an occupational medicine specialist, assessed Mr. Midgley on June 8, 2010. In his report dated July 2, 2010, he concluded that as a result of the 2004 Accident, Mr. Midgley developed persisting lumbar pain with occasional shooting pains up the right paravertebral area and also in his left leg. In Dr. Hamm's view, Mr. Midgley suffers from post-traumatic chronic mechanical low back pain, which is aggravated by prolonged postures and repetitive forceful movements. He states as follows:

> It is my own opinion that it is the accident of March 26, 2004 which has resulted in Mr. Midgley's current level of symptomatology and disability as noted above. In my opinion, the accident of October 10, 2006 caused additional pain intensity but did not essentially alter the pattern of Mr. Midgley's pre-existing pain and disability.

[97] As of 2010, Mr. Midgley was not able to tolerate prolonged sitting or prolonged walking without developing increased pain. In Dr. Hamm's opinion, Mr. Midgley is not capable of tolerating his former work as a dryer-operator nor is he suited for work which requires heavy strength physical demands.

[98] He concluded that for the foreseeable future, Mr. Midgley will likely continue to experience mechanical low back pain, with exacerbation from over-exertion or prolonged postures. According to Dr. Hamm, this will "adversely impact his options for employment."

(v) Dr. O'Breasail

[99] Dr. O'Breasail is a psychiatrist who assessed Mr. Midgley on June 14, 2010.

[100] In his report dated December 23, 2010, he states that Mr. Midgley is suffering from chronic pain and following the 2004 Accident, he suffered a Major Depression, which is now in partial remission. Mr. Midgley experienced depressed mood,

decreased drive and motivation, cognitive difficulties with impairment in concentration and memory, irritability and a generally low frustration tolerance. He has become more socially withdrawn and enjoys life much less.

[101] He opined that Mr. Midgley will likely suffer chronic pain in the long term and will continue to experience mood difficulties. His opinion is that Mr. Midgley has a permanent partial disability.

[102] He concluded that, in addition to the physical problems it caused, the 2004 Accident was primarily responsible for Mr. Midgley's disabling psychological injuries.

(vi) Dr. Russell O'Connor

[103] Mr. Midgley was assessed by Dr. O'Connor, a physical medicine and rehabilitation specialist, on June 1, 2011.

[104] In his report dated June 1, 2011, he stated that, because of Mr. Midgley's complaints of deep right buttock pain that worsened with rotation of the hip and the mechanism of the injury in the 2004 Accident, he suspected Mr. Midgley had sustained a labral tear in the right hip in the 2004 Accident. He recommended that an MRI arthrogram be carried out to determine if that was the case. In his first report, he states as follows:

> During the accident, the mechanism of injury to his hip was loading of the hip inn (sic) full flexion where he was bent forward and off to the right, putting his right hip in a maximum hip impingement-type position and then was rear-ended. For this reason a hip arthrogram should be done to look for this type of hip injury.

[105] A right hip MRI arthrogram which was performed on July 27, 2011, confirmed Dr. O'Connor's suspicion that Mr. Midgley had sustained a tear to the labrum of the right hip. The labrum is the connective tissue or cartilage that surrounds the ball and socket joint in the hip. The MRI arthrogram showed that Mr. Midgley had a cam-type impingement in his hip socket -a boney bump on the ball of the femur that sits inside the hip joint - which put him at an increased risk for a labral tear. Dr. O'Connor's opinion is that the 2004 Accident caused Mr. Midgley's labral tear. Dr. O'Connor also opined that the 2004 Accident aggravated the pre-existing degenerative changes in

Mr. Midgley's back and caused an increase in the severity and frequency of Mr. Midgley's low back pain, particularly on the right side.

[106] In Dr. O'Connor's opinion, Mr. Midgley was unable to return to his previous occupation as a dryer-operator in Weyerhaeuser and would never be able to do so. In his view, Mr. Midgley is capable of moderate level work but not on a full-time basis.

[107] With respect to prognosis, he stated that it is possible, with surgery, Mr. Midgley's hip and buttock pain would improve, but without further surgery, in all probability, there will be no improvement in his condition. It is his opinion that without further intervention, Mr. Midgley's back pain should be considered to have plateaued. However, given that the hip pain is the trigger for the flares of pain he experiences six to seven times a year, there may be some improvement with his back pain if the labral problem is addressed surgically.

[108] In his August 10, 2011, report, Dr. O'Connor concludes as follows:

> The surgery for the hip labral repair and removal of the bones causing the impingement will not return the hip to normal. But getting rid of the bone spurs may slow the deterioration of the hip down. The repair of the labrum may decrease the frequency and severity of the flares of pain. We will know more after the surgery. He will need physio and strength and conditioning after the hip surgery for about 6 months.

Defendants' Experts

(i) Dr. Miller

[109] Dr. Miller, a psychiatrist, conducted an assessment of Mr. Midgley on September 30, 2011. He addressed the opinion of Dr. O'Breasail on behalf of the defence.

[110] In his assessment dated September 30, 2011, Dr. Miller essentially agreed with Dr. O'Breasail's opinion. Although Mr. Midgley's depressive symptoms have remitted to a significant extent, he agreed that some of the symptoms he presents with, such as disturbance of mood, anger and frustration and anxiety regarding his current circumstances, are depressive in nature. He also observed that there may

well have been times in the past few years that there had been sufficient depressive symptoms to warrant a diagnosis of Major Depression.

[111] Dr. Miller also stated that Mr. Midgley has chronic pain symptoms that are sufficient for a diagnosis of chronic pain disorder. He also opined that Mr. Midgley's self-esteem and his coping mechanisms, which included exercising at a high intensity, have both been reduced because of his inability to maintain a high level of physical activity.

[112] In his opinion, Mr. Midgley, who enjoys physical activities, is capable of "limited and relatively low-stress work" that is consonant with his physical limitations.

[113] Insofar as treatment, he agrees with Dr. O'Breasail that Mr. Midgley requires further treatment for his psychological issues, including cognitive behavioural treatment. However, in contrast to Dr. O'Breasail, Dr. Miller does not recommend anti-depressant medication for Mr. Midgley. He is of the view that if Mr. Midgley, after ceasing the use of anabolic steroids, continues to have mood problems, there should be consideration of the usage of a mood stabilization medication.

(ii) Dr. Schweigel

[114] Dr. Robert Schweigel, an orthopedic surgeon, who assessed Mr. Midgley on behalf of the Defendants on August 8, 2011, prepared a report dated August 8, 2011.

[115] In his report, he described Mr. Midgley as cooperative through the history and physical assessment. According to his report Mr. Midgley did not complain of any pain during the examination of his hips.

[116] Dr. Schweigel emphasized that Mr. Midgley has degenerative disc disease in his lumbar spine; he has a mild disc protrusion at L5-S1and some mild disc bulging at L4-5. It is his view that the degenerative disc disease pre-existed the 2004 Accident. However, he also notes that, on review of his family doctor's notes, Mr. Midgley was "relatively asymptomatic" with respect to the lumbar spine prior to the 2004 Accident.

[117] Dr. Schweigel stated in his report that Mr. Midgley's ongoing mechanical back pain symptoms and the pain he persistently experiences in his right buttock region are likely from the degenerative disc disease in his lumbar spine.

[118] Dr. Schweigel concluded that Mr. Midgley did sustain soft tissue injuries in both the 2004 and 2006 accidents. In his view, Mr. Midgley would have been limited with respect to impact and heavy activities for probably three to six months after sustaining these soft tissue injuries, after which he would have expected that Mr. Midgley could have worked.

Response Report of Dr. O'Connor to Dr. Schweigel

[119] In response to the report of Dr. Schweigel, Dr. O'Connor, in his report dated September 9, 2011, explains why he disagrees with Dr. Schweigel's opinion that Mr. Midgley's degenerative changes in his spine are the cause of Mr. Midgley's complaints. He states as follows:

> The reason I disagree with Dr. Schweigel on this point is Mr. Midgley was relatively asymptomatic, functioning well and in fact at an elite level of physical activity prior to the accident. Mr. Midgley was showing no signs of being limited by his back pain according to the medical information I have available to me at the time of this report. Mr. Midgley was involved in a motor vehicle accident and subsequently had ongoing back and hip pain that became incapacitating and prevented him from both competing and working in a competitive environment. The main change, in my opinion, was the motor vehicle accident. The mechanism of injury of the 2004 MVA (despite it being a low velocity impact) is important with regards to helping make the diagnosis. Mr. Midgley described being hyperflexed at both the back and the hip, and twisted to the right getting something off the floor on the passenger foot well. This puts his right hip into a hyperflexed, internally rotated, and relatively adducted position to his trunk, which put him at prime risk for injury to his labrum on the right side and injury to his low back. It is my opinion he suffered a labral and hip injury as a result of the MVA.

Adverse Inference

[120] Since 2009, Mr. Midgley has been treated by Dr. J. Coppin. Dr. Coppin did not give evidence and the defence asked that I draw an adverse inference from the plaintiff's failure to call him.

[121] It is well-established on the authorities that an inference adverse to a litigant may be drawn if that litigant fails to call a witness who could reasonably be expected to provide supporting evidence. In *Buksh v. Miles*, 2008 BCCA 318, the British Columbia Court of Appeal provides guidance on the factors which inform the analysis of whether an adverse inference should be drawn for the failure to call a treating physician. The factors include the following: the explanations proffered for not calling a witness, the nature of the evidence that could be provided by the witness and the extent of disclosure of that physician's clinical notes.

[122] Dr. Coppin's complete records were disclosed to the defence. I have no grounds for assuming that Dr. Coppin's evidence could not have been obtained by the defence.

[123] Mr. Midgley's counsel points out that Dr. Coppin first became involved with Mr. Midgley's care more than five years after the 2004 Accident and only when his long-term family physician died suddenly. Dr. Coppin apparently provides homeopathic hormonal balancing and anti-aging treatments at his clinic. Mr. Midgley testified that Dr. Coppin treated him regarding his heart palpitations and hormone balancing. It is not alleged that this condition is related to the 2004 Accident.

[124] I accept Mr. Midgley's counsel's submission that, given the nature of the treatment Dr. Coppin provided, it cannot reasonably be inferred that Dr. Coppin could have provided cogent evidence in this case, particularly in light of the multitude of other medical opinions proffered by Mr. Midgley.

[125] In my view, this is not an appropriate case to conclude that an adverse inference should be drawn against Mr. Midgley for his failure to call Dr. Coppin.

Conclusions on Mr. Midgley's Condition

[126] Mr. Midgley contends that, as a result of the 2004 Accident, he sustained the following injuries:

- injuries to his neck;

- a torn labrum in his right hip;
- injuries to his low back;
- chronic pain disorder, depression and anxiety.

[127] In this section, I will set out my findings on Mr. Midgley's condition, including the assessment of the severity of his persisting symptoms. I will address causation in the next section of these reasons.

[128] I note that Mr. Midgley is not seeking to prove that the mild disc protrusion at L5/S1 initially revealed by the CT scan of his lumbar spine in December 2004 was caused by the 2004 Accident. I also note parenthetically that neither does his counsel assert that the cardiac problems Mr. Midgley experienced in 2008 are related to the 2004 Accident.

[129] It is key to observe that the medical experts who assessed Mr. Midgley relied on him, to varying degrees, to describe his history and the multiple medical opinions adduced in this case have been based to a large extent on Mr. Midgley's subjective reporting of his symptoms.

[130] As was emphasized by defence counsel, the weight that can be given to those experts opinions ultimately turns on the court's assessment of Mr. Midgley's evidence at trial and the consistency of that evidence with the information that he previously communicated to the various professionals who treated and assessed him; *Edmondson v. Payer*, 2011 BCSC 118 at para. 21, aff'd 2012 BCCA 114.

[131] Insofar as the defence submissions relating to Mr. Midgley's evidence at trial and the alleged inconsistencies with the information he previously provided to various medical professionals, the court's observations in *Edmondson* are instructive:

> [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-

> examination, can rarely do more than agree that he or she must have said what the doctor wrote.

[132] These observations are particularly apt in this case, in which Mr. Midgley has seen a multitude of health care professionals and physicians over an eight-year period, "particularly given the human tendency to reconsider, review and summarize history in light of new information": *Burke-Petramala v. Samad*, 2004 BCSC 470 at para. 104. In the circumstances, it is not surprising that some variation can be found between Mr. Midgley's testimony and the entries in the clinical records, which purport to record his history.

[133] The overarching submission of the defence is that Mr. Midgley is exaggerating the severity of his current complaints.

[134] The following hospital record from July 25, 2008, was put to Mr. Midgley in cross-examination:

> He is still very active, though, doing a lot of weights. He had a very hard work out the preceding afternoon/morning and he had no chest pain during it.

[135] The context of this entry must be kept in mind. Mr. Midgley was attending the hospital in the middle of the night for an unrelated medical issue - heart palpitations. We do not know the questions posed by the doctor that elicited the recorded information and the notation does not purport to be a direct quotation. This may have been the doctor's words, not Mr. Midgley's, and Mr. Midgley would not have had any opportunity to correct any misunderstanding of what he said. Nor do we know everything that Mr. Midgley may have said to the attending physician.

[136] On the totality of the evidence, I cannot conclude that Mr. Midgley attempted to mislead the court or exaggerate or embellish the extent of his injuries or the severity of his current symptoms to advance his litigation objectives. I find that Mr. Midgley was and is motivated to be as physically active as possible. In my view feigning injuries or a contrived disability would be incompatible with Mr. Midgley's life-long focus on maintaining his physical conditioning and the pride he took in his physical achievements. Notably, none of the physicians who assessed Mr. Midgley have found any amplification of his symptoms or exaggerated pain behaviour.

[137] I next address the injuries Mr. Midgley alleges he sustained in the 2004 Accident.

[138] The evidence shows that in the 2004 Accident, Mr. Midgley sustained a mild cervical and thoracic spine injury which resolved within a matter of weeks.

[139] At trial, Mr. Midgley's primary complaint was the persistent pain that is centered in and around his right buttock. Mr. Midgley described a "toothache" type of sensation deep in his right hip in the buttock area which has persisted since the 2004 Accident. It is worse with the internal or external rotation of his hip. The pain sometimes radiates into his legs. Walking and standing for a prolonged period aggravates his symptoms.

[140] In cross-examination, Dr. O'Connor testified that buttock pain can emanate from either the back or the hip. His explanation was as follows:

> Patients with back pain can have buttock pain and patients with hip pain can have buttock pain, so the buttock to me means that either one of those things are on the list of possibilities as far as the possible cause of buttock pain.

[141] It is uncontroversial that the medical evidence establishes that, as of 2011, Mr. Midgley had a torn labrum in his right hip.

[142] Since the 2004 Accident, Mr. Midgley has also experienced persistent low back pain and tenderness with intermittent spasms. He routinely wears a back brace and belt for support. It is the right side of his back that bothers him more. He continues to experience discomfort and stiffness on a daily basis in his lumbar spine and paralumbar spine.

[143] Since the 2004 Accident, Mr. Midgley described having a pattern of "good days" and "bad days". On a good day, he is able to perform his routine activities, but on his bad days, which are at least twice a week, his daily activities are severely restricted by his symptoms.

[144] The evidence also shows that since the 2004 Accident, about six or seven times a year, Mr. Midgley has experienced an aggravation of symptoms in his right

buttock and lumbosacral junction and paraspinal muscles. I accept Mr. Midgley's evidence that two to three episodic aggravations per year cause him to experience severe pain, which is debilitating. These episodic aggravations usually last two to three days. His symptoms are more intense in the colder months of the year.

[145] I find that, after the 2004 Accident, Mr. Midgley took reasonable steps to try to improve his condition. After the 2004 Accident, Mr. Midgley used, on the recommendation of his doctor, anti-inflammatories and muscle-relaxant prescription medication. Mr. Midgley also attended physiotherapy, chiropractic and acupuncture treatments and prolotherapy and massage therapy. Having found that none of these modalities resulted in any significant improvement in his condition, he now follows a regime of homeopathic medication and hormone therapy. For the most part, he now eschews prescription pain medication.

[146] There is no cogent evidence that the symptoms of Mr. Midgley's injuries and, in particular, the labral tear in his hip, would have improved if he had continued to pursue the traditional modalities of treatment.

[147] Mr. Midgley also followed his doctor's recommendation to perform light gym workouts. His workouts continue to be focussed at maintaining his fitness level but not aggravating his back and hip injuries. He is clearly motivated to maintain his fitness level as high as possible. The intensity of his current workout regime varies with his symptoms, but I find that the intensity and duration of his sessions are considerably less than those workouts and activities that he enjoyed prior to the 2004 Accident. His wife summarized the changes in his workout regime with her candid observation that he no longer "sweats" at the gym.

[148] I accept that Mr. Midgley suffers from chronic pain symptoms that Dr. Miller, the psychiatrist for the defence, stated would be "sufficient for a diagnosis of chronic pain disorder." He also has suffered from depression and anxiety symptoms since the 2004 Accident. Dr. O'Breasail and Dr. Miller agree that in 2006, Mr. Midgley likely suffered a Major Depression, although his depressive symptoms have remitted to a significant extent.

[149] In the years following the 2004 Accident, Mr. Midgley experienced severe mood difficulties and suffered bouts of irritability and anxiety. As a result, the relationship with his family deteriorated and his marriage was strained. Notably, Mr. Midgley's then teen-age son moved out of his home during this period. Mr. Midgley's social life has diminished because of his limitations.

[150] Mr. Midgley also began consuming alcohol and, on his own admission, he drank daily and to excess, in order to alleviate his physical and mental distress and his frustration with his level of function. He did stop drinking alcohol for approximately six months, but he has resumed consuming alcohol in an effort to alleviate his symptoms.

[151] My best assessment is that Mr. Midgley currently continues to suffer from chronic pain, anxiety and depression symptoms, as well as some mood disturbance. He also continues to suffer from sleep disturbances.

[152] I am fortified in my conclusions regarding Mr. Midgley's current condition by the evidence of the witnesses called by Mr. Midgley. Without exception, I found them to be credible witnesses and I found their evidence reliable regarding their respective observations about the changes in Mr. Midgley after the 2004 Accident.

[153] Ms. Midgley candidly testified regarding her observations about the changes in her husband after the 2004 Accident. She noted his mood changes and irritability and the difficulties he encounters with his episodic flare-ups. She has also observed his sleeping difficulties and his problems with standing and sitting for any prolonged periods of time. She corroborated that he sometimes is required to rely on his disability sticker when parking his car, which causes him some embarrassment. This is to ensure that he has sufficient room to ingress and egress his vehicle. Her distress over Mr. Midgley's self-medication with alcohol after the 2004 Accident was palpable in her testimony.

[154] Mr. Yates, a Chilliwack businessman, who has known Mr. Midgley since approximately 1986, also gave credible testimony about his observations of the

significant changes in Mr. Midgley following the 2004 Accident. In the years prior to the 2004 Accident, Mr. Yates played golf and baseball with Mr. Midgley and worked out at the same gym. He never observed Mr. Midgley having any physical limitations with regard to any activities. He described Mr. Midgley prior to the 2004 Accident as "vibrant and tough". Since the 2004 Accident, he has never seen Mr. Midgley without his back support. He has observed that Mr. Midgley's gym workouts are significantly restricted. According to Mr. Yates, Mr. Midgley is "broken" and "not the same guy".

[155] In 2007, Mr. Yates hired Mr. Midgley to work at one of the private liquor stores he owns in Sardis. After approximately six weeks, Mr. Yates and Mr. Midgley mutually agreed that was not suitable employment for Mr. Midgley, because he could not perform the repetitive lifting of the heavy cases.

[156] Mr. Bill Miller, another Chilliwack businessman and former neighbour and employer of Mr. Midgley, also testified about the changes in Mr. Midgley after the 2004 Accident. Prior to the 2004 Accident, he described Mr. Midgley as very strong, active and driven. Subsequent to the 2004 Accident, he observed that Mr. Midgley appeared to be in a lot of discomfort because he was walking and sitting differently.

[157] In 2006, Mr. Miller had offered Mr. Midgley a desk job in his steel brokerage business, but found after a month or so that Mr. Midgley was not able to focus nor endure the sitting requirements. He then hired Mr. Midgley to provide personal training instruction to his staff and family members. They too, mutually decided to part ways in 2007, because Mr. Midgley was routinely cancelling the scheduled training sessions on account of his pain symptoms.

[158] Andy Sylvester has known Mr. Midgley since approximately 1987 and has seen him regularly since 1993, both socially and at the gym. He described Mr. Midgley as a "grin and bear it" type of individual. Prior to the 2004 Accident, he described Mr. Midgley as being in top physical shape and that he was a very outgoing, charismatic and positive individual. Mr. Sylvester observed significant negative changes in both Mr. Midgley's physical abilities and mood following the 2004 Accident. In his testimony, he described Mr. Midgley, who was then wearing a

back brace, encountering difficulties getting in and out of a motor vehicle. According to Mr. Sylvester, Mr. Midgley's exercise routine at the gym has changed substantially and it appears that he has engaged in more of a "rehabilitation type" program.

[159] A careful review of the videos of surveillance submitted by the defence does not demonstrate any inconsistencies with my findings. Moreover, there was no evidence that any of the medical experts were asked to comment on what the videos may have indicated about Mr. Midgley's condition.

[160] In summary on this issue, I find Mr. Midgley's symptoms are genuine. He has endured significant and chronic pain, notwithstanding his efforts to minimize his symptoms. He regularly experiences varying degrees of pain and discomfort in his hip, back and buttock and he suffers from episodic flare-ups of his symptoms. He also suffers from depressive and anxiety symptoms.

[161] In the end, the question of Mr. Midgley's prognosis is difficult because, as of the date of trial, although Dr. O'Connor had recommended a referral to a surgeon for consideration of labral hip repair/resection and removal of the cam-type boney impingement, Mr. Midgley had not yet seen a surgeon.

[162] I accept Dr. O'Connor's opinion that without surgery, Mr. Midgley is unlikely to experience any measurable improvement in his condition. There is a possibility that with surgery, Mr. Midgley will experience a decrease in the frequency and severity of his episodic aggravations of his hip, buttock and back pain. The preponderance of the psychiatric evidence, along with the lay evidence that I accept, supports a finding that if Mr. Midgley continues to suffer chronic pain, he will likely continue to experience mood difficulties and depressive and anxiety symptoms. The cognitive therapy recommended by the psychiatrists may bring him some relief of his psychological symptoms.

[163] In my view, on balance, it is more likely than not that Mr. Midgley's symptoms will persist and limit his functions indefinitely.

[164] I will address the functional capacity evaluations and whether Mr. Midgley's injures have impacted his income-earning capacity in the section on damages.

CAUSATION

[165] In order to justify any compensation for his condition, Mr. Midgley must establish a causal connection between the defendants' unlawful acts and his condition.

[166] Causation is a central issue in this case. Mr. Midgley submits he has met the burden of proving that the defendants' negligence caused the constellation of symptoms from which he now suffers. The defence forcefully submits that Mr. Midgley has not discharged his burden.

Legal Framework

[167] Whether a defendant is liable to a plaintiff for an injury is a matter of causation. It is crucial to keep in mind the analytical distinction between determining causation and assessing damages, since different principles govern the two questions: *T.W.N.A. v. Canada (Ministry of Indian Affairs),* 2003 BCCA 670 at para. 16; *Drodge v. Kozak,* 2011 BCSC 1316 at para. 79; *Moore v. Kyba,* 2012 BCCA 361 at paras. 35-36. I will return to the principles which govern the assessment of damages later in these reasons in the section on damages.

[168] The primary test to be applied in determining causation is commonly articulated as the "but for" test. The plaintiff bears the burden of showing that "but for" the negligent act or omission of the defendant, the plaintiff's injury would not have occurred.

[169] The "but for" test need not be determined with scientific precision. Rather, causation is a practical question of fact which can be best answered by ordinary common sense: *Snell v. Farrell,* [1990] 2 S.C.R. 311 at 328.

[170] A plaintiff need not establish that a defendant's tortious conduct is the sole cause of the injury. A defendant will be fully liable for the harm suffered by a plaintiff,

even if other causal factors for which he is not responsible were at play in producing the harm, as long as the plaintiff establishes a substantial connection between the injuries and the defendant's negligence beyond the "*de minimus*" range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9 and 11; *Athey v. Leonati,* [1996] 3 S.C.R. 458; *Resurfice Corp v. Hanke,* 2007 SCC 7; *Clements v. Clements,* 2012 SCC 32; *Hunt v. Ugre*, 2012 BCSC 1704 at para. 120.

[171] The court must be cautious when inferring causation from a temporal sequence; that is, from a consideration of pre-accident versus post-accident condition. In cases where causation is asserted primarily on a temporal relationship between the negligent conduct and injury in question, the authorities mandate that a "close scrutiny of the evidence is required because the inference from a temporal sequence to a causal connection is not always reliable": *Hardychuk* at para. 130. See also: *Madill v. Sithivong,* 2012 BCCA 62 at para. 20; *White v. Stonestreet,* 2006 BCSC 801 at paras. 74-75. However, the authorities recognise that temporal reasoning is not an illegitimate analysis if invoked in the appropriate circumstances: *Erickson v. Sibble*, 2012 BCSC 1880 at para. 223.

[172] When assessing medical evidence, the court must be mindful that in the legal context the "but for test" need only be established on a balance of probabilities; a plaintiff must show that it is more likely than not that, without the tort, the injury or medical condition would not have occurred. This is to be contrasted with the more exacting standard that approaches scientific certainty in the medical context. The court in *Tsalamandris v. MacDonald*, 2011 BCSC 1138 at paras. 145-146 (var'd on other grounds, 2012 BCCA 239), provides the following instructive formulation of the governing principles:

> In determining causation in the legal context, courts must be mindful to assess the import and substance of the expert opinion evidence, and to be cautious about the wording used by the experts so as to not unduly discount or over-weigh the expert's choice of language when describing medical causation. Ultimately causation is a question for the court, taking into account the evidence.
>
> It is important for the court to keep in mind that all that is required to determine these complex medical issues in the context of causation is for the plaintiff to prove what is more likely than not. This is what is meant by the "but

> for" test: it is more likely than not, that without the tort, the injury or medical condition would not have happened.
>
> (Emphasis added.)

Discussion

[173] The primary contention of the defendants is that Mr. Midgley has failed to prove that he sustained anything other than a minimal injury in the 2004 Accident.

[174] The overarching submission of the defence was that "this was a nothing accident". The tenor of the defence submission was that, since there was no damage to Mr. Midgley's motor vehicle, he could not have sustained the damage he alleges in the 2004 Accident.

[175] There is no legal principle that holds that if a collision is not severely violent or if there is no significant damage to a motor vehicle, the individual seated within that vehicle at the time of the impact cannot have sustained injuries. The authorities clearly establish that, while the lack of vehicle damage may be a relevant consideration, the extent of the injuries suffered by a plaintiff is not to be measured by the severity of the force in a collision or the degree of the vehicle's damage. Rather, the existence and extent of a plaintiff's injuries is to be determined on the basis of the evidentiary record at trial: see *Gordon v. Palmer* (1993), 78 B.C.L.R. (2d) 236.

[176] As I referred to earlier, the defence led no opinion evidence to support the assertion that the force of the impact in this case was incapable of producing the injury alleged by Mr. Midgley. I accept Mr. Midgley's evidence regarding his body position at the time of impact and that, as far as he was concerned, the collision was jarring. In any case, there is expert medical evidence, which I find persuasive, that supports the relationship between the 2004 Accident - and, in particular, Mr. Midgley's body position at the time of impact - and the existence of his injuries.

[177] On the totality of the evidence, I am persuaded that Mr. Midgley sustained an injury in the 2004 Accident, in spite of the fact that his vehicle apparently was not damaged.

(i) Was the hip labral tear and low back injury caused by the 2004 Accident?

[178] A right hip MRI arthrogram performed on Mr. Midgley on July 27, 2011, showed femoral acetabular impingement and a labral tear.

[179] Mr. Midgley's submissions are grounded in Dr. O'Connor's opinion that Mr. Midgley's labral tear was caused by the 2004 Accident. He opines in his report dated August 10, 2011 as follows:

> This MRI confirms my clinical findings of femoral acetabular impingement and my suspicion of a labral tear. The labral tear was caused by the accident. The tear is what is causing the flares of pain he gets 6-7 times a year. Once he gets into these flares, back pain also flares. This is a typical finding in patients with labral problems.

[180] For the reasons set out earlier, I do not accept the defence contention that Dr. O'Connor was "misled" by Mr. Midgley about his body position at the time of impact and his difficulties returning to work on the green chain after the 2004 Accident. In cross-examination, Dr. O'Connor demonstrated a sufficiently accurate understanding of Mr. Midgley's work history after the 2004 Accident. I also find that Mr. Midgley accurately reported to Dr. O'Connor regarding the onset and severity of his symptoms.

[181] The medical evidence shows that the symptoms of labral tears often do not present in a straightforward fashion and are often difficult to diagnose. I accept Dr. O'Connor's evidence that patients with hip labral tears often poorly or vaguely describe a variety of non-specific symptoms, such as an ache or burning in the knees or sacroiliac joint, or as low back pain.

[182] According to Dr. O'Connor the link between Mr. Midgley's deep buttock pain and the aggravation of his back pain was a key factor. Dr. O'Connor explained that patients who have a significant hip labral injury often describe back and buttock pain that develops as the hip gets aggravated. Frequently, as in Mr. Midgley's case, the back pain becomes the main focus. I found his testimony compelling.

[183] Mr. Midgley's testimony regarding his symptoms is consistent with Dr. O'Connor's observation that patients who have a significant hip labral injury often imprecisely describe pain in the hip, back and buttock, particularly when the hip injury is aggravated. Dr. McKenzie also affirmed that some individuals may not identify pain in the correct anatomical structure and that pain in the hip and back is often difficult to distinguish. Notably, Ms. Zinck, an expert witness who was called by the defence, affirmed that many patients cannot distinguish between hip pain and back pain.

[184] Dr. O'Connor points out that the mechanism of the injury in the 2004 Accident, despite it being a low velocity impact, was an important factor in his analysis. According to Dr. O'Connor, Mr. Midgley's position of being twisted to the right put his right hip into a hyperflexed, internally rotated, and relatively adducted position to his trunk, which placed him at "prime risk for injury to his labrum on the right side and injury to his low back."

[185] Dr. O'Connor described Mr. Midgley's particular injury as a separation or pulling away of the labrum or cartilage rim around the socket on the lateral side of the right hip, as well as a complex tear of the anterior aspect of the labrum.

[186] Although Dr. O'Connor initially suspected a posterolateral tear, the arthrogram confirmed a labral tear of the anterior margin. In cross-examination Dr. O'Connor persuasively discounted the defence postulation that pain from this type of labral tear would be more to the anterior than the posterior of the body. He reiterated that symptoms from a labral tear often do not present in a straightforward fashion and that patients who describe vague, non-descriptive hip pain sometimes describe that pain "as front, sometimes lateral, sometimes posterior or buttock and sometimes all the way up quite close to the back or low back."

[187] I found Dr. O'Connor to be a very careful and objective witness. It was clear from his testimony, that he had thoroughly reviewed Mr. Midgley's records. His opinion was not weakened in the face of a thorough cross-examination.

[188] For the reasons that follow, I do not accept the defence submission that Mr. Midgley's complaints of hip pain did not "really come forward until he was diagnosed with a labral tear in the summer of 2011".

[189] I find Mr. Midgley's evidence on the onset of his symptoms persuasive. I accept his testimony that, immediately after the 2004 Accident, he knew "something was wrong" and he felt pain down to his knees. He described his hips and lower back "aching like a toothache". He attended the emergency room immediately after the Accident.

[190] As was referred to by Dr. O'Connor in his cross-examination, in his first clinical entry, on March 29, 2004, following the 2004 Accident, Dr. Klassen referred to pain with "right hip flexion". It was the right hip in which the MRI arthrogram showed Mr. Midgley had sustained a labral tear. On April 6, 2004, Dr. Klassen notes right "SI" or buttock pain, right leg pain and pain in both hips.

[191] In August 2006, Mr. Midgley reported to Ms. Fischer tightness in his groin muscles and a "burning" sensation in his hips.

[192] It is also noteworthy that Dr. Shuckett, when she examined Mr. Midgley in 2007, noted that flexion of his right hip elicited groin pain. She pointed out that soon after the Accident, he complained of right hip pain and there is no indication that he had those complaints before the 2004 Accident. She testified in cross-examination that the acetabular labral tear in Mr. Midgley's right hip revealed by the MRI arthrogram in 2011, was "most likely causally due" to the 2004 Accident.

[193] Neither Dr. Klassen, Dr. Hamm nor Dr. McKenzie diagnosed the labral tear. However, as I mentioned earlier, the medical evidence supports a finding that labral tears are notoriously difficult to diagnose. Dr. Hamm, who diagnosed Mr. Midgley with chronic mechanical low back pain, testified that on the examination, Mr. Midgley reported hip and buttock pain. He also testified that Mr. Midgley's body position was more important in assessing his injury than the damage to the vehicle.
Dr. McKenzie, who diagnosed Mr. Midgley as suffering from "non-specific low back

pain" as a result of the 2004 Accident, noted that Mr. Midgley had anterior hip pain when he adducted his hips during his assessment. Notably, the arthrogram showed a labral tear in the anterior margin. He also noted that Mr. Midgley reported hip pain which he described as a burning sensation and that on examination he was tender over the sacroiliac joints.

[194] The defence has not suggested a plausible alternate event which would explain the development of Mr. Midgley's symptomatology in this case .The defence submission that the labral tear was a function of Mr. Midgley's long-standing history of kickboxing is based upon speculation and is not supported by the evidence. Dr. O'Connor discounted this theory in cross-examination, pointing to Mr. Midgley's pre-2004 Accident level of functioning. I accept Dr. O'Connor's evidence that labral tears are rarely asymptomatic.

[195] I turn to address the opinion of the defence expert, Dr. Schweigel. Dr. Schweigel did not diagnose a labral tear, although it clearly existed when he examined Mr. Midgley.

[196] He opined that Mr. Midgley's current low back symptoms are mechanical in nature and are caused by his pre-existing condition - the degenerative changes shown on his imaging results. He says that Mr. Midgley's current symptoms are not due to any injuries he sustained in the 2004 Accident. He also stated in his report that Mr. Midgley's pain in his right buttock was "probably from the degenerative disc disease in his lumbar spine".

[197] In cross-examination, Dr. Schweigel conceded that, based on degenerative changes on imaging, he is not able to predict when an individual will develop back pain. He also acknowledged that it is normal for individuals to develop degenerative changes in their spine as they age and that not all of those individuals with degenerative changes will develop back pain.

[198] Dr. Schweigel, in cross-examination, also conceded that if Mr. Midgley's hip was in a flex position at the time of the impact, it could "potentially cause a labral

tear" but that it would be more suspicious if his knee struck the dash. He also testified that Mr. Midgley's description of pain was atypical and that, usually with a labral problem, patients complain of groin pain that goes through to the buttock. However, in cross-examination, Dr. Schweigel conceded that hip problems do not always manifest themselves as groin pain. This is consistent with the evidence of Dr. O'Connor on this point.

[199] In my view Dr. O'Connor, as well as Dr. McKenzie, persuasively discounted Dr. Schweigel's opinion regarding Mr. Midgley's current complaints.

[200] In his report dated September 9, 2011, Dr. O'Connor sets out why he disagrees with Dr. Schweigel. In discounting Dr. Schweigel's postulation, Dr. O'Connor points to the fact that Mr. Midgley was relatively asymptomatic and functioning at a high level prior to the 2004 Accident. Dr. O'Connor also affirmed in his testimony that medical professionals cannot predict the manifestation of back pain from degenerative changes shown on imaging.

[201] In cross-examination, Dr. McKenzie also disagreed with the notion that degenerative changes are causing Mr. Midgley's back pain. He testified as follows:

> I explained, that the fact that he has pre-existing areas of degenerative changes do not translate into pain now, or <u>even pain in the future</u>. (Emphasis added.)

[202] I accept Dr. McKenzie's evidence on this point.

[203] Based on the foregoing and the significant concessions Dr. Schweigel made in cross-examination, I do not consider it safe for the court to rely on Dr. Schweigel's opinion. The preponderance of the evidence does not support his conclusions regarding causation. I have far greater confidence in the opinion of Dr. O'Connor as to causation, which I prefer to the opinion of Dr. Schweigel on all fronts where their opinions diverge.

[204] In determining causation, I have not overlooked the defence assertion that Mr. Midgley had pre-existing problems with his low back and hips. He had on occasion visited a chiropractor for what Mr. Midgley had described as "tune-ups" for

his back, primarily in the period he was training as a body-builder. There were no visits recorded between 1997 and July 2003. There is one visit in 2003 and one visit in March 2004, prior to the 2004 Accident. Notably, Dr. O'Connor was aware of Mr. Midgley's prior chiropractic treatments when formulating his opinion.

[205] In support of their assertion, the defence primarily relies on a note taken by a chiropractor, Dr. Maier, regarding a visit from Mr. Midgley on August 17, 2004, some five months after the 2004 Accident. The notation refers to "back and hip pain for four to five years". In my view, it would be inappropriate to attach much significance to this single clinical entry. We do not know the questions Dr. Maier asked Mr. Midgley. The defence, although having subpoenaed him, chose not to call Dr. Maier.

[206] The context of this notation must be considered. Mr. Midgley explained in cross-examination, that since it was the first time he had seen Dr. Maier, he gave him a full medical history. Mr. Midgley's testimony on this point, which I accept, was as follows:

> That I had just another motor vehicle accident four or five months ago and how that was affecting my lower back and hips and then once in a while I would have, over the last four to five years, I would have a tweak in my lower back. But nothing that I felt needed or warranted a doctor visit or chiropractor visit. So I just told him about everything that I had.

[207] Nor am I persuaded that one entry in the clinical records in 2002, wherein Dr. Klassen's locum notes back pain is significant in the context of the evidence as a whole. Notably, Dr. Schweigel comments in his report that prior to the 2004 Accident, Mr. Midgley was "relatively asymptomatic in his family physician's notes with respect to the lumbar spine".

[208] The preponderance of the evidence supports a finding that prior to the 2004 Accident, Mr. Midgley was very physically active recreationally and performing a manual labour job. I do not find persuasive the fact that an individual such as Mr. Midgley, who was engaged in physically rigorous activities, on occasion sought chiropractic treatment for his back and very infrequently his left hip. In the years prior

to the 2004 Accident, his back symptoms bothered him only very occasionally. The preponderance of the evidence and the probabilities in this case do not demonstrate that prior to the 2004 Accident Mr. Midgley's back symptoms were significant or seriously interfered with his lifestyle, his employment, or recreational pursuits. In contrast, after the 2004 Accident, his back symptoms were much more persistent and severe.

[209] In short, I have concluded that the defence position is not supported by the whole of the evidence. I am not persuaded that prior to the 2004 Accident, Mr. Midgley experienced significant symptoms with either his back or hips.

[210] I recognize the dangers inherent in applying temporal reasoning in determining legal causation. However, when the timeline of the pertinent events is scrutinized in the context of the totality of the evidence, the inference of causation is compelling.

[211] Based on the opinion of Dr. O'Connor and Dr. Shuckett's testimony, in conjunction with the preponderance of the lay evidence material to the issue of causation that I accept, I conclude that Mr. Midgley sustained a labral tear in his right hip in the 2004 Accident. Based on the opinions of Dr. O'Connor, Dr. Shuckett, Dr. McKenzie, Dr. Hamm and Dr. Klassen, in conjunction with the lay evidence material to causation that I accept, I also conclude that Mr. Midgley sustained an injury to his low back in the 2004 Accident, which has caused him to experience chronic low back pain. For the purposes of causation, it is not necessary for the court to determine, as a matter of medical diagnosis, a precise description for the lumbar spine injury he sustained.

[212] In summary on this issue, I have concluded that Mr. Midgley has met the "but for" test mandated in the authorities. I am satisfied that it is more likely than not that Mr. Midgley sustained injuries to his hip and back in the 2004 Accident. Mr. Midgley would not have sustained these injuries and the constellation of symptoms in his hips, back and buttocks I have described earlier in these reasons, but for the negligence of the defendants.

(ii) Did the 2004 Accident cause psychological injury?

[213] The principles which inform the analysis of causation of physical injury apply to causation of psychological injury: *Hunt* at para. 123.

[214] The psychiatric evidence clearly establishes that Mr. Midgley suffers from a chronic pain disorder; he also suffers from some mood disturbance, and he continues to experience depression and anxiety symptoms.

[215] Mr. Midgley did not have any psychiatric history prior to the 2004 Accident.

[216] Mr. Midgley has resumed taking anabolic steroids in 2009, under the direction of Dr. Coppin. Mr. Midgley had taken steroids previously but had ceased doing so some years prior to the 2004 Accident. His mood disturbance, sleep disturbance and anxiety symptoms pre-dated his resumption of steroid use. While both psychiatrists who testified at trial were in agreement that Mr. Midgley's emotional lability is likely detrimentally influenced by his continued usage of anabolic steroids, I am not persuaded that in the absence of the 2004 Accident, Mr. Midgley would have developed the constellation of psychological symptoms and sleep disturbance from which he now suffers.

[217] Based on the psychiatric evidence, in conjunction with the preponderance of the lay evidence material to the issue of causation, I conclude that Mr. Midgley has satisfied the "but for" test mandated by the authorities. On balance, I find that absent the 2004 Accident, Mr. Midgley would not have developed his current constellation of psychological symptoms.

DAMAGES

[218] I next address Mr. Midgley's claim for damages under the following headings:

(a) non-pecuniary damages;

(b) loss of past and future earning capacity;

(c) cost of future care;

(d) loss of housekeeping capacity;

(e) special damages.

Non-Pecuniary Damages

[219] Mr. Midgley seeks an award of $125,000 for non-pecuniary damages. The defence submits that non-pecuniary damages should be assessed in the range of $20,000 to $70,000 and that if Mr. Midgley's evidence is accepted his injuries could attract damages in the range of $100,000.

[220] Non-pecuniary damages are intended to compensate a plaintiff's pain, suffering, and loss of enjoyment of life. While recognizing that the loss of good health cannot be valued in monetary terms, the "functional approach" attempts to assess the compensation required to provide a plaintiff with reasonable solace for his injuries. The award should compensate a plaintiff for the non-pecuniary loss he has suffered up to the date of the trial and for that loss he will suffer in the future. An award for non-pecuniary damages must be fair and reasonable to both parties: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637; *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 55; *Farand v. Seidel*, 2013 BCSC 323 at para. 69.

[221] While fairness is assessed by reference to awards made in comparable cases because of the requirement for an individualized assessment, it is impossible to develop a "tariff". Each case must be decided on its own unique facts because no two individual plaintiffs' personal experiences in dealing with their injuries and the adverse consequences of those injuries are identical: *Lindal* at 637; *Kuskis v. Hon Tin*, 2008 BCSC 862 at para. 136; *Kapelus v. Hu*, 2013 BCCA 86 at para. 15; *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[222] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, Kirkpatrick J.A. enumerated the factors to be considered in awarding non-pecuniary damages. The non-exhaustive list includes: the age of the plaintiff; the nature of the injury; the severity and duration of pain; the degree of disability; emotional suffering; the impairment of family, marital, and social relationships; impairment of physical and mental abilities; loss of lifestyle and the plaintiff's stoicism.

[223] The essential principle in the assessment of damages is that the plaintiff must be placed in the position he or she would have been in absent the defendants' negligence. It is also fundamental to the assessment of damages that a defendant must take the plaintiff as he is, even where because of a unique susceptibility or vulnerability, the injury was more dramatic or unexpectedly severe than one would expect an average person to sustain: *Athey*; *Erickson* at para. 250.

[224] I have concluded that the injuries Mr. Midgley sustained in the 2004 Accident have caused him years of significant pain, suffering and loss of enjoyment in life. Earlier in these reasons, I have set out my findings on the progression of his symptoms.

[225] As a result of the injuries he sustained in the 2004 Accident, and the persistent pain he experiences, Mr. Midgley's level of participation in his recreational activities and sports has been significantly curtailed. He is no longer able to enjoy his previously active lifestyle. He is no longer capable of performing strenuous manual labour.

[226] Prior to the 2004 Accident, Mr. Midgley, a former professional athlete, took considerable pride in his superlative level of physical fitness and his ability to engage in an active lifestyle. He was a robust and energetic individual with a positive outlook on life. He has lost much of the joy he associated with work, socializing and physical pursuits. The impact of his injuries has dramatically and adversely impacted the quality and enjoyment of his life. As a consequence of his physical limitations, he has developed self-image problems and associated psychological symptoms. He experiences mood disturbances, depression and anxiety symptoms.

[227] Mr. Midgley's marriage is strained. Mr. Midgley has experienced difficulties with physical intimacy since the 2004 Accident and the pain and discomfort from his injuries has contributed to those problems. His distress over the limitations caused by his injuries and its adverse impact on his marriage was palpable in his testimony.

[228] As of the trial, it was not certain whether Mr. Midgley would have surgery to repair his hip. If Mr. Midgley has surgery, the likelihood for any improvement in his condition is uncertain. Without surgery, it is unlikely that he will ever be pain-free. There is a real and substantial possibility he will be left with a permanent partial disability.

[229] If there was a measurable risk that Mr. Midgley's pre-existing but formerly largely asymptomatic degenerative condition in his spine would have resulted in a loss absent the 2004 Accident, then that pre-existing risk of loss must be taken into account in assessing damages: *Moore* at para. 43. This is pertinent because Mr. Midgley must be restored to the position he would have been in absent the 2004 Accident, and not a better position: *Athey* at para. 35.

[230] In my assessment of damages, the evidence I accept does not establish any measurable risk that Mr. Midgley's low back symptoms would have manifested themselves as they have, absent the injuries he sustained in the 2004 Accident. Accordingly, there is no principled basis on which to reduce the award for damages.

[231] I have reviewed all of the authorities provided by both counsel. Although the cases are instructive, I do not propose to review them in detail as they only provide general guidelines. Considering Mr. Midgley's unique circumstances, I conclude a fair and reasonable award for non-pecuniary damages is $110,000.

Loss of Past Earning Capacity and Loss of Future Earning Capacity

[232] The parties are significantly far apart on this head of damages. This head of damages constitutes the most significant and complex aspect of Mr. Midgley's claim.

[233] Mr. Midgley seeks compensation of $380,120 gross or $266,084 (net of taxes) for loss of past earning capacity and $700,000 for loss of future earning capacity. He is also seeking compensation of $100,000 for the business loss he alleges he has incurred as a result of his injuries.

[234] The defence disputes Mr. Midgley's assertion that his income earning capacity was impaired as a result of the injuries he sustained in the 2004 Accident. The defendants argue that Mr. Midgley did not suffer any wage loss, except for the few weeks of work he missed following the 2004 Accident and that his loss should be assessed as $2,500. The essential contention of the defence is that Mr. Midgley ceased working and went on short-term disability benefits in October 2004, because he was tired of working at Weyerhaeuser and "this was his ticket out."

Legal Framework

[235] The legal principle that governs the assessment for loss of earning capacity is that, insofar as is possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendants' negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185. It is well-settled that an award for future loss of earning capacity represents compensation for a pecuniary loss: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32. Compensation must be made for the loss of earning capacity and not for the loss of earnings: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *X. v. Y*, 2011 BCSC 944 at para. 188.

[236] The recent jurisprudence of the Court of Appeal has affirmed that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Regardless of the approach, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 at para. 19; *X. v. Y* at para. 183.

[237] As enumerated by the court in *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45, the principles which inform the assessment of loss of earning capacity include the following:

(i) The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.

(ii) The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* (1990), 75 O.R. (2d) 622 at 636 (C.A.).

(iii) The court must assess damages for loss of earning capacity, rather than calculating those damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43. The assessment is based on the evidence, taking into account all positive and negative contingencies. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

[238] Although a claim for "past loss of income" is often characterized as a separate head of damages, it is properly characterized as a component of loss of earning capacity: *Falati* at para. 39. It is compensation for the impairment to the plaintiff's past earning capacity that was occasioned by his or her injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32; *X. v. Y* at para. 185.

[239] While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27.

[240] This court in *Falati* at para. 40 summarized the pertinent legal principles governing the assessment of post-accident, pre-trial loss of earning capacity and concluded that:

> [40] ... the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity. ... As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 29,
>
> > "What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events."

Functional Capacity Evaluations

[241] Before turning to the analysis of this head of damages, it is necessary to summarize the key aspects of various functional capacity evaluations of Mr. Midgley.

(i) Jodi Fischer

[242] Ms. Fischer, who is an experienced occupational therapist, assessed Mr. Midgley on August 3, 2006; she prepared a report dated March 23, 2007.

[243] She concludes that as of the date of her assessment, Mr. Midgley was not physically capable of returning to his pre-injury occupation of green end/veneer dryer operator. She states in her report that "he did not demonstrate the ability to tolerate the prolonged static standing, forwarding reaching or static trunk bending required" for that occupation.

[244] In her opinion, Mr. Midgley did not present with any "non-organic findings and his reported level of pain enduring testing was consistent with the objective test findings." In her view, his subjective reports suggest that he has become "over-protective of his lower back, thus avoiding activities and particular movements in fear of symptom exacerbation and re-injury."

[245] Ms. Fischer opined that Mr. Midgley was capable of work activity in Sedentary (limited), Light, and Medium strength categories in the National Occupation Classification (NCC), Dictionary of Occupations Titles (DCT), and that he was capable of occasional lifting only in the entry level of Heavy Strength ranges. In cross-examination, she acknowledged that there were probably many jobs

Mr. Midgley could do based on the physical abilities he demonstrated during his assessment.

(ii) Louise Craig

[246] Ms. Craig, who is a qualified physiotherapist, performed a functional capacity evaluation on Mr. Midgley on June 11, 2010. Her report is dated June 28, 2010.

[247] She also concluded that Mr. Midgley did not meet the functional demands of a mill worker or veneer/dryer operator.

[248] She found Mr. Midgley is limited for prolonged sitting, sustained and repetitive walking, heavy lifting and carrying and that he has difficulty working at low levels, crouching and sustained overhead reaching.

[249] In her view, he met the majority of occupational demands of a personal trainer and gym owner, except that he had reduced tolerance for working at low levels. He could not tolerate a sedentary occupation due to sustained sitting requirements.

[250] Ms. Craig observed that Mr. Midgley demonstrated instability in his right hip. She found that, although Mr. Midgley may have underestimated his physical abilities at times, he used high effort and exhibited competitive test behaviour, and that her assessment findings generally supported his subjective reports of pain.

[251] Ms. Craig concluded that Mr. Midgley's competitive employability had been reduced by his demonstrated functional limitations.

(iii) Kim Zinck

[252] Ms. Zinck is not a functional capacity evaluator; she is a registered kinesiologist. She performed an assessment of Mr. Midgley on April 10 and 12, 2007, on behalf of his long-term disability insurer. The defence relied on her April 19, 2007, report at trial.

[253] In her opinion, Mr. Midgley functioned at a "medium physical demand capacity." Based on her assessment, Mr. Midgley was primarily limited with activities "involving forward bending/squatting to the ground", frequent walking and static

standing. She concluded that Mr. Midgley would be suited for work that allowed him flexibility to rotate between standing and sitting positions and that limited the amount of walking to an occasional basis.

[254] She observed an increased altered gait at the end of both testing days and she observed Mr. Midgley to demonstrate limitations with movements involving right hip rotation.

[255] She concluded that Mr. Midgley's reports of pain were magnified. She found pain behaviours throughout testing and commented on his poor "psychodynamics." He appeared cautious and fearful of re-injuring himself.

(iv) Rajni Dhiman

[256] Ms. Dhiman is an occupational therapist who conducted a functional capacity evaluation of Mr. Midgley on June 8, 2005, at the request of Weyerhaeuser. She was called by the defence to address her observations of Mr. Midgley at his assessment. Her opinion was not tendered in evidence.

[257] Notably Mr. Midgley terminated the dryer outfeed tasks during the evaluation, reporting increased "pulling" in his low back and a "raw" feeling in his buttocks, and commenting that he should have ceased the activity earlier.

[258] She found no signs of exaggerated pain behaviour.

Was Mr. Midgley able to return to his former position at Weyerhaeuser?

[259] Mr. Midgley was off work from October 2004 through to August 2005. Although I find that Mr. Midgley was very motivated to return to Weyerhaeuser, his graduated return to work was unsuccessful and he ceased working at Weyerhaeuser on October 26, 2005. I reject the defence characterization of his efforts to return to his former position at Weyerhaeuser as unreasonable. The weight of the evidence, both lay and expert, amply supports a finding that because of the pain and physical restrictions occasioned by the injuries he sustained in the 2004 Accident,

Mr. Midgley was incapable of fulfilling, on any sustained basis, the repetitive job demands of a green end/veneer operator.

[260] The evidence of Dr. O'Connor, Dr. Hamm, Dr. Klassen, Ms. Fischer and Ms. Craig, all support this finding. The consistency of findings in the four functional capacity evaluations conducted over a five-year period fortifies my conclusion.

What is Mr. Midgley's residual earning capacity?

[261] For the reasons set out below, I conclude that the preponderance of the evidence overwhelmingly shows that Mr. Midgley's competitive employability has been reduced by his functional limitations.

[262] Dr. McKenzie, Dr. O'Connor, Dr. Hamm, Ms. Fischer, Ms. Craig, Dr. Schweigel and Ms. Dhiman did not find pain behaviour during their assessments of Mr. Midgley – however, Ms. Zinck did. I prefer their evidence on this point to that of Ms. Zinck. While I accept that, on occasion, Mr. Midgley may underestimate his physical capabilities, I am not persuaded that, in view of his chronic pain, that is surprising. He was and is protective of his injury because, on his own admission, he was "afraid" of aggravating his injuries which he described as a "stabbing" sensation in his right buttock/back. Moreover, there was no cogent evidence that he could engage in activities at a more intense level without suffering additional pain and discomfort.

[263] Dr. Hamm who, as I referred to earlier, is an occupational medicine specialist, opined that Mr. Midgley was and is restricted from performing heavy strength, physically demanding jobs. In his opinion, Mr. Midgley, because of his low back pain, must avoid occupations demanding overexertion, "prolonged postures or forceful repetitive bending and lifting activities." While he stated in cross-examination that Mr. Midgley, subject to skills, training and experience, could do light and medium strength and sedentary jobs, he emphasized that he would require ergonomic devices, and the ability to change his postures as needed. He described Mr. Midgley as needing a sympathetic and accommodating employer.

[264] Dr. O'Connor's opinion is that Mr. Midgley is capable of moderate-level work but not on a full-time basis. Accordingly, he did not recommend a return to full-time employment but rather recommended that Mr. Midgley continue with his entrepreneurial type of work.

[265] Dr. O'Breasail opined that Mr. Midgley has a permanent partial vocational disability because of the injuries he sustained in the 2004 Accident. Dr. Miller, the defence psychiatrist, opined that in his assessment, Mr. Midgley was capable of limited work of "relatively low stress."

[266] The functional capacity evaluation reports show that Mr. Midgley is capable of performing light and medium-strength work. However, I accept Dr. O'Connor's opinion that performing at an evaluation does not necessarily equate with a durable return to full-time employment. Mr. Midgley's performance in a single day of testing does not necessarily equate with his ability to repeat that performance day in and day out for an extended period: *Scoates v. Dermott*, 2012 BCSC 485 at para. 193.

[267] Moreover, Mr. Midgley has limitations insofar as prolonged sitting, static standing and sustained and repetitive walking. I also recognize that the episodic aggravations Mr. Midgley experiences would detrimentally impact his attendance at his employment with set hours. It can reasonably be inferred that Mr. Midgley will be required to request some accommodation which permits him some flexibility in whatever occupation he pursues.

[268] In summary on this issue, Mr. Midgley has proven that the injuries he sustained in the 2004 Accident have impaired his earning capacity. However, that is only the first step in the analysis. I must next consider whether or not there is a real and substantial possibility that this impairment will generate a pecuniary loss.

Loss of Earning Capacity to the Date of Trial

[269] I turn to address whether the impairment in Mr. Midgley's capacity generated a pecuniary loss in the post-Accident, pre-trial period.

[270] After the 2004 Accident, Mr. Midgley worked for an investment office as a stock consultant for approximately two months but he found he could not tolerate the prolonged sitting. He also worked for his friend, Mr. Miller, in a steel company, for approximately one month and as a personal trainer for Mr. Miller's staff and family, for about eight months. He also worked for his friend, Mr. Yates, in a private Sardis liquor store for about six weeks. However, he could not perform the heavy lifting required for the job. He also worked briefly as a tree-topper.

[271] In January 2009, Mr. Midgley established his own business by opening a gym and personal training studio in Chilliwack ("the Gym"). The essential contention of Mr. Midgley is that, having failed in his efforts to return to his Weyerhaeuser job and having failed at working in a number of sedentary to moderate physically demanding jobs provided by sympathetic employers, it was reasonable for him to open the Gym.

[272] If the court accepts that Mr. Midgley suffered a loss of income earning capacity because of the 2004 Accident, the defendants are not seeking to deduct from the wage loss claim any of the short-term and long-term disability payments received by Mr. Midgley. They assert, however, that even if the 2004 Accident had not occurred, he would likely have lost his job in December 2007 at Weyerhaeuser, due to the lay-offs. Alternatively, they argue that he would have likely lost his job in February /March 2009, when there was a further downsizing at Weyerhaeuser.

[273] Further, the defence contends that Mr. Midgley has failed to mitigate his loss. They say he made minimal, if any, effort to find alternate suitable employment that would provide him with replacement income, other than short-term employment from friends. They contend that Mr. Midgley, because of his lack of experience, was bound to fail in the employment endeavours he did pursue.

[274] I will address each of these submissions in turn.

Likelihood of Lay-off from Weyerhaeuser

[275] Mr. Paul's evidence established that there was a series of lay-offs and terminations at Weyerhaeuser in December 2007. He explained that in 2007, there

was a downturn in the demand for Weyerhaeuser lumber products. Eighteen on-call list associates and six on-shift associates were let go. Four of the six associates who were terminated opted to take severance packages as they were near retirement age. In February 2009, there were further lay-offs and by March 2009, 42 production associates were terminated.

[276] Mr. Paul explained that, because the Weyerhaeuser mill is non-union, the lay-offs and ultimately the terminations were not determined by virtue of seniority alone. Weyerhaeuser considered performance-related criteria which look at critical skills, attendance, as well as a seniority or service component which made up 20 percent of the overall assessment.

[277] The uncontroverted evidence shows that when Mr. Midgley was working at Weyerhaeuser, the mill operated with 220 associates, salaried and hourly, and that those associates worked seven days a week, 24-hours a day. By March 2009, there were only two shifts, with a total of 110 employees. Mr. Paul explained that in March 2009, all but four of the 42 associates who were terminated had more service than Mr. Midgley. He also pointed out that 20 of the terminations were voluntary, presumably to benefit from the severance package.

[278] In my view, the preponderance of the evidence supports a finding that there was a real and substantial possibility that absent the 2004 Accident, Mr. Midgley likely would have continued to work at Weyerhaeuser. I find, however, that there is a real and substantial possibility that Mr. Midgley's employment with Weyerhaeuser would have been terminated in December 2007 and a greater possibility of such a termination occurring by March 2009. This is a significant negative contingency in assessing Mr. Midgley's claim for his future loss of earning capacity, as well as his claim for loss of earning capacity in the post-Accident, pre-trial period.

Alternate Replacement Employment in the Pre-Trial Period

[279] The recent jurisprudence from the Court of Appeal in *Bradley* has clarified that a claim that is often described as "past loss of income" is actually a claim for loss of earning capacity.

[280] In *Parypa v. Wickware*, 1999 BCCA 88 at para. 67, the court stated that there is a duty on a plaintiff to mitigate his damages by seeking, if at all possible, a line of work that can be pursued in spite of his injuries: See also *Graham v. Rogers*, 2001 BCCA 432 (leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 467).

[281] In *Mazzuca v. Alexakis*, [1994] B.C.J. No. 2128 (S.C.) (appeal dismissed) in assessing future income loss, the trial judge cited Southin J.A.'s comments in *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.), and observed that a plaintiff must prove that the earnings from the vocation which he has lost the capacity to perform cannot be replaced by a substituted vocation.

[282] After the 2004 Accident, Mr. Midgley was obliged to take reasonable steps to find employment at a level he reasonably could have been expected to achieve in light of his injuries. Doctrinally, whether this postulation is articulated and analyzed as mitigation of losses or an assessment of Mr. Midgley's residual earning capacity, in this case, the result is the same.

[283] In assessing Mr. Midgley's pre-trial loss of his earning capacity, I must consider:

(a) what Mr. Midgley would have earned in the pre-trial period had he not been injured in the Accident,

(b) what, in light of his injuries, Mr. Midgley could have reasonably earned in the pre-trial period; and

(c) what in fact Mr. Midgley earned in this period.

(a) Earnings in pre-trial period with no injury

[284] This assessment must begin with a consideration of what Mr. Midgley would have earned during the loss period, had he not been injured by the defendants' negligent conduct.

[285] In the absence of the 2004 Accident Mr. Midgley likely would have continued to work at Weyerhaeuser as a mill worker, and would have earned the 2005 base

salary of $60,060.00 plus 15 percent for a “shift premium”, which equates to $69,069.00 per year. He would also have been entitled to benefits. The evidence shows that in 2005, his benefits were approximately $2,800.

[286] I note parenthetically that there was no evidence to show if the 2004 Accident had not occurred Mr. Midgley would have suffered any income loss as a result of the 2006 Accident.

[287] Given my findings that there was a real and substantial possibility that Mr. Midgley would have been laid-off from Weyerhaeuser in December 2007, and a more substantial possibility he would have been laid-off by March 2009, I must consider, in the absence of the 2004 Accident, what work Mr. Midgley would have performed if he was no longer working at Weyerhaeuser.

[288] The evidence does support a finding that Mr. Midgley has some history of failed entrepreneurial endeavours. However, I reject the defence submission that Mr. Midgley was not a hard-working individual. The fact that two apparently successful businessmen in the Chilliwack community offered him employment and loaned him monies for the Gym stands a testament to his work ethic. The testimony of the personnel from Weyerhaeuser clearly establishes that he was a well-regarded and hard-working team member. Mr. Paul confirmed that his work-performance reviews were stellar.

[289] Mr. Midgley’s employment, for the most part, except for his failed entrepreneurial pursuits and his work at the oil companies in Alberta, has been largely physical in nature, including employment as a delivery man, sprinkler installer, and security doorman. There is a real and substantial possibility that he would have continued to do physical work if he had been laid off from Weyerhaeuser. However, the totality of the evidence supports a finding that Weyerhaeuser paid high wages for a labour job. The evidence as a whole supports a reasonable inference that absent the 2004 Accident, there was a real and substantial possibility that Mr. Midgley would have found an equivalent vocation, but

it was unlikely that Mr. Midgley would have earned as much as he was earning at Weyerhaeuser.

[290] The evidence does not support a finding that absent the 2004 Accident, Mr. Midgley would have opened the Gym.

[291] On my best assessment, there is a real and substantial possibility that absent the 2004 Accident, Mr. Midgley, if he had ceased employment with Weyerhaeuser by 2009, would have earned thereafter in the range of $50,000-$55,000 per annum.

(b) In light of his injuries, what could Mr. Midgley have reasonably earned in the pre-trial period?

[292] Given Mr. Midgley's age, work history and injuries, there was a real and substantial possibility that, had he not pursued employment opportunities through his friends, Mr. Midgley would have experienced difficulties re-entering the labour force after the termination of his employment with Weyerhaeuser in October 2005. The evidence shows that in 2006, he was suffering from significant depressive symptoms. Mr. Midgley's reasonable prospects for employment must be viewed through the lens of his physical limitations, psychological issues, chronic pain and episodic flare-ups of his symptoms. He clearly required some flexibility in his occupational endeavours.

[293] I find nonetheless that the preponderance of the evidence shows that Mr. Midgley had some residual earning capacity from 2006 to the date of trial.

[294] Neither party led any expert evidence to establish what particular occupations Mr. Midgley, given the circumstances I have summarized above, could have otherwise reasonably pursued in the post-accident pre-trial period. I have given limited weight to the 2005 census data provided by the defence. The listing of NOC occupations does not provide any information as to what training or experience would be required for those positions, nor the potential for flexibility associated with each position. The wages only refer to income in 2005 for full-time work. It is difficult to extrapolate from this information in any meaningful way.

[295] Mr. Midgley testified about the possibility of selling cars and offered that, working six days a week, six hours per day, one could earn $30,000 per year.

[296] On my best assessment, I conclude that there was a real and substantial possibility that Mr. Midgley, after he left Weyerhaeuser -- with his limitations and if he had not pursued the employment he did -- would have been realistically able to earn $25,000 to $35,000 annually. This reflects slightly more than the approximate income that he would have earned from either full-time work at minimum wage in British Columbia or some part-time work at a higher wage.

[297] In my assessment, I have taken into account that Mr. Midgley may have had some difficulty in immediately finding employment after his termination from Weyerhaeuser.

(c) What did Mr. Midgley earn in the post-Accident, pre-trial period?

[298] The next step in my assessment is to consider what Mr. Midgley did in fact earn in the post-Accident, pre-trial period.

[299] Although the evidence on this point was somewhat thin, it supports a finding that Mr. Midgley did in fact earn the following amounts in the following years:

2005:	$19,762.00	plus $11,275-gross business income before deduction for expenses
2006:	$98.00	
2007:	$571.00	plus $22,932.00- gross business income before deduction for expenses
2008:	$1,687.00	plus $27,080.00- gross business income before deduction for expenses

[300] Mr. Midgley testified that he earned $10,000 when he worked for Blue Chip, a friend’s investment company. It is difficult to determine from Mr. Midgley’s 2005 income tax return whether this income was reported. The defence submits that the $10,000 he apparently earned in 2005 must be taken into account in my assessment. I agree.

[301] Commencing in January 2009, Mr. Midgley commenced the Gym business. This has permitted him flexibility in his work hours and, it can reasonably be inferred, the ability to delegate the heavier tasks to his staff members. The evidence shows that while Mr. Midgley has paid his staff and equipment lease payments, he has remained in arrears for the rent. Although he has withdrawn up to $6,000 per year, and paid his car expenses he says that he has never earned enough to pay himself a regular salary. As I referred to earlier in these reasons, the monthly lease payments of $5,200 for the equipment were to be paid off in January 2012. It can reasonably be inferred that the business has the potential to pay rent and generate some profit, assuming that the membership numbers are sustained and no new capital expenditures are required.

[302] In all the circumstances I am satisfied that it was not unreasonable for Mr. Midgley to have pursued his own Gym business. The field of physical fitness and training is a suitable vocational option for him. He acted reasonably in pursuing an endeavour which could yield a potentially higher income than alternate entry-level or part-time positions that he may have otherwise pursued. However, by January 2012 it is reasonable to assume that he could earn in the range of $25,000 - $35,000 either in the gym business or some other competitive employment.

[303] I have also factored into my assessment what Mr. Midgley did in fact earn during this period and what he could have reasonably earned in the period prior to opening the Gym.

[304] Given the various contingencies and the substantial negative contingency that his employment at Weyerhaeuser would have been terminated by 2009, I exercise my discretion based on the principles articulated in *Lines* as follows: I assess his loss as $12,500 in 2004; as $40,000 for 2005, as $105,000 for 2006-2008 and $115,000 from 2009 to date of trial.

[305] In summary on this issue, I conclude that the 2004 Accident has resulted in a total past loss of income of $272,500 to Mr. Midgley for the period from the date of 2004 Accident to trial.

[306] As Mr. Midgley is only entitled to recover his net income losses, I direct counsel to carry out the necessary calculations in order to determine the appropriate net loss. Counsel have liberty to apply if they are unable to agree as to this amount.

Business Losses

[307] Mr. Midgley asserts that, in his attempts to mitigate his loss of earnings by operating the Gym, he suffered significant financial losses.

[308] Mr. Midgley claims compensation of $100,000 for his losses which is comprised of the $70,000 Mr. Yates and Mr. Miller loaned to Mr. Midgley for his business start-up and the $30,000 in rental arrears, owing to Mr. Yates for the last two years of operation of the Gym. The $100,000 business loss claim does not include any claim for the $72,000 in rental arrears arising from the Gym's first year of operation, since Mr. Yates testified he was prepared to waive recovery of that amount from Mr. Midgley.

[309] For the reasons set out below, I am not persuaded that this amount should be assessed against the defendants.

[310] At its core, this claim engages an inquiry of reasonable foreseeability and remoteness in the recovery of damages.

[311] The Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, clarified the principles of foreseeability in tort damages. Chief Justice McLachlin clarified that the key to the remoteness inquiry is whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable". She also affirmed at para. 12 that since the *Wagon Mound (No.1)*, "it is the foresight of the reasonable man which alone can determine responsibility." Reasonable foreseeability is determined at the time of the tort and the question of what harm the plaintiff or a person of ordinary fortitude would suffer, is to be determined objectively; *Milliken v. Rowe*, 2012 BCCA 490.

[312] The Court's comments at para. 16 are instructive:

> ...the law of tort imposes an obligation to compensate for any harm done on the basis of *reasonable* foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. [Emphasis in original.]

[313] It follows that in order to succeed in this claim , Mr. Midgley must show that it was foreseeable that a person of ordinary fortitude would suffer the business loss he alleges as a result of his injuries. In my view, he has failed to do so. This possibility was not a "real risk" in the mind of a reasonable man in the position of the defendant; *Milliken* at para. 10.

[314] In short, the loss claimed is too remote to be reasonably foreseeable and consequently is not recoverable from the defendant. It follows that Mr. Midgley's claim for $100,000 business loss must fail.

[315] I also note that, while the business in 2009 through 2011, in its start-up phase, was showing an operating loss, it appears that by 2012 - with the equipment having been paid off - it had the potential to become a profitable business.

Loss of Future Earning Capacity

[316] As I have referenced earlier, Mr. Midgley submits that he is entitled to an award of $700,000 for loss of future earning capacity. The defence forcefully submits that Mr. Midgley has not met the burden of proof in establishing that he has suffered a diminishment of his future earning capacity attributable to the 2004 Accident.

[317] The essential task of this Court is to compare the likely future of Mr. Midgley's working life if the 2004 Accident had not happened with Mr. Midgley's likely future working life after the 2004 Accident: *Hunt* at para. 204.

[318] I have concluded earlier in these reasons that Mr. Midgley's 2004 Accident-related injuries have impaired his earning capacity. The limitations caused by his injuries in the 2004 Accident have rendered him less capable overall from earning income, have rendered him a less marketable and attractive employee, and have taken from him the ability to take advantage of all job opportunities that might otherwise have been open to him. The preponderance of the evidence demonstrates

that this impairment will likely harm Mr. Midgley's earning capacity in the future. For the reasons that follow, I have also concluded that, on account of his 2004 Accident-related injuries and consequent impairment of his earning capacity, there is a real and substantial possibility that Mr. Midgley will suffer some future pecuniary loss.

[319] Mr. Midgley was 46-years old as of the date of trial.

[320] Earlier in these reasons, I have found that absent the 2004 Accident there was a real and substantial possibility that Mr. Midgley would have been laid off from Weyerhaeuser somewhere in the period between 2007 and 2009. Absent the 2004 Accident and if his employment with Weyerhaeuser had been terminated by 2009, I find a real and substantial possibility that he would have found alternate employment albeit at a lower wage and that he would have continued to earn in that range up until age 65.

[321] I am satisfied on the evidence that at his age, his future prospects for attracting and holding employment that he can perform with his physical limitations, chronic pain and episodic flare-ups has been diminished. There is a real and substantial possibility that this impairment will impact his future earnings.

[322] On my best assessment of the evidence, there is also a real and substantial possibility that Mr. Midgley will now retire earlier than age 65. There is a real chance that his chronic pain will take a toll and, over time, will detrimentally impact his ability to work, regardless of what accommodations any future employer is prepared to make: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41.

[323] From 2009 up until the end of 2011, I found it reasonable to permit Mr. Midgley the opportunity to continue to operate his business in anticipation that it would eventually generate a better level of income for him. I recognize that it remains uncertain whether Mr. Midgley, with the Gym equipment now having been paid off, will be able to earn more money operating his gym or whether he would be better served trying to secure employment in the marketplace.

[324] Whatever occupational endeavour he pursues, for purposes of assessing his future loss, I find that that there is a real and substantial possibility that Mr. Midgley is capable of earning $25,000 to $35,000 per annum.

[325] Having found that Mr. Midgley's future earning capacity is diminished and that there is a real and substantial possibility that the impairment of his capacity will generate a pecuniary loss over time, I must now decide the companion issue of what, in all the circumstances, he should be awarded as compensation.

[326] Each party provided future income loss multipliers from their respective economists which were intended to assist the court in the evaluation of Mr. Midgley's future income loss. The future income loss multipliers included an adjustment for survival and discount rates, as well as labour market contingencies for average BC males with a high school diploma.

[327] The economists' evidence is of limited assistance in this case because I accept the defence submission that the assessment of Mr. Midgley's impairment of earning capacity must be done on the basis of a loss of capital asset. This approach is appropriate given the uncertainty associated with Mr. Midgley, in the absence of the 2004 Accident, having continued to work at Weyerhaeuser after the significant layoffs and terminations in 2007 and 2009.

[328] In this case, I must forecast Mr. Midgley's future losses. It is well-recognized that unknown contingencies and uncertain factors make it impossible to calculate future earning capacity with any precision. Damages must be assessed, not calculated and must be fair to both parties: *Power v. Carswell*, 2011 BCSC 1672 at para. 211. The evidence in this case mandates that in my assessment I take into account the following contingencies which reflect the likelihood of the future loss occurring:

(i) Mr. Midgley, absent the 2004 Accident, may not have maintained full-time employment with Weyerhaeuser and may not have continued to earn as high wages as he was earning as of the date of the 2004 Accident. This is a significant negative contingency.

(ii) Mr. Midgley would have withdrawn from employment before age 65 or had reduced earnings because of illness, injury or disability, unrelated to the 2004 Accident.

(iii) In the future, Mr. Midgley may earn a higher wage from the Gym business or competitive employment than is reflected in the range of wages I have discussed above.

[329] Taking into account all of the evidence and relevant negative and positive contingencies, I assess Mr. Midgley's loss of future earning capacity from the date of trial as $160,000. I am satisfied that in all the circumstances this is a fair and reasonable award.

Pension Loss

[330] Mr. Midgley's counsel submits that, but for the 2004 Accident, Mr. Midgley stood to be able to benefit from one of "the most attractive pension benefits protection available to workers in the forest products industry." He asserts that the present value of Mr. Midgley's pension loss flowing from the 2004 Accident is $240,000. The pertinent calculations are set out in his written submissions.

[331] Mr. Midgley testified that during the time he was employed by Weyerhaeuser, the company contributed to the employee pension plan on his behalf as part of his compensation and benefits package and that he was periodically provided with credits to purchase or maximize his benefits under the plan. However, he could not recall any particulars as to whether he made any such contributions.

[332] Mr. Paul explained that the Weyerhaeuser pension was a defined pension plan but could provide no information on Mr. Midgley's potential entitlement. There was no evidence led as to when Mr. Midgley's pension may have vested. There was no pertinent documentation regarding the Weyerhaeuser pension plan or any calculations from an economist advanced at trial.

[333] Counsel applied to re-open his case after the conclusion of closing submissions but prior to judgment, for the purpose of deducing further evidence –

namely an economist's report – to address Mr. Midgley's claim for loss of pension benefits. I concluded that he had not established the likelihood of a miscarriage of justice if he was not permitted to open his case and I dismissed the application.

[334] In the end, in light of the deficiencies in the evidence, I am unable to make any award for loss of pension benefits.

Cost of Future Care

[335] Mr. Midgley seeks compensation of $29,000 for the cost of anti-depressant medication and the cost for counselling treatment. The defence submits that the evidence does not support any future care award because they assert Mr. Midgley likely would not use the medication or access counselling treatment.

[336] The purpose of an award for future care is to compensate a plaintiff for costs which reasonably may be expected to be incurred to preserve and promote the plaintiff's mental and physical health: *Milina* at para. 78; *Gigmac v. Insurance Corporation of British Columbia ,* 2012 BCCA 351 at para. 30. The items or services claims must be medically justified and the claims must be reasonable: *Milina* at p. 84. In assessing what is reasonably necessary to promote the plaintiff's health, the court should also consider whether the plaintiff would likely use the items or services in the future: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at paras. 12-14; *Drodge* at para. 194.

[337] The quantification of damages for the cost of future care is an assessment and not a precise accounting exercise; adjustments must be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle* (*Guardian ad litem of*) *v*. *Brisco,* 2002 SCC 9 at para. 21; *Prempeh v. Boisvert*, 2012 BCSC 304 at para. 108.

[338] Mr. Midgley submits that $20,000 is appropriate compensation for the future cost of medication. He relies on Dr. O'Breasail's recommendations that he, in the long term, would benefit from daily anti-depressant medication. Dr. Miller, the psychiatrist for the defence, disagrees with Dr. O'Breasail's recommendation

regarding anti-depressant medications. Dr. O'Breasail estimated the monthly cost for this medication to be in the range of $60 to $80. On counsel's calculation, the present value of the medication costs to be incurred over 30 years (to age 76) is $20,000.

[339] Insofar as the medication, Mr. Midgley has expressed some reservation with respect to using prescription medication. Whether a plaintiff would accept a recommendation is a relevant consideration; *O'Connell v. Yung*, 2012 BCCA 57 at para. 60. On the evidence, I am not persuaded that Mr. Midgley would use anti-depressant medication and I decline to make any award for this item.

[340] Dr. O'Breasail also recommended counselling or psychotherapy to assist Mr. Midgley in coping with his chronic pain. He suggested weekly sessions for three to six months, decreasing in frequency to once every two to four weeks over the following 18 months. Dr. O'Connor also recommended psychological counselling for Mr. Midgley, as well as Dr. Miller, who was of the view that Mr. Midgley would benefit from cognitive behavioural treatment.

[341] Mr. Midgley has undergone counselling when it was available to him through his employment at Weyerhaeuser. I am satisfied that counselling is reasonably necessary on the medical evidence and that with the elimination of any obvious financial impediment Mr. Midgley would access such treatment.

[342] In the result, and on the totality of the evidence and taking into account the relevant contingencies, I assess an award for the cost of counselling in the amount of $7,500.

Loss of Housekeeping Capacity

[343] I next turn to address whether Mr. Midgley is entitled to compensation for impaired housekeeping capacity. The defence submits the evidence does not support such a claim.

[344] In *Dykeman v. Porohowski,* 2010 BCCA 36 at para. 28, Newbury J.A. summarized the governing principles with respect to awarding damages for the loss or impairment of housekeeping capacity. She affirmed that damages for the loss of housekeeping capacity may be awarded even though the plaintiff has not incurred any expense, because housekeeping services were gratuitously replaced by a family member. Moreover, since the award recognizes the impairment of housekeeping capacity, whether a plaintiff is likely to hire such assistance in the future, does not inform the analysis; *X. v. Y.* at para. 256; *O'Connell* at para. 67. Recovery may be allowed for both the future loss of the ability to perform household tasks as well as for the loss of such abilities prior to trial. The amount of compensation awarded must be commensurate with the plaintiff's loss: *Dykeman* at para. 29; *X. v. Y.* at para. 246.

[345] In assessing damages under this head, the authorities mandate that the court must carefully scrutinize the gratuitous services provided by the family member. A relatively minor adjustment of duties within a family will not justify a discrete assessment of damages: *Campbell v. Banman*, 2009 BCCA 484 at para. 19. In *Dykeman* at para. 29, Newbury J.A. cautioned that:

> Instead, claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services – were they simply part of the usual 'give and take' between family members, or did they go 'above and beyond' that level? – and with respect to causation – were the services necessitated by the plaintiff's injuries or would they have been provided in any event? [Emphasis in original]

[346] Mr. Midgley's counsel asserts that the expert evidence identifies permanent limitations in Mr. Midgley's ability to carry out the heavier aspects of his household duties. He seeks $30,000 compensation calculated at approximately $1,500 per year to age 75, when they say some of the needs may have arisen even in the absence of the 2004 Accident.

[347] Dr. Hamm was of the view that Mr. Midgley will require some occasional assistance with respect to heavier and/or seasonal household and yard work. Ms. Craig, the occupational therapist who conducted a functional capacity evaluation

of Mr. Midgley on June 28, 2010, suggested that he may require help for some maintenance and heavier chores, as long as his symptoms persist.

[348] I find that Mr. Midgley has resumed mowing the lawn and performing lighter household maintenance. He and his wife provided only the most general evidence as to what household service she now performs that would have been performed by Mr. Midgley prior to the 2004 Accident. Mr. Midgley referred to his inability to shovel the driveway. Ms. Midgley testified that she now takes out the garbage and performs the lifting and yard work including the weeding. There was no cogent evidence of them hiring outside help to perform these services.

[349] While I accept that, because of Mr. Midgley's physical limitations there has been some adjustment of household duties between he and his wife since the 2004 Accident, I am not persuaded on the evidence that it justifies a discrete award of damages. Moreover, there was no evidence tendered as to the market value of the provision of those household services that Mr. Midgley can no longer perform.

[350] In all the circumstances, I have concluded that Mr. Midgley's loss is properly considered as a factor in the assessment of his non-pecuniary damages; this is reflected in the non-pecuniary damages award I have assessed.

[351] In the result, I make no award for loss of housekeeping capacity.

Management Fee

[352] The parties have agreed that determination of whether the management fee is appropriate and a quantification of the management fee will be the subject of further submissions once these reasons have been released.

Special Damages

[353] Mr. Midgley seeks special damages totalling $5,861.07 plus $4,042.50 for services provided by Rosaroma Therapy.

[354] It is well-established that an injured person is entitled to recover the reasonable out-of-pocket expenses they incurred as a result of an accident. This is

grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *Milina* at 78; *X. v. Y.* at para. 281.

[355] I accept the defendants' submission that the $4,042.50 for therapy treatments claimed by Mr. Midgley for the services provided by Rosaroma Therapy for the period October 12, 2005, to November 21, 2008, are not properly recoverable, as there is no indication such treatments were provided by a registered massage therapist or were medically approved treatments.

[356] Mr. Midgley has also submitted prescriptions in the amount of $2,184.34 and $556.39 for Pregnenolone, Daga, and 7-Keto-DHEA and unspecified compound prescription from Dr. James Copp. It is not established on the evidence that this medication was reasonably necessary to treat the injuries Mr. Midgley sustained in the 2004 Accident.

[357] Mr. Midgley is awarded the balance of the items claimed. In the result, I find that Mr. Midgley is entitled to re-imbursement for special damages of $3,120.38.

CONCLUSION

[358] Mr. Midgley's damages are assessed at $553,120.38 consisting of the following:

Non pecuniary	$110,000.00
Past wage loss (less income taxes to be calculated by counsel)	$272,500.00
Future loss of income	$160,000.00
Cost of Future Care:	$7,500.00
Special damages	$3,120.38
Total	$553,120.38

[359] I find that the injuries Mr. Midgley sustained in the 2006 Accident are indivisible. I have assessed damages globally. Any damages arising from the 2006 Accident should be deducted from my award.

COSTS

[360] Mr. Midgley is entitled to his costs at Scale B unless there are any pertinent circumstances that should be brought to the court's attention. If a hearing is required, I request that counsel make attempts to schedule a hearing date within six months from the date of the release of these reasons.

"Dardi J."