IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Karpenko v. King,*
2023 BCSC 345

Date: 20230308
Docket: M111424
Registry: Kelowna

Between:

Andriy Karpenko

Plaintiff

And

David Oliver King and John Doe

Defendants

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:	B. Fitzpatrick D. Whittaker
Counsel for the Defendant, David King:	K. Cheung
Place and Date of Trial/Hearing:	Kelowna, B.C. January 9–11, 16–20, 23–25, 2023
Place and Date of Judgment:	Kelowna, B.C. March 8, 2023

I. INTRODUCTION

[1] The 52-year-old plaintiff claims damages for injuries arising out of a rear-end collision that occurred on June 21, 2014, as he turned right onto Highway 97 from Dilworth Drive in Kelowna, BC (the "Collision"). Liability for the Collision has been admitted on behalf of the defendant Mr. King.

[2] The plaintiff was formerly a high-ranking police and military officer in Ukraine. He left Ukraine and immigrated to Canada in 2004 to escape what he viewed as the deteriorating political climate. He has since become a Canadian citizen. He says that he has suffered from chronic pain since the Collision, which has prevented him from reaching his goal of becoming a police officer in Canada. He says that before the Collision he was working hard to complete all steps necessary to qualify as a police officer and that he would have easily reached that goal but for the Collision.

[3] The defence admits that the plaintiff suffered injuries in the Collision, including the development of a chronic pain condition, but denies that the plaintiff is unable to function in life and that the Collision prevented him from becoming a police officer.

II. CHRONOLOGY

A. The Pre-Collision Plaintiff

[4] English is the plaintiff's second language. While proficient in speaking and understanding English, an English-Ukrainian translator assisted him from time to time as he gave evidence by interpreting words and phrases that he found difficult.

[5] The plaintiff was born in Ukraine to a military family. He excelled academically in high school, then received further education including a university degree in criminal law. His passion was law enforcement and he became a military and police officer. In Ukraine, he rose to reach the ranks of major and colonel, oversaw some 1,500 police officers, and worked with INTERPOL.

[6] In November 2002, three months before he became pension-eligible, he left the Ukrainian police force. He believed that a criminal element held political control at that time and had marked him as a target. In order to leave Ukraine, he upgraded

his English and applied to immigrate to Canada under the skilled worker program as an auto mechanic. While he had no experience or qualifications as a mechanic, his understanding was that his application would take at least ten years if he applied as a police officer, during which time his life would have been in jeopardy.

[7] In January 2004, he was granted a Canadian work visa. He immigrated to Canada, arriving in Toronto before relocating to Winnipeg. He obtained employment as an auto mechanic for $8 per hour, first in Dauphin and then in Winnipeg. He received Canadian permanent residency in 2005 or 2006.

[8] Eventually, he changed his job focus to construction. In March 2006, he moved to Penticton, BC, and began gaining skills and experience by working as an apprentice for a construction company. In December 2008, he incorporated a construction company. His company completed commercial and residential renovation projects around the Kelowna area. He gained experience with masonry, framing, painting, insulation, drywall and finishing.

[9] His goal was always to qualify as and become a police officer in Canada. He knew he had to first obtain his Canadian citizenship, improve his English and take relevant courses. He took courses at Okanagan College, obtained qualifications as a security guard and security supervisor and worked in those roles at various venues, while continuing his work in the construction and masonry trades.

[10] In September 2009, he became a Canadian citizen. He befriended a former officer with the Royal Canadian Mounted Police (“RCMP”), who explained the process of applying to become a police officer and strongly recommended that he continue adding to his resume by improving his English language skills and seeking medical training. Accordingly, he took and completed further courses at Okanagan College, including courses in 2011 to become a bylaw enforcement officer.

[11] In late 2010, he took training through the Justice Institute of British Columbia to become an auxiliary member of the RCMP, successfully completing his qualifications in February 2011. He had no physical restrictions or complaints at the

time. He promptly joined the Kelowna RCMP as an auxiliary member and worked one to two 12-hour volunteer shifts per week. He continued working in the construction industry, taking on mostly masonry projects. Additionally, he worked security at music festivals and provided RCMP members and others with hand-to-hand combat training that he had learned in Ukraine.

[12] In the spring of 2011, he formally applied to the RCMP and other police agencies, including the New Westminster Police, Port Moody Police, Vancouver City Police and Saanich Police. He was interviewed by the Saanich Police and RCMP and believed both were interested in him becoming a member of their respective forces, because of his background, experience and credentials in policing in Ukraine. During his interviews, he made it clear that he would only accept a starting position much higher than constable.

[13] In December 2013, he put his policing applications on hold to travel to Ukraine for a complete medical work-up. He believed this work-up was unavailable in Canada and would ensure he had no physical conditions that might affect his police applications. Dr. Marta Pakish assessed the plaintiff, the same doctor who had assessed him before his move to Canada. In late January 2014, he returned to Canada with a complete bill of health, bringing with him the results of his medical assessments.

[14] The plaintiff believed that the RCMP wanted to recruit him and would fast-track him into service. He claims they suggested sending him to Montreal to assist in policing the Russian mafia. Because he did not speak French, the plaintiff suggested in response that he be given a position teaching hand-to-hand combat to regular members. He says that during his RCMP interview, he mentioned that the Saanich Police had invited him to join their force and that the RCMP members asked him not to accept. He understood that his acceptance into the RCMP would be a relatively quick process.

[15] Following his RCMP interview, he continued to work for his construction company, as a security guard and as a volunteer auxiliary RCMP officer. He

continued his usual active lifestyle by working out at the gym, swimming, boxing, kickboxing, hiking, fishing, hunting, and playing volleyball and soccer. He had no physical or mental health issues leading up to the Collision.

[16] In the months before the Collision, he focused his time and energy on upgrading his resume. He spent the majority of his spare time studying at Okanagan College and working security jobs.

B. The June 24, 2014 Collision

[17] The plaintiff was driving his Audi A6 sedan on Dilworth Drive in Kelowna, BC, intending to turn right onto Highway 97, the main highway through the city. It was daylight and he had a friend in the passenger seat.

[18] The traffic on Highway 97 was heavy. As he stopped in the right turn lane to merge onto the highway, his body and head were twisted to the left so that he could see the oncoming traffic and take the next opportunity to proceed. Without warning, a vehicle driven by the defendant Mr. King struck his vehicle in the rear. The force of the impact propelled the plaintiff's vehicle into Highway 97 by less than a car length. The plaintiff immediately felt pain in his neck, back and head. He believes his head struck the steering wheel. He felt dizzy.

[19] Both drivers pulled their vehicles to the side of the road and exited. Mr. King apologized for what had happened. He stated that he would pay for the Audi's damage, which appeared to be minimal, and asked the plaintiff not to call the police or ambulance because he did not want to be late for a wedding he was attending. The plaintiff agreed, even though he was experiencing pain in his upper and lower back and the right side of his head, numbness in the fingers of his left hand, and numbness and sharp pains on the front and back of his left leg at the time. He left the scene and his passenger drove him home.

[20] As the day progressed, the plaintiff's pain increased. He was unable to secure an appointment with his family doctor, Dr. John McNern. The plaintiff says that despite many phone calls and unannounced visits to Dr. McNern's office, he was

unable to see him until October 2014. He managed, however, to secure an appointment with a chiropractor within a few days of the Collision.

[21] Because Dr. McNern was unavailable, the plaintiff called Dr. Pakish in Ukraine, who sent him prescription pain cream and medication.

[22] The plaintiff says he always assumed that his condition would improve and he would recover. Nonetheless, he continues to suffer varying levels of pain in his neck, left shoulder, left arm, left leg and upper and lower back.

C. The Post-Collision Plaintiff

[23] In the years following the Collision, the plaintiff has received a variety of treatment modalities including chiropractic, physiotherapy, massage therapy and acupuncture. Despite these treatments, the plaintiff continues to suffer from upper and lower back pain, left shoulder and neck pain, and numbness in his left arm and leg. He has ongoing headaches and difficulty sleeping. On a scale of 1 to 10, his pain varies from 3 or 4 to 9 or 10 depending on his activities. He finds that even if he is feeling relatively good, his pain will shoot up to 9 or 10 if he does too much or moves the wrong way. His hand goes numb when he lifts things with his left arm.

[24] He took a break from construction work after the Collision, expecting to fully recover in a few months. He quoted, obtained and completed a $2,400 drywall job in November 2014. He found that even this small job increased his pain. In 2016, the plaintiff was referred to a pain clinic, where he received a series of injections over a period of weeks. The injections were painful and did not relieve his ongoing issues.

[25] He says that he was a strong, active and healthy man all his life until the Collision. Since the Collision, he has to move carefully for fear that he might trigger increased pain. He still tries to swim as often as possible, summer and winter, and uses saunas and steam baths regularly to ease his symptoms.

[26] Currently, he can do some physical activities and work in construction or masonry, but has to moderate himself and cannot work full-time. He described his

level of pain increasing along with his activity level and adversely affecting his sleep. He experiences headaches two or three times per week. These headaches are not debilitating, but do affect his function and force him to take breaks from work. He notes that his neck spasms reduce and headaches disappear after receiving chiropractic adjustments or other treatments, but they always return eventually.

[27] Despite the pain, the plaintiff has continued to work as best he can in order to survive and pay bills.

[28] He continued volunteering as an auxiliary RCMP officer for a few weeks following the Collision, but gave it up in July 2014. He says that the required duty belt, vest and physical duties caused him too much pain. He also withdrew his applications from the RCMP and Saanich Police because he believed he would be unable to pass their physical examinations.

[29] Following the Collision in 2014 through 2016, the plaintiff continued to take on construction projects, but found them difficult. He relied heavily on sub-trades to complete them. In 2014 and 2015, he quoted some masonry jobs, but then declined them because he believed his ongoing symptoms would prevent him from completing them.

[30] In June 2016, the City of Kelowna accepted the plaintiff's application to become a bylaw enforcement officer. He had first applied in 2011 after he passed bylaw enforcement officer training at Okanagan College. He was initially hired as a traffic officer on a casual part-time basis for a six-month contract, but the City renewed the contract through November 2020. The duty belt for a bylaw enforcement officer is lighter than that for an auxiliary RCMP officer. Nevertheless, the duty belt increased his pain symptoms.

[31] In April 2020, the City assigned the plaintiff to be a Covid-19 ambassador. His duties included attending Kelowna businesses who were in violation of Covid-19 public health orders and educating the business owners on the proper protocols.

[32] In December 2014, the plaintiff met Svitlana Kharsika through an online dating application. He sponsored her to come to Canada from Ukraine and they were married in February 2015. The plaintiff says that they got married because Ms. Kharsika falsely told him she was pregnant so that he would marry her and she could immigrate to Canada. The couple have one child, born on February 16, 2016.

[33] In August 2018, Ms. Kharsika made a complaint to the RCMP, who laid assault charges against the plaintiff on August 3, 2018. The plaintiff testified that prior to this, Ms. Kharsika had learned of his Collision-related personal injury claim and threatened to accuse him of criminal misconduct if he did not pay her $150,000. The plaintiff fought the charges and a related protection order against him for three-and-a-half years until the Crown stayed the proceeding in fall 2021.

[34] The couple separated shortly after charges were laid. Ms. Kharsika moved to Saskatchewan with their child. She denies the plaintiff's allegation of blackmail. There is an ongoing acrimonious family law dispute between her and the plaintiff.

III. LAY WITNESS EVIDENCE

[35] The lay witnesses called by the plaintiff generally supported his position that he continues to suffer from Collision-related symptoms. The lay witnesses called by the defendant, including Ms. Kharsika and her father, generally did not support the plaintiff's case.

i. David Iverson

[36] Mr. Iverson was a civilian member of the RCMP for 17 years. He met the plaintiff in 2006, they became friends and have socialized ever since. He assisted the plaintiff with his Canadian citizenship application and introduced him to members of the Kelowna RCMP.

[37] The plaintiff had made it clear that becoming a police officer was his primary goal and Mr. Iverson assisted him with the process of applying to the RCMP, recommending that he first improve his English and become an auxiliary member of the RCMP. In his view, the plaintiff's past policing credentials were an asset.

Mr. Iverson provided the plaintiff with links to various police force websites around the province. He introduced the plaintiff to connections in bylaw enforcement.

[38] Mr. Iverson described the plaintiff's pre-Collision physical prowess as "amazing". From his observations, the plaintiff was highly skilled and capable of defusing hostile situations. He considered the plaintiff to have excellent powers of observation, a strong work ethic and a "police mind". He felt the plaintiff was an excellent candidate to become a police officer.

ii. Pavel Kalashnikoff

[39] Mr. Kalashnikoff met the plaintiff when both were taking bylaw officer courses together in 2011. They also worked some security jobs together. He described the plaintiff as having a good work ethic and communication skills. He stated that he learned a lot from the plaintiff. The plaintiff told him that his focus was on becoming a police officer.

[40] Mr. Kalashnikoff's observations of the pre-Collision plaintiff were that he was outgoing, social and physically strong. After the Collision, he observed that the plaintiff moved more slowly, had reduced energy and did not want to go out much. He recalls that the plaintiff asked him for help on a small masonry project after the Collision. Mr. Kalashnikoff lifted 50-pound boxes of tiles and 50-pound stones for the plaintiff. He noted that the plaintiff did not attempt to lift these items on his own.

iii. Kevin Bohnet

[41] Mr. Bohnet joined the City of Kelowna bylaw traffic department approximately five years ago as a bylaw enforcement officer. His duties included parking and traffic enforcement, driving in a vehicle equipped with a passenger-seat computer up to seven hours per day, and entering data on the computer up to 100 times per day. He testified that the location of the computer in the passenger seat requires the operator to twist to the right in what could be an awkward position.

[42] When Mr. Bohnet started as a bylaw enforcement officer, the plaintiff trained him. Mr. Bohnet testified that the plaintiff was knowledgeable, had a strong work

ethic and was always professional and courteous with the public. He observed him to deal with issues that came up in a calm and professional manner. He observed the plaintiff to wear a duty vest and belt during his employment.

[43] The Covid-19 pandemic significantly reduced the number of traffic violations, and corresponding data entry requirements, because the population was not travelling as much. Instead, he and the plaintiff were given the job of educating the public on Covid-19 health protocols.

[44] Mr. Bohnet stated that the plaintiff could not bid on internal job postings at the City of Kelowna because he was a casual part-time employee.

iv. Mihaela Rasovic

[45] Ms. Rasovic and her husband moved to Kelowna in 2001 and met the plaintiff through her husband's construction company. Her husband hired the plaintiff as a masonry subcontractor and to do some masonry and stonework on a custom home they were building. Her husband died in 2014 and the plaintiff did some masonry work for Ms. Rasovic in the 2015 timeframe.

[46] In 2018, the plaintiff quoted on a significant amount of masonry and stonework at a new home she had purchased. She gave him the job, but the home was destroyed by fire in 2019, before the work had commenced.

v. David Duncan

[47] Mr. Duncan is the parking service manager for the City of Kelowna and was one of the plaintiff's immediate bosses while he worked as a bylaw officer. He hired the plaintiff in 2016 on a casual basis to fill in "on-call" as and when needed. From 2016 through November 2020, the plaintiff's duties were shared between his department and the bylaw services department depending on need. In order to be employed in Mr. Duncan's department, an applicant needs security clearance and a bylaw enforcement course. Uniforms are required, but wearing a duty vest and belt is optional.

[48] He described the plaintiff's work ethic as exceptional. He stated that the plaintiff was one of the few persons he could always rely on to work when needed. He noted that the plaintiff was dynamic, able to jump into any duties he was assigned. Although the plaintiff was good at his job, he tended to have a "by the book, black and white" approach to writing parking tickets and bylaw enforcement. The plaintiff took detailed notes, perhaps more than necessary. There was no issue with the plaintiff taking and following directions and he did what he was asked to do.

[49] He testified that the plaintiff could stay as a casual employee as long as he wanted, although it was unusual for a casual employee not to apply for a full-time permanent position after a few years. A casual employee's hours are never guaranteed, they do not accumulate seniority, but they do receive non-wage benefits as members of the union. Full-time employees have priority for internal job postings.

[50] The biggest impact of the Covid-19 pandemic on the City of Kelowna's bylaw department was the reduction in hours available to casual employees. Events that casual employees typically attended were closed. Although Mr. Duncan did his best to allocate hours to the plaintiff, he could no longer do so after November 2020, when the City replaced his budget for casual employees with a full-time position.

[51] Although the plaintiff remains in the casual employee pool, there are no hours available to give him. He stated that the plaintiff is welcome to apply for a full-time position in his department.

vi. Alex Schoenherr

[52] Mr. Schoenherr, a 33-year-old former semi-professional boxer, met the plaintiff working with a security company in 2012.

[53] He described the plaintiff as an honest, kind, and extremely hard-working perfectionist who often did more than was expected of him.

[54] In 2015, Mr. Schoenherr began assisting the plaintiff with construction and masonry projects. Mr. Schoenherr's role was to carry the heavy stones and put them

in place for the plaintiff to attach them. Together with Paul St. Maurice, Mr. Schoenherr built scaffolding, lifted the heavy rocks onto the scaffolding and held them in place as the plaintiff attached them. He also helped the plaintiff install drywall by holding drywall sheets in place as the plaintiff attached them. The plaintiff would often complain to him that he could not lift drywall or function like he once did and he observed the plaintiff struggling with what appeared to be back pain.

vii. Aleksandr Isakov

[55] Mr. Isakov was the plaintiff's accountant from 2011 to 2017. He was called to review and explain portions of the plaintiff's personal and corporate tax returns. He confirmed that the plaintiff told him of his desire to become a police officer and was debating between a career in policing or construction.

viii. Dr. Jeff Barnett

[56] Dr. Barnett has been the plaintiff's chiropractor since August 2015. He testified about his observations of the plaintiff during numerous chiropractic sessions. He encouraged the plaintiff to be as active as possible, engage in exercises that did not cause pain or discomfort and cease work activities that caused aggravation of his symptoms such as repetitive physical work. Many of the plaintiff's visits to him were unscheduled visits to treat flare-ups related to his activities.

[57] He noted that the plaintiff has a leg-length discrepancy and gave him a 7-mm. heel lift in an unsuccessful effort to help his low back pain.

ix. Vladimir and Anotolij Gering

[58] Vladimir and Anotolij Gering are twin brothers. They are both tile-setters who met the plaintiff in approximately 2006, became friends and socialized together. Both also worked security jobs with the plaintiff. In addition, Vladimir hired the plaintiff from time to time to assist him with tile-setting and masonry work.

[59] Vladimir noted changes between the plaintiff's pre- and post-Collision function. He described the plaintiff as a meticulous worker who did high-quality work. He said he worked like a machine for long hours before the Collision and appeared

to have no physical issues or restrictions. After the Collision, he noted that the plaintiff was unable to mix mortar, carry heavy mortar buckets and appeared to have problems bending, stooping and kneeling. He also noted that after the Collision, the plaintiff's security work involved mainly standing or sitting in one place, whereas before the Collision he had worked as a 'rover' and was able to handle emergencies and unruly patrons with ease.

[60] Anotolij also worked security and set tiles with the plaintiff. He noted that the plaintiff had no apparent issues before the Collision and was always ready, willing and able to perform any task he was asked to do. After the Collision, the plaintiff asked for help with heavier tasks and could not function as well as beforehand.

x. David Gazley

[61] Mr. Gazley was the City of Kelowna's bylaw department manager from June 2017 through August 2021. He is a former member of the RCMP, now retired after working as an officer for 26 years.

[62] Mr. Gazley described the job duties of bylaw enforcement officers. The plaintiff was one of his casual officers who was shared between the bylaw enforcement and traffic services offices. He described the plaintiff as being "black and white" in his duties, meaning that he was stern in enforcement. He mused that this was not a bad thing, but tended to increase the complaints he attracted from the public. He noted that the plaintiff worked mostly in the traffic department. Although the plaintiff once applied to work full-time, he remained a casual employee. Mr. Gazley recalled that the 2018 charges against the plaintiff resulted in him losing his security clearance, which is a requirement to work as a bylaw officer.

[63] Mr. Gazley did his best to find work for the plaintiff because he was a good worker and Mr. Gazley had a 'soft spot' for him.

[64] In 2020, the wearing of personal protective equipment including duty belts and vests became mandatory for all bylaw enforcement officers.

xi. Sergei Chelest

[65] Mr. Chelest is a Russian-born gymnastics coach who met the plaintiff while he was a security guard and supervisor at a gymnastics event in Kelowna in 2012. They became friends and socialized together until Mr. Chelest moved to Australia in October 2020. He observed the plaintiff before and after the Collision and noted changes in his physical abilities. After the Collision, the plaintiff complained of neck and back pain. Mr. Chelest has experience with treating injured athletes and gave the plaintiff equipment and advice in an effort to help him. The plaintiff lived in Mr. Chelest's basement suite from December 2019 until October 2020. Mr. Chelest observed the plaintiff exercising and using a specialized mat in an apparent attempt to ease his symptoms.

xii. Paul St. Maurice

[66] Mr. St. Maurice is a Red Seal journeyman stonemason specializing in high-end masonry and stonework. He met the plaintiff in 2011 when they worked together on a large masonry project. He was impressed with the plaintiff's abilities, describing him as energetic, enthusiastic and meticulous. He described the pre-Collision plaintiff as "a remarkable physical specimen", who was very fit and a good person to work with. They developed a friendship over the years and he asked the plaintiff to assist him on masonry projects from time to time.

[67] In 2016, he took on a large masonry project and asked the plaintiff to help. The project involved painstakingly placing one-inch stones on pillars and on a large fireplace. He noted that the plaintiff appeared to have trouble bending and stooping at low levels. The plaintiff often complained of a sore back. Despite giving him easier tasks, Mr. St. Maurice noted that the plaintiff's speed was slower than before the Collision. It was obvious to Mr. St. Maurice that the plaintiff had some painful physical issues.

[68] When Mr. St. Maurice asked the plaintiff to assist on other projects, the plaintiff expressed interest but advised that he could only assist if he had helpers to perform the heavy 'grunt' work such as mixing, lifting mortar and lifting and moving

heavy insulated tarps. On these projects, the plaintiff's role was essentially to fit the small stone pieces into place after the helpers set up the scaffolding and work areas. He said that these projects took longer than they would have if the plaintiff was in better shape. From his observations, there was no question that the plaintiff was suffering and in pain.

xiii. Dr. Marta Pakish

[69] Dr. Pakish is a medical doctor in Lviv, Ukraine and attended the trial by video conference. She met the plaintiff while she was an intern at a military hospital and the plaintiff was undergoing medical examinations. Starting in 2005, she treated the plaintiff from time to time and consulted with him even after the plaintiff immigrated to Canada. In January 2014, she learned that the plaintiff wanted to apply to become a police officer in Canada and required medical tests to do so. She understood that the tests would take longer in Canada, so the plaintiff travelled to Ukraine where there was no wait list for them. She testified that the plaintiff passed the medical tests she conducted without difficulty and was in good health.

[70] The plaintiff routinely consulted her after the Collision via Skype. She gave him prescriptions to treat pain, high blood pressure and kidney stones.

xiv. Dale Lockhart

[71] Mr. Lockhart met the plaintiff prior to the Collision in 2014, while they were both working for a security company. He noted that prior to the Collision the plaintiff worked many more shifts as a security guard than he did afterward. He did not see him much after the Collision and estimates that the plaintiff's shifts reduced by ninety percent.

[72] Mr. Lockhart's description of the plaintiff's pre-Collision work ethic as a security guard was glowing. He said he was a hard worker, was always early for his shifts and was able to easily defuse difficult situations. He noted that the plaintiff's English was good and that the plaintiff upgraded his English at the International Gateway College, where Mr. Lockhart was director, in an effort to pass the entrance

exams to become a police officer. Mr. Lockhart also arranged for English-language tutoring for the plaintiff.

xvi. Alexey Grave

[73] Mr. Grave is a plumber and pipefitter who has known and worked on job-sites with the plaintiff since 2011. Shortly before the Collision, the plaintiff quoted a masonry job on Mr. Grave's home but the Collision intervened and he was unable to do the job. He also assisted the plaintiff with a small construction project after the Collision that involved framing, mudding and taping, because the plaintiff said he could not do it by himself. Mr. Grave worked with the plaintiff during the winter of 2017–2018, and noted that he was only performing light duties and recalls the plaintiff complaining of back pain.

xvii. Svitlana Kharsika

[74] Ms. Kharsika, originally from the Ukraine, met the plaintiff through an online dating application after the Collision, moved to Canada in December 2014 and married the plaintiff in February 2015. She did not speak English at the time and trusted the plaintiff. Her relationship with the plaintiff soured in 2018 and they separated. She moved to Saskatchewan in July 2021.

[75] The plaintiff told Ms. Kharsika about the Collision. From her observations, the plaintiff appeared to be able to function normally, without serious injuries or discomfort. She described him as a very strong, healthy man. She did not believe he was injured. She said that she was unable to keep up with him when walking. She saw him playing beach volleyball.

[76] She noted that, even though they were married, she did not spend much time with the plaintiff because he preferred to work and spend time with his friends.

[77] She recalled that the plaintiff told her that he wanted to become a police officer but settled on becoming a bylaw enforcement officer instead.

[78] She denied attempting to blackmail the plaintiff for money. She described the plaintiff's abuse, which led her to press charges against him and leave the marriage.

xviii. Fedir Tytorchuk

[79] Mr. Tytorchuk is Ms. Kharsika's 70-year-old father who resides in Ukraine. He came to Kelowna to visit Ms. Kharsika and the plaintiff from October 2017 to April 2018. He, too, did not observe the plaintiff to be injured or suffering any pain. He assisted the plaintiff on a couple of masonry jobs and observed the plaintiff working as hard as the other workers.

IV. EXPERT EVIDENCE

i. Melanie Bos – Functional Capacity Evaluation and Future Care Costs

[80] Ms. Bos is a registered occupational therapist in private practice in Kelowna. She has over twenty years' experience in conducting functional capacity evaluations and future care cost assessments. She was qualified without debate as an expert in the fields of functional and work capacity assessments and in recommending future care requirements.

[81] Ms. Bos assessed the plaintiff at his counsel's behest on May 9 and 10, 2017, and on April 27 and June 28, 2022. She authored three reports providing her opinions on his functional capacity, which included recommendations and costing for his future care. Ms. Bos' reports are dated June 27, 2017, August 26, 2022 and October 14, 2022, and were filed as exhibits without objection.

[82] During the 2017 assessment, Ms. Bos identified limitations in the plaintiff's ability to perform prolonged or repetitive stooping or bending, crouching and low-level work involving trunk flexion, sustained neck flexion, static standing and repetitive climbing and descending. She opined that these activities increased his symptoms and she noted that he tended to offload his left leg, stretch his low back and neck and change his walking pattern after bending for more than three minutes. Based on her assessment, Ms. Bos' opinion in 2017 was that the plaintiff had a decreased tolerance for bending, crouching and low-level work and did not meet the

job demands for working in construction as a mason on a full-time basis, meaning he could not perform his duties for a regular 37.5 to 40-hour work week. At that point, he was complaining of neck and left-sided low back pain. While she agreed that the plaintiff met the basic physical tolerance for working as a bylaw officer or security guard, she noted that both jobs carry an inherent risk of physical altercations that could put him at risk of re-injury or aggravation of his ongoing injury.

[83] Following her assessments of the plaintiff in 2022, Ms. Bos' opinion was that his presentation was similar to the 2017 assessment. He continued to offload his left side. Her opinion was that the primary limiting factors for his work capacity were his neck, left shoulder and low back pain. At the 2022 assessment, the plaintiff was complaining of pain symptoms in his left shoulder, arm and hand. She noted that the internal rotation of his left shoulder was limited. He did not perform the same low-level work that he was able to perform in 2017 and she noted that his low-level work, including crouching and kneeling tolerances, was more limited than in 2017. His walking speed was slower and his blood pressure was higher, suggesting overall deconditioning. He gave higher pain reports than in 2017.

[84] Overall, however, her opinion regarding the plaintiff's ability to work had not changed since 2017. She concluded that he did not demonstrate the capacity for construction or masonry work because both are classified as requiring heavy-level strength demands and low-level positioning. Police work is also classified as having heavy physical demands. She opined that the plaintiff does not demonstrate the physical capacity required for training to become or working as a police officer.

[85] However, Ms. Bos' opinion is that the plaintiff is able to work as a security guard and perform some aspects of the job of a bylaw officer. Her concerns with him working as a bylaw officer are the required heavy-duty belt and vest and the awkward placement of the computer in his vehicle. Overall, she concluded that he is best suited for traffic bylaw enforcement, which requires only light physical effort.

ii. Dr. John-Paul Etheridge – Chronic Pain

[86] Dr. Etheridge was qualified without debate as a general practitioner with a specialty in interventional chronic pain management.

[87] Dr. Etheridge assessed the plaintiff at the Kelowna Pain Clinic in 2016. At that point, the plaintiff presented with pain symptoms that had persisted for the two years since the Collision. Dr. Etheridge diagnosed him with chronic myofascial pain. He was also experiencing left-sided arm and hand numbness and low back pain. Dr. Etheridge did not expect his pain symptoms would be alleviated even if the plaintiff ceased his masonry and construction activities.

[88] Dr. Etheridge diagnosed the plaintiff as probably having suffered a whiplash injury in the Collision, which resulted in ongoing myofascial pain in his left neck and shoulder muscles with associated left-hand numbness, and a soft-tissue injury to his lower back resulting in lumbar facet-joint generated pain. He considered that the incidental radiological findings of disc protrusions and spinal stenosis in the plaintiff's lower back likely pre-existed the Collision and did not contribute to his low back pain.

[89] Dr. Etheridge's opinion was that the plaintiff's pain symptoms would likely be permanent and partially disable him. He made a series of recommendations to help keep the plaintiff as functional as possible in the future.

[90] On cross-examination, Dr. Etheridge stated that if the plaintiff ceased working in masonry or construction, his pain symptoms would probably be less severe but it would not change the baseline. He also expressed his view that the plaintiff's participation in activities that aggravated his symptoms would increase pain, but would not result in the further deterioration of his condition.

iii. Dr. Aaron MacInnes – Anesthesia and Interventional Pain Management

[91] Dr. MacInnes is an anesthesiologist with a specialty in the diagnosis and treatment of chronic pain. He was qualified without debate as an expert in anesthesia and interventional pain management.

[92] Dr. MacInnes presented as highly qualified, articulate and knowledgeable in the field of chronic pain. He assessed the plaintiff at his counsel's behest on May 22, 2022, and authored a medical-legal report dated July 13, 2022. Based on his assessment and review of extensive medical records, he diagnosed the plaintiff as suffering from:

a) chronic whiplash-associated disorder;

b) chronic mechanical spine pain;

c) chronic myofascial pain syndrome;

d) mood and anxiety symptoms; and

e) sleep disruption.

[93] Dr. MacInnes' opinion was that the Collision triggered soft-tissue injuries, which in turn caused a constellation of symptoms affecting the plaintiff's neck and back. His view was that the whiplash injury the plaintiff suffered in the Collision caused injuries to his neck, upper back, bilateral shoulder girdles, left arm, left hand, lower back, left buttock, left hip and left leg. These injuries have become chronic.

[94] With the diagnosis of chronic mechanical pain, Dr. MacInnes expects that the movement of the plaintiff's spine is likely to exacerbate his back pain. The mechanical back pain that has developed is contributing to the plaintiff's pain symptoms. Dr. MacInnes' opinion is that the development of the plaintiff's chronic mechanical spine pain is secondary to the whiplash injuries suffered in the Collision. Similar to his opinion respecting the plaintiff's soft-tissue injuries and given the chronic nature of his symptoms, he is not optimistic that they will resolve and expects the plaintiff will be left with ongoing pain symptoms in the future. His overall prognosis for any significant improvement of this condition and associated symptoms is guarded.

[95] Dr. MacInnes' diagnosis of chronic myofascial pain syndrome and intermittent neurological symptoms in the plaintiff's left arm and hand is likewise guarded. His

opinion is that the transient neurological symptoms he experiences are most likely due to intermittent traction put on the nerves as they exit from the neck and course into the left upper extremity. Again, Dr. MacInnes relates this condition to the whiplash injuries and subsequent mechanical spine pain that the plaintiff suffered in the Collision, and again opines that as long as his mechanical back pain persists, the plaintiff will continue to have associated myofascial pain in the affected regions.

[96] Dr. MacInnes suggests that the plaintiff's mood disorder and anxiety could be contributing to his pain symptoms and recommends that a psychologist monitor and manage them. He deferred to a psychologist's views on causation, diagnosis and prognosis. However, because the plaintiff developed issues with his sleep after the Collision, it is his opinion that the resultant physical and psychological symptoms most likely contributed to his sleep disruption.

[97] Given that it has been over eight years since the Collision and the plaintiff's pain symptoms have persisted and continue to wax and wane despite a multitude of treatment modalities, his prognosis for complete resolution of the symptoms is poor. His opinion is that the plaintiff will probably be left with pain into the future and be prone to flare-ups related to his work and other physical activities. These flare-ups could be unprovoked and last for variable amounts of time.

[98] Dr. MacInnes agrees with Ms. Bos' functional capacity evaluation that the plaintiff does not meet the requirements for full-time work as a mason or construction worker, now or in the future. Likewise, because the nature of work as a bylaw officer or security guard can be unpredictable in the event of an emergency, he is concerned that the plaintiff could be at risk if an altercation should occur. Additionally, Dr. MacInnes opines that the plaintiff is probably unable to meet the physical demands required of a police officer. These jobs are not the best choices for him or sustainable in the long term. Accordingly, he suggests that the plaintiff will face difficulties with working full-time and he may need to reduce his work to part-time so that he can manage his chronic pain. If he does not, or if he continues in activities that aggravate his symptoms, he can expect flare-ups to occur.

[99] Dr. MacInnes made a series of recommendations and strategies for future management of his conditions that will allow the plaintiff to actively manage his chronic pain symptoms for the rest of his life.

iv. Dr. Zeeshan Waseem – Physical Medicine and Rehabilitation

[100] Dr. Waseem is a physiatrist specializing in physical medicine and rehabilitation. He assessed the plaintiff at his counsel's request on March 29, 2018, December 14, 2021 and February 11, 2022.

[101] His diagnoses and prognosis respecting the plaintiff's condition are similar to Dr. MacInnes. Specifically, based on his three assessments of the plaintiff, Dr. Waseem diagnosed chronic myofascial pain of the neck and middle and lower back, chronic headaches, chronic facetogenic lower back pain, and intermittent numbness in his left arm, all likely caused by the Collision. He made recommendations designed to keep the plaintiff functional, including an active rehabilitation program, exercise and medications. His prognosis for "full symptomatic recovery" was guarded. Based on the plaintiff's ongoing symptoms, his opinion was that the plaintiff was probably unsuited to a career in policing and he did not believe that the plaintiff could pass the physical qualifying testing. He believes that the plaintiff is ill-suited to work that requires a significant physical component, but that he could work in security or bylaw enforcement, albeit in pain.

v. Christiane Clark – Economic Damages and Pecuniary Damage Calculation

[102] Ms. Clark is an economist qualified as an expert on economic damages and calculations of pecuniary damages in personal injury claims.

[103] In preparing her report dated October 13, 2022, she was asked to make a series of assumptions concerning the plaintiff's with-Collision and without-Collision earnings and earnings potential. Specifically, she was asked to assume that, but for the Collision, the plaintiff would have obtained a job in policing with the RCMP or a municipal police force as of January 1, 2016. Between the Collision and the end of December 2015, Ms. Clark was asked to assume that the plaintiff would have

earned income in construction and as a mason, consistent with cross-Canada census data earnings for those job classifications.

vi. Dr. Derik Krete – Physiatrist for the Defence

[104] Dr. Krete is a physiatrist who assessed the plaintiff at the defence's request on February 14, 2020, and authored a report dated March 13, 2020.

[105] Dr. Krete considered that the plaintiff was likely suffering from a chronic myofascial pain syndrome as a result of the Collision, which was producing various other symptoms. He wrote the following in his report:

> In my opinion, Mr. Karpenko appears to be suffering from a chronic myofascial pain syndrome as a result of the accident of June 24, 2014 producing symptoms of pain, headaches and left upper limb paresthesias. The timeframe for which Mr. Karpenko's pain has persisted would qualify his condition as chronic thus far. The diagnosis of myofascial pain syndrome in this setting in my opinion refers to ongoing pain, headache and paresthesias persisting beyond the usual timeframe of expected recovery generally within six months post injury.

[106] Due to the chronicity of the plaintiff's symptoms, Dr. Krete's prognosis for their resolution was likewise guarded, with limitations to any recovery.

[107] Dr. Krete also made a series of recommendations for ongoing rehabilitation, including an active therapy program initially supervised by a physiotherapist, medications, counselling, and a possible referral to a headache clinic or headache specialist if symptoms persist.

[108] He also opined that the plaintiff should not return to construction or masonry work, but that he should be able to continue working in bylaw enforcement. He was of the view that the plaintiff would struggle carrying out heavy domestic chores that mimic the physical demands of construction or masonry work.

V. DISCUSSION

[109] The plaintiff argues that the effects on the plaintiff have been significant and debilitating. The defence says that the plaintiff is functioning relatively well, albeit with differing levels of pain depending on activity.

A. Credibility Assessments

[110] This case is predominantly about the effect of the plaintiff's subjective pain and reduced function for the past eight years. Accordingly, the Court must be cautious and consider the plaintiff's credibility to ensure that his complaints truly reflect the continuing effects of the Collision-related injuries: *Karim v. Li*, 2015 BCSC 498 at paras. 86–87.

[111] The plaintiff testified in a straightforward manner, eager to assist the Court in any way possible. He described his background, the steps he took to become a police officer in Canada and his current situation.

[112] Although generally credible, I conclude that he tended to exaggerate his Collision-related symptoms and minimize his post-Collision function. Simply put, although I accept the plaintiff has chronic pain symptoms resulting from the Collision that have affected and continue to affect his function, I do not accept that the plaintiff is as dysfunctional as he suggests.

[113] The defence called Ms. Kharsika and Mr. Tytorchuk, both of whom testified that the plaintiff appeared to be functioning completely normal and without pain or injury. I do not give their evidence much weight because most of the relevant parts of their testimony were not put to the plaintiff on cross-examination, which violates the well-known rule in *Browne v. Dunn*.

[114] In any event, I did not find Mr. Tytorchuk to be an objective witness. He is clearly aligned with his daughter, who herself is involved in an acrimonious family law dispute with the plaintiff. Mr. Tytorchuk took every opportunity to undermine and disparage the plaintiff's character.

[115] Although Ms. Kharsika's evidence was more objective, I give her evidence limited weight and only as it relates to her general observations of the plaintiff during the four years they resided together. She did not see him at work and did not spend much recreational time with him. She did not enter the plaintiff's life until after the

Collision. Her evidence, however, suggests that the plaintiff was more functional than what he describes.

[116] There are features of the plaintiff's case that raised concerns and affected the reliability of his evidence. Several of these features remain unexplained, including:

a) The plaintiff quit his role as an auxiliary RCMP officer less than one month post-Collision, at which time he would have had no idea if his symptoms would resolve.

b) Despite eight years passing since the Collision, the RCMP has still not complied with requests to produce its file concerning the plaintiff, including the plaintiff's interview with RCMP representatives. The reason for this failure is unclear.

c) The plaintiff called no witnesses from either the RCMP or Saanich Police to provide evidence about the plaintiff's job prospects as a police officer.

d) The plaintiff did not actively continue to seek shifts as a bylaw officer after November 2020, even though he remained on the casual call list.

e) Ms. Bos noted some discrepancies between the plaintiff's subjective complaints and his demonstrated function in her two assessments, namely that testing revealed lesser levels of restricted function than he reported. Indeed, during the second functional capacity evaluation in 2022, the plaintiff brought with him a doctor's note suggesting his lifting tolerance was eight pounds, when testing revealed his lifting tolerance to be much higher. I question why the plaintiff would have brought this note from his doctor to a functional capacity evaluation, the purpose of which was to determine things such as his lifting tolerance, especially when he had apparently been lifting much heavier weights during his construction and masonry work.

f) The plaintiff testified that the emails he received from the Saanich Police were job offers when they were clearly not. The emails mentioned possible future vacancies and invited him to inquire if he was still interested, but do not contain actual job offers.

g) The plaintiff made no post-Collision applications to police forces. He stated that he was concerned that he would not pass the required physical and that he wanted to wait for his divorce from his first wife to be finalized.

B. Findings of Fact

[117] I accept that the plaintiff's stated injuries arose from the Collision. Although the Collision was at low velocity, I accept that the dynamics involved account for his injuries, namely that the plaintiff was twisted in his seat and looking left. The medical evidence is consistent that he has developed a soft-tissue and mechanical chronic pain condition as a result of the Collision. In addition to his Collision-related symptoms, he had recurring flare-ups with kidney stones unrelated to the Collision that required hospitalization in 2017 and 2019.

[118] Indeed, the medical evidence is not seriously in dispute. All doctors agree that the plaintiff is suffering from a chronic pain condition related to the soft-tissue injuries he sustained in the Collision. The parties disagree primarily as to the extent that the plaintiff's chronic pain condition has affected and will continue to affect the plaintiff's ability to function vocationally, socially and recreationally. Specifically, the parties disagree over whether he would have secured a career as a police officer but for the Collision.

[119] I was particularly impressed with Dr. MacInnes' testimony. I found him to be impartial and presented his evidence in a thoughtful, helpful and persuasive manner. I accept his evidence, diagnoses, prognoses, and medical opinions on causation without hesitation.

[120] I conclude that the plaintiff becoming a police officer was no more than a significant possibility had the Collision not occurred. I accept that he had taken

numerous positive steps towards that end from 2006 until 2012 by improving his English, becoming an auxiliary RCMP officer, upgrading his education, and interviewing with the RCMP and Saanich Police. Putting his background, experience and resume in the best possible light, I conclude that achieving that goal was a substantial possibility at best. I make this finding because there was no independent evidence from the RCMP or other police agencies respecting their requirements to become a police officer and because the plaintiff was fairly adamant that he was not prepared to accept an entry-level position because he considered it beneath him. He viewed himself as a highly sought-after commodity in the world of policing and suggested the RCMP and Saanich Police thought likewise. If this was the case, I would have expected him to tender confirmatory evidence from a police force.

[121] On the whole of the evidence, I conclude that the plaintiff has been able to function relatively well despite his chronic pain condition. He experiences varying levels of symptoms depending on his level of activity. There is no doubt that the plaintiff was extremely fit prior to the Collision. There is also no doubt that the injuries he suffered in the Collision, both soft-tissue and mechanical in nature, have developed into a chronic condition that have affected and will continue to affect his function to varying levels.

[122] The plaintiff has done his best to carry on with life despite his chronic pain, but he continues to suffer from various levels of pain on an ongoing, daily basis, although not to the level he suggests. I also conclude that this condition will continue into the foreseeable future.

[123] On this backdrop, I will assess the plaintiff's damage claim.

VI. DAMAGES

A. General Damages

[124] The plaintiff was rear-ended in what the photographic evidence suggests was a low-velocity impact. I accept that his head and body were twisted to the left in an awkward position at the time of impact, which probably explains why he suffered the

injuries that have now become chronic. The symptoms wax and wane in degree and intensity and he has lived with them for the past eight-and-a-half years. The medical evidence agrees that his prognosis for any substantial recovery is guarded. The pain he experiences fluctuates with activity and is aggravated by heavy lifting. He has intermittent numbness in his left ring finger. He is clearly frustrated with his lack of recovery, but is more functional than he lets on. Nevertheless, I accept that his ongoing Collision-related injuries have interfered with his work, recreation and home life. The more he does, the greater the symptoms. He is never without some degree of pain in some areas.

[125] Despite his symptoms, the plaintiff continues to work in construction and masonry, performing the work as best he can with helpers to perform the heavy work. The more physical the work, the more at risk he is of increased symptoms. He does what he can to protect his neck, back and left side.

[126] As is typical of chronic pain cases, the plaintiff can function but if he overdoes it, his symptoms flare up and he has to rest. Painful injections to his back administered from November 2015 through March 2016 did not assist. He continued with the recommended active exercise program. Chiropractic manipulations consistently resolved his pain, which would then return when he engaged in heavy physical activity. He is able to work part-time hours with adaptation and assistance. He found himself in the ongoing cycle of getting treatments, reducing his activities and feeling better, only to have his symptoms increase when he increased his function. He tries to avoid activities and postures that aggravate his condition.

[127] The various clinical records that were put to him confirm this pattern. He has noted that even sitting too much while doing security work or when he was a bylaw officer aggravated his symptoms.

[128] In sum, the plaintiff is able to function, but must be careful in his level of activity. If he passes his threshold, his pain symptoms and headaches increase.

[129] Respecting his general damages claim, the plaintiff seeks an award of $200,000 and refers to several authorities in support, including *Stapley v. Hejslet,* 2006 BCCA 34, where the Court of Appeal reduced a jury award for soft-tissue injuries, back and neck pain and arm pain and numbness from $275,000 to $175,000*; Bhatti v. Jones*, 2020 BCSC 1935, where a 36-year-old chronic pain sufferer with reduced function was awarded $190,000; and *Gill v. Apeldoorn*, 2019 BCSC 798, where a 49-year-old chronic pain sufferer was awarded $200,000.

[130] The defence suggests a more appropriate general damage award should be in the range of $70,000 to $90,000 and refers to three recent chronic pain cases in support: *Hoffman v. Luan*, 2021 BCSC 811, where a 27-year-old plaintiff was awarded $75,000; *Dosangh v. Xie*, 2017 BCSC 1937, where a 50-year-old plaintiff was awarded $70,000; and *Khademolhosseini v. Ji*, 2019 BCSC 854, where a 33-year-old plaintiff was awarded $85,000.

[131] In my view, the defence cases are more analogous to this case than the cases the plaintiff referred me to.

[132] In *Stapley* at para. 46, the Court of Appeal set out the list of factors that influence an award of non-pecuniary damages:

a) age of the plaintiff;

b) nature of the injury;

c) severity and duration of the pain;

d) disability;

e) emotional suffering;

f) loss or impairment of life;

g) impairment of family, marital and social relationships;

h) impairment of physical and mental abilities;

i) loss of lifestyle; and

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

[133] The plaintiff was 44 years' old at the time of the Collision. He is now 52. He sustained chronic myofascial pain to his upper back and shoulders, cervicogenic headaches, intermittent numbness in his left hand, and mechanical back pain made symptomatic by the Collision. His symptoms have persisted to different degrees for over eight years. He is able to function but experiences differing levels of pain and discomfort depending on his level of activity. While not disabled in his personal, vocational, recreational or social life, it is expected he will have to manage chronic pain for the foreseeable future.

[134] He returned to work as a contractor and mason five months post-Collision. In 2016, he successfully obtained employment with the City of Kelowna as a bylaw officer, earning far more than he ever earned pre-Collision. Alongside his full-time work in bylaw enforcement, he continued working as a security guard and construction worker, often for more than 12 hours per day. I accept that he experienced varying levels of pain as he worked.

[135] I accept that the plaintiff's pre-Collision recreational activities, including hunting, fishing, hiking and swimming, although curtailed to some degree, continued mostly unchanged post-Collision.

[136] By no means is this a case of a plaintiff who has been forced to stay at home or significantly curtail his activities due to chronic pain. Rather, this is a case of a plaintiff who continues to function and be able to perform most pre-Collision activities, albeit having to contend with varying levels of pain and discomfort.

[137] Considering the well-known *Stapley* factors, including the plaintiff's age, chronicity of his pain symptoms, the fact that they are likely permanent, the impairment of his lifestyle and abilities which I do not consider debilitating, I assess the plaintiff's general damages at $100,000.

B. Special Damages

[138] As the trial was concluding, the parties reached an agreement on special damages at $37,000. The plaintiff is awarded that sum.

C. Past Loss of Earnings

[139] The plaintiff's claim for past loss of earnings requires a comparison of what he hypothetically would have earned but for the Collision with what he actually did earn: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. The standard of proof for hypothetical events is a "real and substantial possibility": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

[140] I accept that until approximately two years prior to the Collision, the plaintiff's primary focus was on obtaining a career in policing. He took multiple courses, upgraded his education and took other steps, including becoming an auxiliary RCMP officer, to prepare for police work. He also worked as a contractor and mason and did security work to pay his living expenses. He says that his pre-Collision plan was to continue construction and masonry as a "side-job" once he got a job in policing.

[141] Following the Collision, he continued with security work, both as an employee and as a sub-contractor, but missed shifts due to pain. Five months after the Collision, he resumed his work in construction and masonry, albeit in pain. This was a reasonable thing for him to do in the circumstances. Oddly, and for reasons not persuasively explained, he quit his position as an auxiliary RCMP officer within one month of the Collision before he could have known if his Collision-related symptoms would resolve as he had expected.

[142] In June 2016, he obtained employment with the City of Kelowna as a bylaw enforcement officer on a casual on-call basis. That employment ended in November 2020, although he remains on the casual list. With the Covid-19 pandemic and resultant changes in the City's administration, it is unknown whether any shifts would have been available to him after November 2020 if he had enquired.

[143] It is clear that the plaintiff was able to work construction and masonry jobs and complete projects despite his Collision-related injuries, although he did so in pain and with reduced hours of work. When assistance was required, he was provided helpers. He also continued his work as a security guard when that work was available. However, much of the security work disappeared with the cancellation of hockey games, concerts and other events after the onset of the Covid-19 pandemic.

[144] The details of the plaintiff's pre- and post-Collision personal and corporate reported earnings are in evidence. The year end for his construction company was November 30 and its tax returns from 2010 to 2018 disclose the following:

a) November 30, 2010: a loss of $4,376;

b) November 30, 2011: a loss of $1,641;

c) November 30, 2012: gross income of $34,876; net after-tax income of $9,420;

d) November 30, 2013: gross income of $36,194; net after-tax income of $21,082;

e) November 30, 2014: gross income of $2,412; net loss of $9,296;

f) November 30, 2015: gross income of $19,041; net after-tax income of $4,911;

g) November 30, 2016: gross income of $18,014; net after-tax income of $8,837; and

h) November 30, 2017: gross income of $24,095; net after-tax income of $3,032.

[145] In May 2018, the plaintiff closed down his construction company. In that year, the company grossed $4,535 and had a net loss of $69.

[146] The plaintiff's personal tax returns from 2010 through 2021 disclose that he reported incomes of $40,212 in 2010; $28,935 in 2011; $16,111 in 2012; $43,432 in 2013; $25,784 in 2014; $34,304 in 2015; $47,232 in 2016; $71,605 in 2017; $82,641 in 2018; $73,582 in 2019; $70,692 in 2020; and $11,845 in 2021. Throughout these years, his personal income comprised T4 employment income, business income, rental income and dividends. Prior to securing a job as a bylaw officer in June 2016, his main source of income was as an employee and as a sub-contractor for various security companies. The significant increase in his annual income from 2016 through November 2020 was due to his employment as a bylaw officer.

[147] In 2017, he performed some construction work grossing approximately $24,000. In 2018, he performed no security work but performed the odd small construction job. In 2019, he engaged in some minor security work. After November 2020, he continued working as a security guard, but to a much lesser degree. His 2021 income was from both security and construction work.

[148] The plaintiff seeks a past loss of earnings award of $444,644.80, net of his actual post-Collision earnings and net of taxes. His claim is based on his position that, but for the Collision, he would have: i) been a police officer as of January 2016 with overtime shifts; and ii) operated his construction and masonry company two days per week in addition to working as a police officer. He relies on Ms. Clark's economist report, which in turn relies on the assumptions that: i) absent the Collision, the plaintiff could have worked full-time as a police officer to his retirement at age 65; and ii) it was the plaintiff's intention to also continue operating his contractor business to his retirement age of 65 or 70. Her report relies on Statistics Canada census data for British Columbia males employed as police officers, masonry and carpentry contractors, and bylaw enforcement officers.

[149] Ms. Clark was asked to assume that from June 22, 2014 to December 31, 2015, the plaintiff would have worked full time as a contractor, and that from January 1, 2016 onward he would have worked full-time as a police officer or continued working as a contractor to his retirement and in doing so earned the average

earnings in those job categories. Making those assumptions, she calculated the plaintiff's past loss of earning net of income tax and net of his actual reported earnings, from the date of the Collision to the date of trial. Using these calculations, the plaintiff asserts that his net past income loss to the date of trial is $444,644.80.

[150] The plaintiff's position is based on his prior 17-year experience in the military and police in Ukraine and his pre-Collision efforts to secure a career in policing. He maintains that he would have not only been successful in securing a position as a police officer, but he also would have started that occupation at a senior rank and be placed in an accelerated training program.

[151] The plaintiff has proven a substantial possibility that, but for the Collision, he would become a police officer, but nothing further. Although I accept that policing was a career focus for the plaintiff, there is no evidence from any police agency to support his contention that he would have secured any position in policing, much less one higher than entry-level. The plaintiff made it clear that he had no interest in being transferred to remote locations with the RCMP and no interest in joining any police force at the bottom rung. He was interested only in a higher-ranking position. There is no evidence of whether, had he maintained that stance, any policing jobs would have been realistically available to him.

[152] Of concern also is that the plaintiff made no reasonable effort to pursue this goal in the two years leading up to the Collision. His stated reasons for failing to do so were that: i) he travelled to Ukraine to pass his medical because it was faster than in Canada; and ii) he was awaiting the finalization of his divorce from his first wife. I am not persuaded by these explanations.

[153] Nor did the plaintiff make any effort to apply for a job in policing after the Collision. He says this was because he knew he would not pass the physical requirements. This reason was also not persuasive, especially given his testimony that the RCMP had suggested that he would be given a higher position such as fighting the Russian mafia in Montreal. In any event, given his level of function, stated focus and drive to become a police officer, I am not satisfied that the

Collision-related symptoms prevented him from at least making further inquiries or applications.

[154] I assess the plaintiff's realistic chances of becoming a police officer at twenty percent had the Collision not occurred. I am not persuaded it would have occurred as early as January 2016 in any event.

[155] The task is to assess a value to that possibility: *Rab v. Prescott*, 2021 BCCA 345 at para. 47.

[156] While I am prepared to accept that the plaintiff's Collision-related symptoms compromised his earnings in construction and masonry, and that he lost some income-earning ability as a consequence, I do not accept that loss was significant. Further, according to Ms. Clark's report, the average earnings of police officers in British Columbia from 2016 through 2020 is similar to the average earnings of bylaw officers in British Columbia in that timeframe.

[157] I conclude that the plaintiff's past loss of earnings claim should be assessed on the basis of him losing an average of $15,000 in gross annual earnings from the Collision to trial. In arriving at this amount, I have considered that there was a twenty percent chance that he would have become a police officer by January 1, 2016, but for the Collision, and that his income-earning potential as a contractor and mason was reduced as a result of his chronic pain symptoms. On that basis, I assess the plaintiff's past loss of earning opportunity related to the Collision net of income tax, at $100,000 (8 years x $15,000 = $120,000 less $20,000 income tax = $100,000).

D. Loss of Future Earning Capacity

[158] An award for loss of future earning capacity requires an assessment of and comparison between the plaintiff's likely future earnings if the Collision had not happened, and the plaintiff's likely future earnings given his ongoing Collision-related issues: *Dornan v. Silva*, 2021 BCCA 228 at para. 156. Because the assessment deals with the unknown future, it involves the consideration of hypothetical events: *Rab* at para. 28, citing *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.

[159] It is a three-step process: (i) whether the evidence discloses a potential future event that could lead to a loss of capacity; (ii) whether the evidence discloses a real and substantial possibility of a future loss of earnings; and if so, (iii) an assessment of the value of that possible future loss, which includes an assessment of the relative likelihood of that possibility occurring: *Rab* at para. 47. Once the assessment has been made, the court must then determine if the proposed damages award is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117.

[160] The evidentiary standard of proof for a loss of future earning capacity claim requires proof that there is a real and substantial possibility of a future event leading to an income loss. Once that has been established, the quantification of that loss can be based on either an earnings or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32; *Kringhaug v. Men*, 2022 BCCA 186 at para. 43.

[161] The plaintiff is concerned about the future. He still hopes that the City of Kelowna will hire him back as a bylaw enforcement officer, but believes the requirement to wear the duty belt and vest will restrict him. He testified that he shut down his construction company in 2018 on his doctor's recommendations because he cannot perform physical labour without increasing his pain symptoms. He hopes that he can continue working as a part-time security guard, perhaps as a supervisor.

[162] Similar to his claim for past loss of earnings, the plaintiff's core loss of future earnings claim is that, but for the Collision, he would have become a police officer. He maintains that, based on the interviews he had with both the RCMP and Saanich Police, there was no question that they wanted him to become a member of their respective forces and that all he needed to do was improve his English and pass the physical examination, a polygraph test and the final entrance exam. He says he was in the process of meeting these requirements when the Collision occurred.

[163] Other than some emails that followed up his RCMP interview, there is no documentary evidence from the RCMP that supports the plaintiff's position that his acceptance into the RCMP was a *fait accompli*. I accept that the RCMP interviewed him and that he has extensive relevant military and police experience in Ukraine.

These factors are enough to suggest a substantial possibility that he would have become a police officer, but it is far from certain.

[164] Respecting the Saanich Police, I accept that the plaintiff applied to become a member, was interviewed, and that the Saanich Police was interested in him becoming a member of their force. The plaintiff relies on two emails from the Saanich Police dated July 26, 2011 and October 25, 2012, which state:

> Email of July 26, 2011: “we anticipate some vacancies in 2011 and 2012”.
> Email of October 25, 2012: “we anticipate some vacancies in 2013/2014”.

The plaintiff understands this to mean that the Saanich Police was offering him a job. He says that he was going through a separation with his first wife at the time and the Saanich Police told him verbally that he had to finalize his divorce before he could join their force.

[165] The next communication from the Saanich Police on March 24, 2016, inquired as to whether he was still interested in applying to become an officer. Once again, the plaintiff interprets this communication as a job offer when it clearly was not.

[166] As earlier mentioned, the plaintiff quit his position as an auxiliary RCMP officer in July 2014, approximately one month after the Collision and after only one month of therapy. He testified that he did so because he could not wear the required duty vest and belt without aggravating his Collision-related symptoms. At the same time, he stated that he was doing what he could to recover from his injuries and was optimistic and hopeful that his condition would improve. Even if he was unable to wear the vest and carry the belt, it would have been reasonable for him to explain his situation to the Kelowna RCMP and take a leave of absence pending his recovery. He had no adequate explanation for his decision to simply quit.

[167] All things considered, and similar to my conclusion respecting the plaintiff’s past loss of earnings claim, I assess his chances of securing a position as a police officer at twenty percent.

[168] I accept that because the plaintiff will continue to suffer from ongoing non-debilitating chronic pain for the remainder of his working life, his ability to work in construction and masonry will be detrimentally impacted to some extent.

[169] Accordingly, I conclude that the plaintiff's chronic pain condition could lead to a loss of future earning capacity. His symptoms are aggravated when he engages in the heavier aspects of his construction, masonry and security work. I accept that, as a consequence, there is a real and substantial possibility that the plaintiff will suffer a loss of earnings in the future, especially in relation to his construction and masonry work. Indeed, the defence concedes these points.

[170] I am not persuaded, however, that his chronic pain condition will affect his ability to work as a security guard or bylaw officer, even with a duty belt and vest.

[171] The determination of the plaintiff's future loss of capacity requires an assessment of hypothetical events. He argues that the valuation should be on a loss of earnings approach based on his projected loss of future earnings as a police officer supplemented by his projected loss of earnings as a contractor.

[172] Again, the plaintiff relies heavily on Ms. Clark's economist report in support of his claim that his future loss of earnings should be assessed at $1.613 million. Ms. Clark was asked to assume that, absent the Collision, the plaintiff would have become a police officer from the trial date to age 65 and would have continued to work in construction and masonry during his days off. Based on the average earnings of police officers and construction workers, she calculated the difference between the plaintiff's without-Collision earnings including non-wage benefits and his with-Collision earnings based on average earnings of construction workers to be $1,613,060.

[173] Using the same assumptions that she did for her past loss of earnings calculations, Ms. Clark provided a survival-adjusted, present-value figure for potential lost future earnings up until the plaintiff's retirement at either age 65 or 70.

[174] Given the lack of certainty that the plaintiff would ever have become a police officer, I do not consider the correct approach in valuing the plaintiff's loss of future earning capacity to be the loss of earnings approach. Instead, I will assess his future loss using the capital asset approach, taking into account various general and specific contingencies.

[175] How the plaintiff's life would have been different but for the Collision is a hypothetical scenario. While the plaintiff need not prove on a balance of probabilities that he would have become a police officer but for the Collision, I will consider the relative likelihood of that hypothetical event occurring in the overall assessment of his loss of future earning capacity award: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at para. 27.

[176] I consider the possibility that the plaintiff would have become a police officer to be low, in the range of twenty percent. If that event did occur, I am not persuaded that he would have carried on a career in construction and masonry other than on a very part-time basis. Taking Ms. Clark's figure as a guide and discounting it by eighty percent to account for my assessment of the relative likelihood of her assumptions occurring, the earnings approach translates into a loss of $322,612.

[177] Ms. Clark also provided the present-value multipliers for the plaintiff's future loss of earnings, assuming a loss of $1,000 per year to various ages in the future. For example, if his Collision-related injuries result in him losing an average of $10,000 per year to age 65, the present value of that loss would be $109,660. If that loss continued to age 70, the present value of that loss would be $145,550. If his average annual loss was $20,000, the present value of the future losses would be $219,320 to age 65 and $291,000 to age 70.

[178] I have already mentioned that the plaintiff's loss of future earnings claim should be assessed using the capital asset approach, which I consider to be the fairest approach in the circumstances. Using that approach, and taking into account Ms. Clark's helpful report, I assess the plaintiff's loss of future earning capacity at $300,000.

E. Future Care Costs

[179] Future care costs must be reasonable and have a medical justification: *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84, 1985 CanLII 179 (S.C.). The costs must be medically necessary and the plaintiff must be likely to incur them: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74. It is not a precise accounting exercise: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 214.

[180] Ms. Clark was not asked to provide present-value calculations for the future care recommendations made by Ms. Bos or the doctors who assessed the plaintiff and no report was filed.

[181] The plaintiff refers to Ms. Bos' recommendations for various treatment modalities, medications, equipment and healthcare maintenance as supplemented by the recommendations of Drs. Etheridge, Waseem and MacInnes, and seeks a "ball park" award in the range of $245,000: *Trusty v. Hatch*, 2021 BCSC 618 at paras. 220–24.

[182] The defence says that the plaintiff's future care costs should be limited to the range of $25,000 to $40,000. While the defence agrees that certain of the plaintiff's claimed future care costs are reasonable, they assert there is no evidence to support the rest.

[183] I have reviewed the recommendations and costing contained in Ms. Bos' August 26, 2022 report, some of which (such as massage therapy, physiotherapy, chiropractic care and medications) continue for the plaintiff's lifetime, as well as the recommendations for future care made by the doctors who assessed him.

[184] Dr. Etheridge felt that the plaintiff would benefit from more lumbar facet-joint nerve blocks to determine if he was a candidate for future facet-joint rhizotomies where the nerve is cauterized, myofascial treatments such as acupuncture, and injections of local anesthetic into the muscle trigger points. He felt these treatments should be combined with an exercise program directed by a kinesiologist or

physiotherapist, chiropractic adjustments, massage therapy for symptomatic pain control at roughly one to two treatments per month in the long term, over the counter pain medication and an antidepressant such as Cymbalta.

[185] Dr. Waseem's recommendations included a three-month, two to three times per week supervised active rehabilitation exercise program, to be followed by the provision of a one-year gym membership to encourage the plaintiff's self-directed exercises with periodic personal training sessions, periodic access to massage therapy, acupuncture or chiropractic adjustments, continued over-the-counter analgesics, topical medication, prescription pain medication and access to an occupational therapist for in-home therapy, advice, activation and use of adaptive equipment.

[186] Dr. MacInnes recommended that the plaintiff maintain his physical activity and conditioning level to manage his chronic pain symptoms and minimize future flare-ups. He further recommended multimodal treatments to address ongoing challenges that the plaintiff may have with his symptoms. He stated that the key to managing the plaintiff's chronic pain and improving his overall health was active self-management. He suggested that the plaintiff participate in a free six-week course put on by Self-Management BC, as well as a free online resource called Live Plan Be, available from Pain BC. He felt that both of these resources would allow the plaintiff to better manage his symptoms and maximize his function.

[187] Additionally, Dr. MacInnes felt that psychological counselling may be of benefit, as well as a minimum 12-week land-and water-based graded exercise program, to be followed by access to a fitness facility and yoga classes. He too recommended that the plaintiff may benefit from a trial of various prescription medications such as nortriptyline and amitriptyline.

[188] Dr. Krete recommended a conservative treatment program that should include an active therapy program initially supervised by a physiotherapist for five visits, and thereafter a self-guided program, medications as needed, and counselling to help him better understand and manage his chronic pain.

[189] I conclude that some of these recommendations are reasonable and medically justified. The plaintiff would benefit from an active rehabilitation program with supervision. He will also benefit from physiotherapy, massage therapy and chiropractic adjustments as needed to relieve increased symptoms and flare-ups that he will experience. He should be given access to those modalities. The plaintiff should also be given prescribed exercises for him to do on his own with a periodical return to the kinesiologist for updates. He should be provided with a yearly pass to a recreational centre or gym, psychological counselling for chronic pain management, and pain medications on an ongoing basis. This will allow the plaintiff to stay as functional as possible.

[190] I accept that the plaintiff's pain-limited tolerance to work and perform everyday activities will depend on the severity of his symptoms each day. I accept that his symptoms will wax and wane. Some days will be good days, and some days will be bad days. I conclude that the plaintiff can function relatively well during the good days, but he will have difficulty functioning when the pain is aggravated. It is not that he cannot work as a mason or in construction at all, but rather that by doing so he risks an increase in his pain symptoms.

[191] I have estimated what I consider to be reasonable amounts. In some cases, I have rounded Mr. Clark's valuations to numbers I consider reasonable.

[192] Relying on Ms. Bos' costing of the treatments I have allowed, but modified not to last for the plaintiff's lifetime, I award the sum of $40,000 for the plaintiff's future care costs.

F. Mitigation

[193] The defendant seeks a reduction of fifteen percent from the plaintiff's general and pecuniary damage awards on the basis that he continued working as a contractor post-Collision contrary to the advice of his medical advisers.

[194] The defendant argues that the plaintiff's insistence on pursuing construction work against the recommendations of his treatment providers has worsened his

symptoms and he has therefore failed to mitigate his damages. In light of the plaintiff's ongoing back symptoms, the defendant argues that the plaintiff should have pursued non-construction work to supplement his income. The defence says that the plaintiff's continued construction work was unreasonable in the circumstances and seeks a reduction of fifteen percent from the plaintiff's general damages, loss of earning capacity and cost of future care awards.

[195] It is trite that a plaintiff has an obligation to take all reasonable steps to mitigate damages by, for example, actively pursuing job opportunities that do not aggravate Collision-related symptoms, taking prescribed medical treatment and seeking appropriate medical assistance: *Stevens v. Creusot*, 2019 BCSC 1781 at para. 227. A plaintiff's failure to mitigate losses may result in a reduction of damage awards. For a mitigation defence to succeed, the defendant must establish: i) that the plaintiff acted unreasonably in eschewing recommended treatment; and ii) the extent, if any, that those steps would have reduced the plaintiff's losses had he taken those steps: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 56–58.

[196] On the one hand, the evidence is that, as early as 2014, Drs. Barnett, McNern and Pakish all suggested to the plaintiff that he should cease heavy physical activities and only pursue activities within his pain tolerance. Dr. Etheridge's view was that had the plaintiff ceased construction work in 2016 as recommended, he would not have expected his condition to worsen. Dr. MacInnes did not think it was unreasonable for the plaintiff to continue construction work, provided it did not aggravate his symptoms.

[197] On the other hand, the thrust of the plaintiff's evidence, and those called on his behalf, is that the level and nature of the plaintiff's construction activities were reduced post-Collision. The plaintiff's evidence is that he continued working in construction and masonry because he needed income to pay his living expenses.

[198] The plaintiff's evidence, supplemented by lay witnesses, and which I accept, is that the masonry and construction work he undertook was lighter work than he did pre-Collision. Where needed, he brought in helpers do the heavier work.

[199] In my view, this evidence confirms that the plaintiff was not disabled from construction or masonry work post-Collision. He was able to what was required, albeit perhaps in pain, with assistance from others as needed.

[200] The plaintiff has suffered various degrees of chronic pain for the past eight-and-a-half years. There is no medical evidence that suggests his symptoms would have improved or resolved had he ceased construction or masonry work. Indeed, the medical advice is that he should stay as active as possible within his pain tolerance. The fact that he has been able to continue construction and masonry work since the Collision speaks to his capacity to function.

[201] I have already found that the plaintiff's condition has waxed and waned, and will continue to do so. I have concluded that the plaintiff has continued his normal activities since the Collision as his level of pain has allowed.

[202] I am not persuaded that the defendant has proven that the plaintiff failed to mitigate his losses and I decline to make the reduction the defendant seeks.

VII. SUMMARY

[203] I award the plaintiff the following damages:

a)	General Damages:	$100,000
b)	Special Damages:	$37,000
c)	Net Past loss of Earnings/Capacity:	$100,000
d)	Future Loss of Earning Capacity:	300,000
e)	Future Care Costs:	40,000

Total:	**$577,000**

[204] Subject to matters of which I am unaware, the plaintiff is entitled to his Scale B costs.

"G.P. Weatherill J."