IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Basra v. Shew,*
2023 BCSC 1056

Date: 20230620
Docket: M186551
Registry: Vancouver

Between:

Manjit Basra

Plaintiff

And

Harvinder Shew

Defendant

Before: The Honourable Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:	U. Ghani B. Birak
Counsel for the Defendant:	L. Grant B. Easton J. Mahil
Place and Date of Trial/Hearing:	Vancouver, B.C. May 8–12, 2023
Place and Date of Judgment:	Vancouver, B.C. June 20, 2023

I. INTRODUCTION

[1] The 55-year-old plaintiff seeks damages for injuries sustained in a May 19, 2016 motor vehicle collision in Surrey, BC, for which liability has been admitted (the "Collision").

[2] The complicating feature of this case is that the plaintiff had already been off work for about 16 months due to a work-related hip injury (the "Hip Injury") when the Collision occurred. The Hip Injury required surgery and was the subject of a WorkSafeBC claim.

[3] The plaintiff's position is that, at the time of the Collision, his Hip Injury had resolved to the point that he was contemplating a return to work in the months ahead. He says that the Collision aggravated the Hip Injury and caused new injuries to his right shoulder, neck and back, as well as psychological injuries. He submits that these Collision-related injuries derailed his plans to return to work, resulting in him being unable to work in any capacity since the Collision.

[4] The defendant's position is that the plaintiff is attempting to maximize his pre-Collision function and minimize the pre-Collision effects of the Hip Injury. The defendant admits that the Collision probably aggravated the Hip Injury to some degree, but submits that it was relatively modest and short-lived. The defendant says that the plaintiff is receiving a permanent pension from WorkSafeBC as a result of the Hip Injury and is attempting double recovery. The defendant further says that the Collision had no effect on the plaintiff's return-to-work plans because the Hip Injury would have prevented him from working in any event.

[5] For the following reasons, I mostly accept the defendant's position and mostly reject the plaintiff's position.

II. FACTUAL BACKGROUND

A. The Plaintiff

[6] The plaintiff immigrated to Canada from India with his parents at the age of seven. He graduated from high school in Kamloops in 1986 with a reasonably strong

academic performance. He was active in sports. He moved to the Vancouver area in 1989, went to college and obtained a business degree. He met and married his current wife Paramjit in 1999. The couple have one daughter, currently aged 16.

[7] From 2001 to 2010, the plaintiff worked as a general contractor overseeing various construction projects throughout the Lower Mainland. This job mostly involved obtaining permits and organizing and managing various sub-trades.

[8] In the fall of 2012, he became interested in working as a longshoreman and obtained a position through a family friend. He felt the job would offer flexibility and job security. By early January 2013, he had passed the requisite physical training program and obtained security clearances without issue. He joined the BC Maritime Employees Association and commenced work as a longshoreman at the Delta Western Stevedoring Co. Ltd. docks. His work was primarily labour to start, but he considered himself physically fit and had no problem performing his assigned tasks.

[9] Between January and August 2013, his longshoreman job was interrupted when he returned to India to help his father close a factory. In August 2013, he returned to work in earnest.

[10] As a longshoreman, he began his days by travelling to the union hall, where the available work is assigned to those present according to their seniority. The higher one's seniority, the less physically demanding the jobs tend to be. Longshoremen began on the "C-board" before advancing first to the "B-board" and finally to the "A-board". By the end of 2014, he had begun to work his way up the seniority ladder, had regular work and occasionally secured work that was less physically demanding. His goal was to continue working his way up to the "A-board", which would allow him the most flexibility, his choice of jobs, union membership and guaranteed work.

[11] The plaintiff enjoyed the diversity of work as a longshoreman, his coworkers and the workplace. He considered himself a good worker. He was looking forward to further opportunities, increased earnings and a long and prosperous career. His

homelife was also happy. He was active, social and performed work around the home, including all outdoor chores. In short, he was enjoying his life and his family. He had no physical or psychological issues or complaints.

[12] By early 2015, he had been certified as a “checker”. A checker controls shipping containers as they are delivered by ship, rail or truck to or from the dockyard and ensures they are sent to the proper destination. The plaintiff enjoyed this work.

B. The Hip Injury

[13] On January 13, 2015, there were no available checker jobs so he accepted a labour placement offloading a ship. Towards the end of his shift, he fell and suffered the Hip Injury. He went to the first aid office and was referred to his family doctor, whom he saw two days later. At his doctor’s suggestion, he filed a WorkSafeBC claim, which was accepted. Further investigations disclosed what was thought to be a labral tear in his right hip and he was referred to a specialist, Dr. Gilbart, for treatment. Despite various forms of treatments including injections, the hip symptoms did not improve. In November 2015, Dr. Gilbart performed arthroscopic surgery to repair the suspected labral tear. It turned out there was no labral tear, so Dr. Gilbart cleaned up some frayed areas of the labrum instead.

[14] After surgery, the plaintiff was prescribed exercise that included the use of a stationary bike and treadmill. The plaintiff tried to continue his previous active lifestyle, but nonetheless had to significantly reduce his home and recreational activities. WorkSafeBC was involved in his rehabilitation and provided extensive physiotherapy and kinesiology treatments multiple times per week. The plaintiff was also prescribed opiate pain medication and muscle relaxants. While he had functional limitations, the plaintiff says he noted steady improvement and was anxious to return to work by spring 2016, hoping to do so by August 2016.

[15] WorkSafeBC accepted his right hip condition as a permanent limitation. On May 17, 2016, a WorkSafeBC worker completed a vocational assessment and planning report on the plaintiff. In the report, she wrote:

> Worker will likely be left with permanent condition and limitations that preclude all pre-injury employment. Worker is longshore labourer and checker[.] Worker's current limitations should allow him to perform ingate/outgate checking . . .

[16] On May 31, 2016, a WorkSafeBC case manager issued a letter to the plaintiff confirming that his condition was now considered permanent. The letter outlined his options for rehabilitation and stated that he would receive an award for his permanent disability. The author was unable to determine if the plaintiff was entitled to a loss of earning award at the time as it depended on his vocational plans and disability award.

[17] Despite the plaintiff's stated enthusiasm to return to work, representatives of WorkSafeBC, his union and employer concluded that he was likely permanently restricted from labour-intensive longshoreman work, but that he could perform less labour-intensive checker and other jobs. The plaintiff had not received medical clearance to return to work, although there had been loose discussions about his return beginning prior to his hip operation.

C. The Collision

[18] The Collision occurred at the intersection of 84th Avenue and 168th Street in Surrey, BC, as the plaintiff was on his way to get gasoline for his lawn equipment. He was driving through a green light when the defendant drove through a red light and struck his vehicle on the driver-side rear panel. The force of the impact spun his vehicle 180 degrees. He felt dazed and shaken up and was assisted out of the car by passersby. Police, ambulance and fire crews were dispatched to the scene and assessed his condition. He declined the ambulance crew's invitation to go to the hospital, preferring to have his wife take him home instead.

[19] His car, a Volkswagen Jetta, was later deemed a total loss.

D. Post-Collision Symptoms and Events

[20] At home following the Collision, the plaintiff noticed increased soreness and a new grinding and popping sensation in his right hip, as well as numbness down his

right leg. He says he also noted soreness in his right arm and stiffness in his neck and back. Later the same day, his wife took him to the hospital for an assessment. He was provided with pain medications and discharged home.

[21] He consulted his family doctor the following week and was followed as needed. He complained of ongoing spasms down his right leg and expressed concern that something was wrong. Doctors, including WorkSafeBC medical advisors, concluded that the Collision had probably aggravated the Hip Injury and noted that the plaintiff's symptom complaints were worse than before.

[22] Following continued extensive rehabilitation, WorkSafeBC concluded that if the plaintiff was unable to return to work as a longshoreman, he would have to retrain for another job. In 2017, WorkSafeBC arranged for a functional capacity assessment to determine other job avenues that might be open to him. Based on the results, WorkSafeBC enrolled the plaintiff in a BCIT sponsored two-year online program to become an Occupational Health and Safety Practitioner. Despite his concerns that he would be ill-suited for that occupation because of the Hip Injury, he completed and successfully passed the course.

[23] In June 2018, a WorkSafeBC review officer directed a further investigation of the plaintiff's occupational goals, which would allow for the issuance of a loss of earnings assessment and possible award upon the investigation's completion. The Review Board completed the investigation and determined that the original loss of function award he received for his permanent disability was suitable without an additional loss of earnings award. The worker appealed, first to the Review Division in 2019, then to the Workers' Compensation Appeal Tribunal ("WCAT") in 2020, but was unsuccessful in receiving an increased loss of earnings award on both appeals.

[24] The plaintiff's inactivity resulted in him gaining somewhere between 20 and 30 pounds. He found that he was anxious, frustrated and depressed. He was having trouble sleeping and concentrating. He had trouble getting out of bed and did not want to socialize. He says that being unable to work was having a negative impact on his family's finances, which in turn had a negative impact on his home life. He

noted that he was grinding his teeth during his sleep and was prescribed a CPAP machine. He was also prescribed increased sleep medications and anti-depressants. His family relationships were suffering. He says that even simple activities like walking on uneven ground would aggravate his hip and reaching with his right arm would aggravate his right shoulder pain.

[25] WorkSafeBC referred him to a psychologist to help with his mental health issues. Over time, he has been able to reduce his weight to his current 205 pounds. Sleep continues to be an issue for him, he says because his right shoulder and back tend to stiffen up. He feels his mental health has improved in the last six months but says that it has been a difficult journey.

[26] The plaintiff relates the injuries to his right shoulder and back, increased right hip symptoms, weight gain and mental health issues to the Collision.

[27] Recently, he was medically cleared to return to work and reapplied for security clearance as a longshoreman. He is in the process of obtaining recertification to work as a checker. He believes he is capable of performing that job and is willing to do so. His union is supportive. He expects to return to work in the next four to six weeks, and that there will be checker jobs available for him two to three days per week. He says he cannot return to the labour-intensive longshoreman jobs because they will aggravate the Hip Injury and his right shoulder. He could not estimate his future earnings, but plans to continue working as long as he can.

III. EXPERT EVIDENCE

A. Dr. Mohammed Khan – Physiatrist

[28] Dr. Khan is a physiatrist who assessed the plaintiff at his counsel's request on January 24, 2023. Based on the plaintiff's history, Dr. Khan felt that the Collision caused him to suffer a neck sprain or strain, right shoulder sprain or strain, and an aggravation of the Hip Injury. Because the plaintiff's injuries had not resolved as at January 2023, Dr. Khan felt that his chances of a complete recovery were poor and

that his ongoing pain symptoms would persist, limiting his ability to return to working as a longshoreman.

[29] Dr. Khan provided a differential diagnosis that the plaintiff's current complaints could alternatively be the result of a greater trochanteric pain syndrome that would have existed in any event of the Collision.

[30] Dr. Khan also felt that to the extent the plaintiff had pre-Collision functional limitations to his right hip, the Collision had further limited and aggravated those limitations and they would probably be permanent.

[31] During his assessment, the plaintiff rated his ongoing hip pain at 6 out of 10 and his ongoing shoulder pain at 5 out of 10, with 10 being the worst pain imaginable. Dr. Khan agreed that shoulder pain rated at 5 out of 10 would interfere with a person's function. Dr. Khan candidly agreed that he would have expected complaints of right shoulder pain to appear in the plaintiff's clinical treatment records and that the absence of notations of right shoulder issues in those records was concerning. He agreed that the plaintiff is unlikely to have experienced seven years of pain and functional limitations to his shoulder without reporting it to his caregivers.

[32] Dr. Khan also opined that, in light of the available surgical records, the plaintiff's recovery from the Hip Injury was extremely slow and atypical.

[33] Dr. Khan acknowledged that, based on his review of the pre-Collision WorkSafeBC records, the plaintiff was probably unable to perform laborious work and would have been restricted to sedentary or light work in any event of the Collision. In other words, Dr. Khan agreed that it was unlikely the plaintiff would have been able to return to laborious work duties regardless of the Collision.

[34] Dr. Khan confirmed that the plaintiff told him that he was doing no housekeeping tasks prior to the Collision. He further confirmed that the plaintiff told him that his symptoms had not improved at all since the Collision.

[35] Finally, Dr. Khan agreed that on the assumption the plaintiff was having difficulties and struggling with exerting effort both pre- and post-Collision, then it is likely that his function would have been similar during both periods.

[36] Dr. Khan concluded his report by making a series of recommendations for future care and treatment modalities he thought would assist the plaintiff.

B. Mr. Raph Kowalik – Kinesiologist

[37] Mr. Kowalik was qualified as a kinesiologist specializing in functional capacity evaluations, cost of future care and vocational assessments. He assessed the plaintiff at his counsel's behest on February 1, 2023, and then prepared a functional capacity and cost of future care report dated February 8, 2023, which was admitted into evidence without debate. He attended trial for cross-examination on his report.

[38] Mr. Kowalik noted that the plaintiff had functional hip and shoulder range of motion. The plaintiff told Mr. Kowalik that his standing, sitting and walking tolerance was restricted to approximately 25 minutes before he needed to stand and stretch his right hip, leg and groin. He also reported constant weight shifting and stretching to alleviate his discomfort and prolong his sitting ability. Mr. Kowalik's observations of the plaintiff were similar to the plaintiff's reported limitations.

[39] The plaintiff also reported to Mr. Kowalik that he was functionally limited due to symptoms of depression, anxiety and lack of motivation and that his right hip and shoulder symptoms had not improved since the Collision. He stated that the Collision completely prevented him from returning to his job as a longshoreman.

[40] Based on his assessment, Dr. Kowalik opined that the plaintiff did not meet the critical job demands of a longshoreman, but he would be capable of the sedentary to light work of a checker on a non-competitive basis. In his opinion, the plaintiff's symptoms and limitations would negatively affect his prospects of working in his current and future positions and therefore he was less attractive as a candidate to new employers compared to others without such limitations.

[41] During the assessment, the plaintiff was asked to rate his hip pain using the Matheson function pain scale, a pain scale used infrequently by doctors. The plaintiff endorsed that he was suffering pain at around 5.5 out of 10, which is defined as:

> very disabling pain: for example, causing great difficulty moving or applying any strength through the painful area. You would stop using the painful area for the present activity.

[42] Mr. Kowalik made a number of recommendations for the plaintiff's future care, including heavier home cleaning support, assistance with yard work, snow removal, home maintenance, various treatment aids, home exercise equipment, sleep aids, gym and pool passes, rehabilitation, nutritionist, psychologist, an orthopaedic consultation, ergonomic work assessment, injections and medications.

C. Mr. Nicholas Coleman – Economist

[43] Mr. Coleman is a forensic economist who was retained by the plaintiff to prepare multipliers and information to assist the court in estimating lost earnings and future care costs. He prepared two reports: i) February 10, 2023, respecting future care costs; and ii) May 6, 2023, respecting earning losses. He was qualified and his February 10, 2023 report was admitted without debate. The defence opposed the admission of his May 6, 2023 report on the basis that it was delivered woefully late to defence counsel, only the weekend before the trial. After hearing submissions, I admitted the May 6, 2023 report solely for the use of the multipliers contained in it.

D. Dr. Matti Sovio – Orthopaedic Surgeon

[44] Dr. Sovio is a mostly-retired orthopaedic surgeon who conducts independent medical assessments. He assessed the plaintiff at the defence's behest on April 29, 2022. He prepared a report, which was entered into evidence without debate. As it happens, Dr. Sovio once worked as a longshoreman and is very familiar with the job.

[45] After assessing the plaintiff and reviewing the medical documentation he was provided, it was Dr. Sovio's opinion that the January 2015 fall was the main cause of the plaintiff's ongoing Hip Injury, which the Collision probably only minorly aggravated. He made this finding on the basis that the plaintiff's history and

subjective complaints were accurate. Objectively, Dr. Sovio was unable to quantify the nature, severity and degree of the Collision's aggravation to the Hip Injury.

IV. DISCUSSION

[46] The parties' positions are diametrically opposed as to the gravity of any injuries caused by the Collision. Save for his wife and sister's evidence (which I will discuss later), there is little to no corroborative evidence to support the plaintiff's subjective reports of symptoms. As such, the reliability, credibility and persuasiveness of the plaintiff's evidence regarding the impact of the Collision on his health and function will be critical to the success of his claim.

[47] It is trite in Canadian tort law that a plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to each of the injuries being alleged. In order to establish causation, the plaintiff must prove that it is more likely than not that, but for the defendant's negligence, the plaintiff would not have suffered the injuries of which they now complain.

[48] The defendant's negligence need not be the sole cause of the injury, so long as it is part of the cause beyond the range of *de minimis*. The defendant must take the plaintiff as they are and is liable even if other causal factors not attributable to the defendant have increased the severity of the plaintiff's losses. At the same time, the defendant is not required to put the plaintiff in a better position than the plaintiff would have been in and need not compensate the plaintiff for the effects of a pre-existing condition that the plaintiff would have experienced in any event: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[49] The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 23.

[50] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58:

> [78] . . . Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway [citation omitted].

[51] In short, the plaintiff is to be placed in the position he would have been in but for the Collision, no better and no worse. The defendant is not required to compensate him for the effects of the Hip Injury or other issues that the plaintiff would have experienced in any event of the Collision.

[52] The Hip Injury pre-existed the Collision and was still actively affecting him when it occurred. The evidence satisfies me that the Hip Injury was probably a permanent condition that would have restricted the plaintiff to sedentary or light activities in any event of the Collision.

[53] For a variety of reasons, I did not find the plaintiff's evidence about his pre-Collision condition and the Collision's effects on his physical and psychological health to be very convincing. I conclude that his Hip Injury symptoms were significant at the time of the Collision and he attempted to minimize them in order to maximize the effect of the Collision for the purpose of this case.

[54] Several aspects of the evidence given by the plaintiff and his family raised concerns. Here are a few examples:

a) The plaintiff, his wife and his sister gave evidence that the plaintiff was functioning well during a trip to New York City in the summer of 2015, before the hip surgery and during his WorkSafeBC-sponsored rehabilitation. He was able to walk and bike around the city, engaging in site-seeing without much difficulty. If this was the case, it is concerning that he did not return to work as a checker when it is apparent he could have done so.

b) The plaintiff told Dr. Khan that he performed no housekeeping tasks prior to the Collision "as he was already limited due to his pre-existing right hip symptoms" and that "he has still not returned to any housekeeping tasks to date". This runs contrary to the evidence of the plaintiff and his wife at trial, that he was still helping at home prior to the Collision but after the Hip Injury.

c) At trial I observed the plaintiff sitting in the witness box for over one hour, without visible discomfort or shifting and without requesting a break. This does not align with the plaintiff's reported inability to sit for more than 20 to 30 minutes.

[55] The nature and extent of the plaintiff's injuries are based on his subjective reporting. By necessity, his pre- and post-Collision treating practitioners and medical experts relied almost exclusively on his self-reporting and assumed that reporting to be correct and unexaggerated. Records from WorkSafeBC and elsewhere provide a useful baseline of his pain and tolerance levels against which to compare the plaintiff's pre- and post-Collision reports to his treating practitioners. This comparison reveals that the plaintiff continued to complain of significant hip pain and restrictions in the weeks and months leading up to the Collision. Consequently, the opinions of Dr. Khan, Mr. Kowalik and Dr. Sovio were undermined to the extent that they assumed the plaintiff's subjective complaints to be true.

[56] The plaintiff was not an overly impressive witness, particularly during his cross-examination. There were features of his testimony that I found problematic to the point of affecting his credibility. He struggled to explain the inconsistency between his direct evidence that his return to work as a longshoreman was imminent, and the documentary evidence that suggests otherwise.

[57] The available records from WorkSafeBC generally indicate that:

a) the plaintiff was still struggling with the Hip Injury right up to the Collision and that his condition was considered permanent;

b) the plaintiff was still receiving WorkSafeBC-sponsored rehabilitation and wage loss benefits at the time of the Collision;

c) various dock employers considered the plaintiff to have a high risk of re-injury, and therefore the plaintiff was unlikely to be allowed to return to full longshoreman work duties before the Collision, but rather at best to working as a checker; and

d) the plaintiff's employer was justifiably reluctant to make accommodations for him such as installing sit-stand desks in checker "towers".

[58] I also note contradictions between the plaintiff's testimony regarding his pre-Collision condition and specific WorkSafeBC records from before the Collision:

a) In a March 19, 2015 WorkSafeBC record, he complained of shooting pain down his right leg, similar to the "spasms" he complained of post-Collision, which he claimed to have never had before. His explanation that "shooting pain" and "spasms" were different was not persuasive.

b) The pre-Collision rehabilitation records suggest that his sitting, walking and exercise tolerance of between 20 and 30 minutes was the same before and after the Collision. For example, in an April 2016 record, he noted that he was able to tolerate about 30 minutes of exercise. Despite his evidence to the contrary, the records suggest that his pre- and post-Collision function was similar.

c) Dr. Gilbart's note from January 25, 2016, two months post-surgery, states:

> [U]nfortunately he is not doing well. He still has ongoing pain in the region of his right hip…he ambulates with a limp. He is continuing with physio although every time they try to ramp up activities, his symptoms of pain flare.

d) A March 31, 2016 record of Dr. Gilbart states:

> . . . the physio is pushing his hip harder with more range of motion exercises, but he has found that at times, this exacerbates his pain. His range of motion is still stiff and unchanged.

[59] Similar concerns are expressed in April and May 2016 WorkSafeBC records. The plaintiff's suggestion that he was making progress does not square with any of this evidence. His explanations for why the records say he was making very slow progress were weak and unpersuasive.

[60] Inconsistencies between the documentary evidence and the plaintiff's testimony cast doubt on the other injuries the plaintiff claims to have suffered as a result of the Collision:

a) The plaintiff suggested at trial that his mental health issues of depression and anxiety were related to the Collision. However, in October 2019, his former counsel made strong submissions to WorkSafeBC that those symptoms were in fact related to the Hip Injury and sought accommodations and compensation on that basis.

b) The plaintiff claims to have sustained a right shoulder injury in the Collision, but there is no mention in any medical or other records of right shoulder issues until years after the Collision. In particular, there is no mention of a right shoulder issue in the May 19, 2016 hospital records nor in his family doctor's post-Collision records. Further, during various post-Collision assessments, the plaintiff was asked to indicate the symptomatic areas of his body and he consistently failed to mention symptoms in his right shoulder. Examples include:

    (1) a CL20 physiotherapy report to ICBC dated August 1, 2018, which does not mention a right shoulder complaint or injury; and

    (2) an August 15, 2018 physiotherapy report, which reports his indicated shoulder pain at 0/10 and contains no suggestion of an issue with his right shoulder.

    The plaintiff explained that his right shoulder was not painful at those times because he was not using it and that he was focused on his right hip issues. I did not find these explanations persuasive.

c) During Mr. Kowalik's functional capacity assessment a little over two months before trial, the plaintiff endorsed his hip pain as very disabling. This is at odds with his wife and sister's evidence that he was functioning much better at the time.

[61] I have also considered the plaintiff's wife and sister's testimony that the plaintiff's physical and psychological function was significantly reduced following the Collision. Their evidence suffers from the same flaw: it is not consistent with the clinical and other records in evidence. I conclude that they both overstated the plaintiff's pre-Collision function related to the Hip Injury, which had the effect of detracting from their evidence as a whole.

[62] I conclude that the Hip Injury remained a significant problem for the plaintiff and was affecting his function leading up to the Collision. It is difficult to objectively discern the actual effect of the Collision, but it clearly did not delay his return to sedentary or light work any more than temporarily.

[63] In sum, while I accept that the Collision probably aggravated the Hip Injury and caused increased symptoms for a period of time, I do not accept that the Collision was the cause of any ongoing hip issues. I conclude that he was having similar difficulties with his hip pre- and post-Collision. In other words, although the Collision resulted in his hip symptoms flaring up, he returned to his pre-Collision baseline within a year or so.

[64] In the end, it is difficult to precisely determine the level of aggravation caused to the Hip Injury by the Collision, but I conclude it was relatively minor. The 2015 fall continues to be the main cause of the plaintiff's ongoing hip complaints.

[65] Even if I could give the plaintiff the benefit of the doubt, I would not conclude that the plaintiff was about to return to work at the docks when the Collision occurred. He was not cleared to perform laborious longshoreman work and his employers were reluctant to allow his return without medical clearance.

[66] The evidence persuades me and I conclude that, regardless of the Collision, the plaintiff would have continued to suffer from functional disabilities from the Hip Injury and that his recovery from the Hip Injury had probably plateaued. If he was able to return to work as a longshoreman at all, he would have been limited to performing duties of a sedentary or light nature, such as a checker, but that would not have occurred in August 2016 as he suggests.

A. General Damages

[67] The plaintiff claims that the Collision caused an aggravation of the Hip Injury, soft-tissue injuries to his neck and back, psychological issues including anxiety and depression, right leg spasms, and a right shoulder injury.

[68] As mentioned, while I accept that the Collision likely aggravated the Hip Injury, I do not accept that the Collision caused ongoing neck, back or right shoulder pain. I make this finding because of my general concerns about the plaintiff's credibility including that the medical records contain no reference to any neck, back or shoulder issues. If he did experience such issues, they were so minor that he did not bother mentioning them.

[69] The plaintiff's wife and sister did their best to paint a picture of the Collision having a profound negative effect on the plaintiff's physical abilities and psychological health. The two witnesses described the plaintiff's condition immediately prior to the Collision as follows:

a) The plaintiff was on the road to recovery following the hip surgery, and was ready to return to work when the Collision derailed his recovery.

b) The plaintiff was able to enjoy a family trip to New York City in July 2015 despite the Hip Injury, evidencing his recovery prior to the Collision and impending return to work. He biked, walked and sightsaw without much difficulty.

c) Overall, the plaintiff's recovery and overall health, mental and physical, was far better immediately prior to the Collision than the WorkSafeBC and treatment records suggest. He was not fully healed, but was excited to return to work. His sister stated that he had a twinkle in his eyes again.

[70] The plaintiff's wife and sister point to numerous changes in the plaintiff in the six years since the Collision:

a) The plaintiff has withdrawn from the family and helps out less around the home.

b) The plaintiff complained of hip pain and gained weight.

c) The plaintiff's personality changed. His wife says he became argumentative and snapped at her and their daughter. She began sleeping in another room in order to avoid him. The plaintiff mostly confined himself to his room and did not interact with his family.

[71] Of interest, both the plaintiff's wife and sister restricted their observations of the plaintiff's physical issues to his hip. Neither mentioned his right shoulder as being a problem.

[72] They also say that within the last 6 to 12 months, the plaintiff's physical and mental state have improved greatly and he is close to being the happy, upbeat, engaged person he was before the Collision.

[73] I conclude that the plaintiff's wife and sister, eager to help the plaintiff's case, downplayed his symptoms that pre-existed the Collision and exaggerated the changes since the Collision. Indeed, they blamed most of the plaintiff's existing difficulties on the Collision, which does not align with the medical and treatment records.

[74] The plaintiff seeks a general damages award of $200,000. In support, he refers to *Martin v. Steunenberg*, 2021 BCSC 1411, and *Steinlauf v. Deol*, 2021 BCSC 1118.

[75] The defendant says a general damages award in the range of $30,000 to $40,000 is appropriate, relying on *Repin v. AAM Ventures Ltd*, 2020 BCSC 227; *Dorsey v. Bhindi*, 2016 BCSC 499; and *Janda v. Mackenzie*, 2018 BCSC 168.

[76] I have reviewed these cases and have determined that the defence cases are more closely aligned to this case than the plaintiff's case.

[77] Considering these authorities and my findings of fact as outlined above, I am assessing the plaintiff's general damages' claim on the basis that the Collision resulted in a short-term aggravation of the Hip Injury. I have considered the established factors that may influence a general damages award, as articulated in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

[78] I am satisfied that $50,000 will properly compensate the plaintiff under this head, including the impact on his Hip Injury and his claim for loss of housekeeping capacity.

B. Special Damages

[79] The plaintiff attributes $17,394.33 in expenses to injuries from the Collision. The defendant does not dispute that sum was spent, but maintains that all of it would have been incurred in connection with the Hip Injury in any event of the Collision.

[80] Specifically, the plaintiff attributes the following expenses to the Collision:

a)	Medication:	$5,318.33
b)	Psychological Services:	$1,955.00
c)	Physiotherapy:	$1,563.00
d)	Kinesiology:	$478.00
e)	Chiropractic/Physio:	$750.00
f)	Equipment:	$7.50
g)	Landscaping Services:	$7,322.50

[81] I agree mostly with the defendant. Based on my assessment of the evidence, it is clear that most of the expenses the plaintiff relates to the Collision were also related to the original Hip Injury and he would have incurred them in any event.

[82] I am satisfied, however, that the Collision temporarily aggravated the Hip Injury, and thereby caused the plaintiff to incur some expenses. In particular, it would have caused him to incur additional expenses for pain medications, physiotherapy and chiropractic treatment. Because the plaintiff was already incurring similar expenses to treat the Hip Injury prior to the Collision, it is impossible to attribute a precise proportion of those costs to the Collision. Having reviewed the costs claimed by the plaintiff and assessed them in light of my findings on the effect of the Collision, I consider the following special damages award to be appropriate:

a)	Medication:	$1,500
b)	Psychological Services:	$0
c)	Physiotherapy:	$1,200
d)	Kinesiology:	$0
e)	Chiropractic/Physio:	$500
f)	Equipment:	$0
g)	Landscaping Services:	$0
	TOTAL:	$3,200

[83] Accordingly, the plaintiff will have a special damage award of $3,200.

C. Past Loss of Earnings

[84] The plaintiff's claim for past loss of earnings must be based on what he would have earned, but could not because of the Collision: *Rowe v. Bobell Express Ltd*., 2005 BCCA 141 at para. 30. This involves the consideration of hypothetical events, which should be taken into consideration as long as there is a real and substantial

possibility of them occurring and not mere speculation: *Safdari v. Buckland*, 2020 BCSC 769 at para. 179.

[85] The plaintiff maintains that the Collision permanently aggravated the Hip Injury, prolonged his recovery and delayed his return to work. He says that, but for the Collision, he would have returned to work as a full-time longshoreman in August 2016. He maintains that the Collision derailed his return-to-work plans and claims a past earning loss of between $443,000 and $650,000 net of income tax. The lower end of the range is based on assumptions that, but for the Collision, he would have returned to work on August 1, 2016 and earned $70,814 per year, equal to what he was earning pre-Hip Injury. The high end of the range also assumes that, but for the Collision, he would have returned to work on August 1, 2016, started earning $70,814 per year, and then earned an additional $20,000 each following year.

[86] The defendant opposes the plaintiff's past loss of income claim on two bases: i) he continued to receive WorkSafeBC disability benefits post-Collision and there is a risk of double recovery; and ii) the medical evidence suggests that he was not prepared to return to work at the time of the Collision and was exhibiting the same functionality before and after the Collision. WorkSafeBC ruled that the plaintiff had permanent disabilities before the Collision and awarded him a lump sum commensurate with his disability.

[87] The defendant says the plaintiff is precluded from claiming any past loss of income because he failed to inform the court as to the amount of WorkSafeBC wage loss benefits he received post-Collision and there is a risk of double recovery. The defendant referred to *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, which states at 981:

> The general principles underlying our system of damages suggest that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been had the tort not been committed, in so far as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, the measure of the damages should be the plaintiff's actual loss. It is implicit in this that the plaintiff should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates this principle. It follows that where a plaintiff sustains no wage loss as a result of a tort because his employer has continued to pay his salary while he was

> unable to work, he should not be entitled to recover damages on that account.

[88] The plaintiff's past loss of income award is to be restricted to his actual loss, as closely as that can be determined, in order to restore him to the position he would have been in but for the tort committed. The measure of his damages is his actual financial loss suffered as a result of the Collision.

[89] The only time the plaintiff worked an entire year was in 2014, when he earned $70,814. The plaintiff's friend and coworker, Mr. Upkar Bariana testified respecting expected past and current earnings as a longshoreman. He is slightly behind the plaintiff in seniority having started with BCME a few days after the plaintiff. He described the physical nature of longshoreman work, and the less physical work of a checker. He also described his earnings from 2014 to trial, which ranged from $69,000 in 2014 to $120,000 last year. He expects to earn between $140,000 and $150,000 in 2023. Mr. Bariana knows the plaintiff and has seen him relatively regularly since the Collision. He is very confident that the plaintiff can perform the work of a checker.

[90] Mr. Sukh Bains, the current secretary and treasurer of the plaintiff's union, testified that the plaintiff remains a casual union member and is "frozen" on the C-Board for picking his daily work, because he has been off work for the eight years since the Hip Injury occurred. He stated that the plaintiff would have been on the A-Board if not for the Hip Injury. This would have enabled the plaintiff to work full-time plus extra hours and earn in the range of $200,000 per year. The plaintiff would be able to work as much or as little as he liked and could secure sedentary or light capacity jobs each day due to his seniority. His current position on the C-Board means that there are less sedentary or light work opportunities available to him. This will be the case until he works through the B-board and up to the A-Board. Currently, workers on day shift earn $48 per hour, afternoon shift is $60 per hour and workers working the graveyard shift earn $75 per hour. Shift work is purely by individual preference. Mr. Bains confirmed that the plaintiff is currently retraining and expected to return to work as a checker in the next month or so.

[91] It is clear that the plaintiff has been receiving WorkSafeBC wage loss benefits since before the Collision. Nevertheless, the plaintiff seeks to recover 100% of his lost earnings since August 1, 2016, the date he says he would have returned to work as a longshoreman but for the Collision.

[92] Firstly, I am not persuaded that he would have returned to work as he suggests. I conclude that his stated enthusiasm to return to work and his position that he would have done so but for the Collision are afterthoughts made up in an effort to blame his non-return-to-work on the Collision.

[93] Secondly, even if I was satisfied that the plaintiff's inability to return to work was related to the Collision, he is not entitled to double recovery of both wage loss benefits from WorkSafeBC and a loss of earnings award from the defendant, unless the past wage loss amount is repayable to WorkSafeBC: *Ratych* at 981.

[94] I note that the plaintiff has provided evidence from WorkSafeBC of the wage loss benefits received since suffering the Hip Injury. Those benefits continued uninterrupted after the Collision. Immediately after the Hip Injury in January 2015, he received net direct wage loss deposits of $2,064.86 every two weeks, reduced to $1,901.76 every two weeks in April 2015. He generally received that amount every two weeks until October 25, 2016, when it reduced to $1,699.18, before increasing to $1,707.58 in January 2017. In June 2017, it reduced to $1,659.84, then continued with what appear to be slight annual increases to $1,690.50 until September 2019. Commencing October 2019, it appears WorkSafeBC began paying $556.11 weekly instead of biweekly, with small gradual increases to $581.42 weekly until April 22, 2023, when the wage loss benefits reverted to $1,764.11 biweekly. No evidence was led respecting these payments and I am left to make inferences.

[95] No submissions were made respecting whether the WorkSafeBC wage loss benefits would be deductible under *Ratych*, but the issue is moot given my decision that follows.

[96] The plaintiff has the burden of proving his wage loss claim on the balance of probabilities. He has not done so. On the evidence, I am not persuaded that the plaintiff would have returned to work in August 2016 but for the Collision, or at all prior to trial. I conclude that the fact of the Collision occurring while he was disabled from work as a longshoreman had no impact on his ability to return to work.

[97] Accordingly, the plaintiff's claim for past loss of earnings must be dismissed.

D. Loss of Future Earning Capacity

[98] The law applicable to loss of future earning capacity was summarized as follows in *Villing v. Husseni*, 2016 BCCA 422:

> [17] In order to receive an award for loss of earning capacity, a plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: *Perren v. Lalari,* 2010 BCCA 140 at paras. 30–32 [*Perren*]. If the plaintiff has discharged the burden of proof, then the judge must turn to an assessment of damages. The assessment may be based on an earnings approach or a capital asset approach: *Perren* at para. 32. An earnings approach is most appropriate where the loss is more easily quantifiable. In general, a party may be forced to default to a capital asset approach where the loss is not easily quantifiable.

[99] The assessment of a future loss of earnings claim is a three-step process. The first step is evidentiary: is there evidence of a potential future event that could lead to a loss of capacity. The second step is whether, on the evidence, there is a real and substantial possibility that the future event will cause a pecuniary loss. If so, the third step requires an assessment of the relative likelihood of that possibility occurring: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; *Lo v. Vos*, 2021 BCCA 421.

[100] The first step gives rise to the well-known considerations set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.). At para. 8 of *Brown*, the Court listed some considerations relevant to the first step, including whether:

> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> 2. the plaintiff is less marketable or attractive as an employee to potential employers;

> 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. [t]he plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[101] In the second and third steps, hypothetical future events are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Turner v. Dionne*, 2017 BCSC 1905 at para. 316, citing *Athey* at para. 27; see also *Dornan* at paras. 93-95.

[102] As at the date of trial, the plaintiff says he is ready and willing to return to work as a longshoreman and expects to do so sometime in June 2023.

[103] As a result of his continuing Hip Injury issues, the plaintiff was assessed by WorkSafeBC as being permanently unable to perform the labour-intensive work duties of a longshoreman. While I am not bound by WorkSafeBC's conclusions on this point, I have determined that the Collision did not change his future abilities. At the time of the Collision, the Plaintiff was continuing to recover from the Hip Injury. There was every indication that his recovery from that injury had plateaued and it was not going to get much better.

[104] I am satisfied that he will be able to return to work as a checker, with accommodations, in the upcoming weeks or months in accordance with his plans. He was restricted to checker work in any event of the Collison. I have found that the Collision aggravated the Hip Injury, causing his function to decrease for a period of time. He has now returned to his baseline from before the Collision. I have also found that to the extent that he sustained either a neck or back injury in the Collision, it was relatively minor and the symptoms quickly resolved. Further, I have concluded that he did not suffer a right shoulder injury in the Collison. If he has shoulder issues, they are related to some other cause.

[105] It is telling that both witnesses the plaintiff called from his workplace, Messrs. Bariana and Bains, agreed that the checker job is something that the

plaintiff was and is capable of performing even considering his hip issues. I have no reason to dispute that evidence. The evidence is also that the plaintiff will be able to return to work as a checker, starting out on the C-Board, probably later this month. He will then work his way up the seniority list to the A-Board, where he will have as much work as he wants. I conclude that the plaintiff's starting position on the C-Board and the fact that he will have to work his way up to the A-Board is because of his protracted Hip Injury and not the Collision. In other words, regardless of the Collision, the plaintiff would have been off work until June 2023.

[106] In sum, it is plain from the evidence, and I accept, that any limitations the plaintiff may have arise from the pre-existing Hip Injury and not the Collision. To the extent the Collision aggravated his hip symptoms, that aggravation did not delay his return to work. Accordingly, I am not persuaded that the plaintiff has proven any possibility of a future event that could lead to a loss of earnings.

E. Future Care Costs

[107] The purpose of future care costs is to provide an injured plaintiff who continues to suffer symptoms from injuries related to the claim with assistance, equipment and facilities to better manage his or her life in the future. In other words, a plaintiff is entitled, in so far as money can do and from an objective standpoint, to an award for the cost of future care expenses that are reasonably necessary to restore them to their pre-injury condition. The items claimed must be legitimate, medically justifiable and not relate to expenses the plaintiff would have incurred in any event: *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244. An assessment of future care costs in not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[108] The plaintiff relies on future care recommendations made by Dr. Khan and Mr. Kowalik and as valued by Mr. Coleman, in support of a future care claim of $36,000. The defence says that nothing should be awarded.

[109] It is clear that the plaintiff was taking medications and receiving ongoing physiotherapy treatments and other modes of rehabilitation leading up to the

Collision. The defendant should only be responsible for any increase or new medications.

[110] I have reviewed Dr. Khan and Mr. Kowalik's recommendations. I have found that the Collision caused relatively minor neck and back issues and temporarily aggravated the Hip Injury. I have also found that the plaintiff's Collision-related injuries have since resolved and he has returned to his pre-Collision baseline. Accordingly, there is no basis for a cost of future care award.

V. SUMMARY

[111] The plaintiff is awarded the following damages:

a) General Damages:	$50,000
b) Special Damages:	$3,200
c) Past Loss of Earnings/Opportunity:	0
d) Future Loss of Earing Capacity:	0
e) Future Care Costs:	0
	$53,200

[112] Unless there are matters of which I am unaware, the plaintiff is entitled to Scale B costs.

"G.P. Weatherill J."