

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Flynn v. Raj*,  
2023 BCSC 1895

Date: 20231115  
Docket: M189000  
Registry: Vancouver

Between:

**Nick Flynn**

Plaintiff

And

**Aaron Dhillon Raj and Agnes Raj**

Defendants

Before: The Honourable Justice Douglas

## Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.  
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July 4–6 and 10–12, 2023

Place and Date of Judgment:

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## I. INTRODUCTION

[1] On October 18, 2016, the plaintiff, Nick Flynn, was a back-seat passenger in a vehicle when it was involved in a rear-end collision (the “Accident”). Liability for the Accident was admitted on the first day of trial and, accordingly, the trial proceeded on damages issues only.

[2] The parties’ positions on damages are diametrically opposed. Their essential dispute is whether the Accident caused a disc herniation in Mr. Flynn’s lumbar spine. They also disagree about the implications of a non-tortious intervening event: namely, a hernia that Mr. Flynn sustained at work on September 30, 2022.

## II. CREDIBILITY AND RELIABILITY OF EVIDENCE

[3] Credibility and reliability are not the same thing. The former is concerned with a witness’s veracity (i.e., speaking the truth); the latter is concerned with a witness’s ability to observe, recall, and recount the events in issue accurately: *Ford v. Lin*, 2022 BCCA 179 at para. 104.

[4] The principles to be applied when assessing the credibility of interested witnesses are discussed in the frequently cited passages of Justice O’Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.), and Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff’d 2012 BCCA 296. Relevant factors include the ability and opportunity to observe events, the firmness of the witness’s memory, the ability to resist the influence of interest to modify recollection, whether the witness’s evidence harmonizes with independent evidence that has been accepted, whether the witness changes their testimony during direct and cross-examination, whether the witness’s testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally: *Bradshaw* at para. 186. I have applied those principles here.

[5] If a plaintiff’s account to experts of his accident-related physical, mental, or emotional condition is different from his trial evidence, the hypothesis on which the

expert opinions rest may be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at para. 49. In cases where there is little or no objective evidence of continuing injury and there are complaints of persistent pain beyond the usual recovery period, there must be evidence of a convincing nature; the plaintiff's own evidence, if consistent with the surrounding circumstances, may suffice: *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 at para. 15, 1993 CanLII 2465 (C.A.).

[6] My assessment of the credibility and reliability of Mr. Flynn's trial evidence has informed my decision on all issues. Accordingly, I address this matter at the outset. Mr. Flynn's predominant ongoing complaints of low back pain and right leg numbness are largely subjective. Accordingly, the credibility and reliability of his evidence has a potentially significant impact on his claim for damages.

#### **A. Plaintiff**

[7] Mr. Flynn was a poor historian. His account of his own work history was vague, unclear, and incomplete. Much of it was uncorroborated. There were several surprising gaps in his memory. His own lawyer conceded that Mr. Flynn is an unreliable witness, a description that I accept.

[8] The assessment of this claim was complicated by inconsistencies between the history Mr. Flynn provided to the experts who assessed him in the context of this litigation and his trial evidence. There were also notable inconsistencies between Mr. Flynn's contemporaneous reports about the onset and evolution of his post-Accident symptoms to Dr. Ivan Crothers, his treating family physician, and the history he provided to the medical experts. The combined effect of these inconsistencies undermined Mr. Flynn's credibility and the reliability of his evidence.

[9] Mr. Flynn went to see Dr. Crothers about his Accident-related complaints on October 19, 2016, one day after the Accident. Based on Dr. Crothers' clinical notes, Mr. Flynn reported having neck pain for one day. There is no reference in Dr. Crothers' clinical notes to any complaints of an immediate onset of post-Accident back pain, or to back pain the day after the Accident. Based on his recorded complaints, as set out in Dr. Crothers' clinical notes, Mr. Flynn first described post-

Accident right leg symptoms on December 19, 2016, more than two months after the Accident.

[10] Mr. Flynn's account regarding the onset of his post-Accident symptoms evolved over time. He reported the following history to the experts who assessed him:

- a) He told neurosurgeon, Dr. Tamir Ailon, that he had no immediate back or lower extremity symptoms but that he developed slight right-sided low back pain the day after the Accident, with no radiation to his right leg;
- b) He told neurosurgeon, Dr. Ramesh Sahjpaal, that he experienced an immediate onset of low back pain after the Accident; and
- c) He told general practitioner, Dr. Trent Faraday, that he experienced no pain immediately after the Accident but that he had a flare of pre-existing neck pain and developed low back pain, with radiation to his right foot, the day after the Accident.

[11] Mr. Flynn conceded that, apart from one detail, he could not recall his October 19, 2016 visit with Dr. Crothers, or any of his subsequent visits to Dr. Crothers' office. Notably, the only salient detail Mr. Flynn now purports to recall is one that is material to an assessment of causation issues in his favour.

[12] I conclude that Dr. Crothers' contemporaneous clinical notes, compiled in the usual course of his business, are likely more reliable than Mr. Flynn's retrospective memory of events almost seven years after the Accident. I find that Mr. Flynn likely did not report symptoms of back pain to Dr. Crothers the day after the Accident. I accept this does not mean that Mr. Flynn was not then experiencing low back pain. However, in my view, it is surprising that Mr. Flynn would not mention back pain to Dr. Crothers on October 19, 2016, if, as he testified at trial, he was there to see Dr. Crothers about his post-Accident complaints and back pain was then his main problem and his most disabling complaint.

[13] Mr. Flynn provided a variable work history to the involved experts:

- a) He told vocational consultant, Dr. van den Berg, that:
  - i. He had completed grade 10;
  - ii. He began working as a full-time glazier with Star 1 Windows and was working in this capacity at the time of the Accident;
  - iii. His post-Accident pain affected his ability to lift, climb scaffolding, carry heavy pieces of glass, install windows, and work on a boom lift; and
  - iv. He worked part-time, two full days a week (due to low work availability) for a residential painter and insulator for eight months after the Accident, earning \$25/hour for this work.
  
- b) He told Dr. Ailon that:
  - i. He was working 50 hours per week as a large truck mechanic at the time of the Accident;
  - ii. He stopped work for one week and then attempted unsuccessfully to return, lasting only four hours before experiencing a significant increase in low back pain; and
  - iii. He then did some stuccoing and painting work for a friend, starting about three weeks after the Accident and continuing until three or four months before Dr. Ailon's August 2017 assessment.
  
- c) He told Dr. Sahjpaul that:
  - i. He was employed full-time as a heavy-duty mechanic at the time of the Accident; and
  - ii. He took a couple of weeks off after the Accident and then returned to work but had to quit because of neck and back pain.
  
- d) He told Dr. Faraday that:

- i. He completed grade 11;
- ii. He was working as a full-time glazier for Glastech Glazing Contractors Ltd. (“Glastech”) at the time of the Accident;
- iii. His job duties included installing windows in the context of condominium construction;
- iv. He missed two weeks of work after the Accident and thereafter tried to return to work for one week but was too sore and so he had to quit;  
and
- v. Thereafter, he worked as a heavy-duty mechanic for Burnaby Diesel Tech Services Inc. (“Diesel Tech”) for one year before moving to KWE Management Ltd. (“Key West”).

[14] At trial, Mr. Flynn retreated from the history he provided to the experts who assessed him. Specifically, he admitted that:

- a) He completed grade 9 and only part of grade 10;
- b) Fremantle Trailer Repairs Ltd. (“Fremantle”) terminated his employment as a heavy-duty mechanic in 2016;
- c) Thereafter, he was unable to find another job as a heavy-duty mechanic before the Accident;
- d) He was not working as a heavy-duty mechanic at the time of the Accident;
- e) He was then working for Glastech as a “helper”;
- f) There was no heavy lifting involved in his Glastech job and he was not allowed on the scaffolding because he did not have the necessary “ticket”;  
and
- g) He did only a few painting jobs for a neighbor after the Accident, earning about \$20/hour for this work over one or two months.



[15] There were other inconsistencies between Mr. Flynn's evidence and the information he provided to the involved medical experts. When Mr. Flynn was confronted with the history he had provided to the experts who assessed him, he consistently denied any recollection of what he had told them. He occasionally said that he could not have provided the history they recorded in their reports because it was untrue. Based on Mr. Flynn's self-reported history, Dr. Sahjpaul noted in his report that Mr. Flynn had completed six weeks of physiotherapy after an injury he sustained at work on February 3, 2016. At trial, Mr. Flynn admitted this information was untrue but denied he had provided it.

[16] Mr. Flynn frequently denied any recollection of matters in response to questions he was asked in cross-examination. He occasionally admitted to having no recollection of events while simultaneously denying that certain events had transpired. For example, although Mr. Flynn denied any recollection about why Fremantle terminated his employment in 2016, he maintained that he knew it was not due to him missing work (contrary to what is recorded in Fremantle's record of employment). It was difficult to reconcile those answers.

[17] It was my general impression that Mr. Flynn tended to minimize matters that he perceived might undermine his claim and overstate those that were favorable to his position. I conclude that his memory of material dates and events is largely unreliable. While I accept plaintiff's counsel's description of Mr. Flynn as an unsophisticated witness, I conclude that it does not explain or excuse all the difficulties with his evidence.

[18] The cumulative effect of the inconsistencies, discrepancies, and evolution in Mr. Flynn's evidence undermined his credibility and the reliability of his evidence. I am unable to rule out the possibility that he may have tailored some of his evidence to suit convenience. I have approached his uncorroborated evidence with caution.

### **B. Lay Witnesses**

[19] Kristen Sheidow, Mr. Flynn's common law spouse, and Buster Flynn, his father ("Mr. Flynn Sr."), testified on Mr. Flynn's behalf at trial. On the uncontroverted

evidence of Mr. Flynn Sr., he and his son have a longstanding close personal relationship. While Ms. Sheidow and Mr. Flynn Sr. both testified in a generally straightforward manner, it is clear that neither is an independent nor a disinterested witness.

[20] Paul Chittick power-washes trucks and trailers for Mr. Flynn's current employer. He was a candid witness. However, Mr. Chittick conceded that he had limited opportunities to observe Mr. Flynn at work after the Accident, a factor that undermined the weight that can be given to some of his evidence.

[21] John Idington, Mr. Flynn's neighbor and former co-worker, and Lynda Brady, finance manager for one of Mr. Flynn's former employers, provided clear and responsive answers to the questions they were asked; their evidence raised no significant concerns.

### **C. Treating Physicians and Medical Experts**

[22] I found the treating physicians and medical experts who testified at trial to be credible witnesses. All testified in a fair and balanced manner, made reasonable concessions, and confined themselves to their respective areas of expertise.

## **III. BEFORE THE ACCIDENT**

[23] Mr. Flynn was 34 years old at the time of the Accident and 41 by the date of trial. He and Ms. Sheidow currently live in a townhouse with their three children in Port Coquitlam, BC.

[24] Mr. Flynn described himself as an engaged, sociable, and hard-working person who was very involved in his children's sports activities before the Accident, evidence Ms. Sheidow and Mr. Flynn Sr. corroborated. Mr. Idington recalled that his own children interacted with Mr. Flynn, and that their respective families periodically socialised before the Accident. Mr. Flynn said that he enjoyed fishing, evidence Mr. Flynn Sr. corroborated. Ms. Sheidow described Mr. Flynn as an amazing father and the general "fix-it" and yard maintenance person at home.

[25] Mr. Flynn liked working with his hands and was mechanically inclined from an early age, evidence Ms. Sheidow and Mr. Flynn Sr. corroborated. Mr. Flynn did not enjoy school, was not a good student, and was in a remedial math class. He admitted that he had academic and social problems in high school, evidence his father corroborated. Ultimately, after completing grade 9 and part of grade 10, Mr. Flynn left school at the age of 16 to find work.

[26] I have done my best on the available evidence to construct a chronological summary of Mr. Flynn's past employment.

[27] After leaving high school, Mr. Flynn found work at a golf course. He cut grass, cleaned stalls, and collected golf balls, earning \$12/hour. At the age of about 19, he accepted a job with Salish Disposal, a garbage disposal company. Although Mr. Flynn described himself as an apprentice, it is unclear whether he was formally hired in this capacity. His job involved manual labour, including cleaning up the shop and emptying garbage cans. Mr. Flynn said that he learned from the Red Seal mechanics in the shop by following them around and that he worked his way up to doing oil changes, grease jobs, and moving trucks in the yard.

[28] According to Mr. Flynn, he was employed with Salish Disposal for about four years. The accuracy of this information is unclear; no one from Salish Disposal testified. Mr. Flynn admitted he was fired for showing up at work while intoxicated.

[29] Mr. Flynn and Ms. Sheidow reconnected in their twenties, having first met in grade school. Their relationship progressed quickly and they soon moved in together and started a family. Mr. Flynn testified that fatherhood prompted him to change some of his previous bad habits, including partying, drinking, and consuming drugs. Mr. Flynn and Ms. Sheidow agreed that they shared childcare, meal preparation, and housework equally; and that Mr. Flynn was responsible for yard work.

[30] At some point, Mr. Flynn found work in Alberta as an uncertified mechanic with Fremantle, a commercial truck and trailer repair company. On Mr. Flynn's evidence, he worked for Fremantle in St. Albert, Alberta as an uncertified mobile

mechanic from 2011 or 2012 until 2015. According to Ms. Sheidow, she and Mr. Flynn lived in Alberta from 2012 until 2015. Based on a January 19, 2023 letter from Ms. Brady, Fremantle's finance manager, Fremantle employed Mr. Flynn as a heavy-duty mechanic from November 11, 2013 to August 11, 2015. I accept this letter as the most reliable evidence of the dates of Mr. Flynn's employment with Fremantle in Alberta.

[31] It is unclear what Mr. Flynn was doing for work after he was fired by Salish Disposal in or about 2005 at the age of about 23 and before he found a job with Fremantle in November 2013 at the age of about 31.

[32] Mr. Flynn and Ms. Sheidow both said they were happy in Alberta. Mr. Flynn worked at Fremantle on his own and out of a truck. Mr. Flynn liked this arrangement, enjoyed being outside, and preferred working alone to being in a shop with others. On his evidence, he was paid \$38/hour and was on-call 24/7. Ms. Brady denied that Fremantle required Mr. Flynn to be on call around the clock. According to Mr. Flynn, he worked on trucks; Ms. Brady testified that he worked on containers. It is unclear why Mr. Flynn's employment with Fremantle in Alberta ended. He testified that this occurred because he injured his ankle, could not do his job on crutches, and there was insufficient work to keep him busy. On Ms. Brady's uncontroverted evidence, Fremantle's St. Albert location was not profitable and the owners shut it down. In 2015, Mr. Flynn and his family returned to BC. He and Ms. Sheidow were both unhappy to leave Alberta.

[33] Mr. Flynn worked briefly for Co-Pilot Industries Ltd. ("Co-Pilot") in 2015, doing repairs on its fleet of dump trucks. It is unclear precisely when he did so. Based on Mr. Flynn's 2015 tax return in evidence, he earned T4 income from Co-Pilot in the amount of \$1,825.20 that year. On Mr. Flynn's uncorroborated evidence, this job lasted only about three days and ended when his boss threw a hammer at him and told him to pack his tools and leave. No one from Co-Pilot testified at trial.

[34] Mr. Flynn subsequently resumed working for Fremantle. Based on Ms. Brady's January 19, 2023 letter, Fremantle employed Mr. Flynn at its Pitt

Meadows, BC location from September 1, 2015 until April 8, 2016, dates Mr. Flynn accepted. On Ms. Brady's evidence, Mr. Flynn's hourly rate dropped substantially (from the \$38/hour he had earned while working for Fremantle in Alberta) to \$27/hour. Mr. Flynn no longer worked on his own from a truck but rather in a shop with other employees.

[35] On February 3, 2016, Mr. Flynn injured his neck when working for Fremantle as a heavy-duty mechanic (the "WCB Injury"). He admitted that he experienced severe neck pain at the time, sought medical treatment, reported this injury to WorkSafeBC, received Workers' Compensation Board ("WCB") benefits, and was off work for an undefined period of time thereafter. Based on the report that Ms. Brady completed and submitted to WorkSafeBC on Fremantle's behalf, Mr. Flynn had not yet returned to work by February 15, 2016, and Fremantle then had no modified or transitional duties available to him. Mr. Flynn admitted he had ongoing symptoms from the WCB Injury before the Accident and that he still does now.

[36] Dr. Crothers treated Mr. Flynn following the WCB Injury. He confirmed that Mr. Flynn injured his neck and shoulder and that Mr. Flynn reported both injuries to be slowly improving by February 23, 2016.

[37] Fremantle terminated Mr. Flynn's employment in April 2016. Mr. Flynn maintained that he could not recall why this occurred. On his evidence, he telephoned Fremantle one morning to advise that he would be late and was told not to bother attending for work as his employment had been terminated. Based on information that she said she received from Fremantle's shop managers, Ms. Brady testified that Mr. Flynn was fired because of his unreliability and continued absences. I do not rely on this hearsay evidence for its truth. Ms. Brady prepared a record of employment documenting Mr. Flynn's termination and the verbal warnings that she understood he had been given by Fremantle's owner. When confronted with this document in cross-examination, Mr. Flynn had no recollection of the information it recorded. Apart from Ms. Brady, no one from Fremantle testified at trial.

[38] The parties invite me to draw different inferences from the limited evidence about why Fremantle terminated Mr. Flynn's employment. Plaintiff's counsel says it is open to me to find that Mr. Flynn was terminated because he was working injured and, on Ms. Brady's evidence, that Fremantle had no transitional or accommodated positions for injured workers. Defence counsel urges me to find that Mr. Flynn was fired for the reasons identified in Fremantle's record of employment. I draw no inferences from Ms. Brady's hearsay evidence or from Fremantle's record of employment about why Mr. Flynn's employment was terminated in 2016. It was open to either party to call a witness with first-hand knowledge of this information. It is unclear why that did not occur.

[39] Mr. Flynn admitted it took him about seven months to find another job after Fremantle terminated his employment in April 2016. He conceded that finding work would have been easier if he had a high school diploma and a Red Seal certification. He agreed that many employers require their mechanics to be Red Seal certified.

[40] Mr. Flynn accepted that his Fremantle work was physical; on his evidence, it sometimes involved lifting very heavy objects and working in awkward positions under vehicles and in cramped conditions on trailers. He agreed that the physical demands of his job took an occasional toll on his body and that he periodically sustained strains and sprains at work, with corresponding aches and pains. He admitted this was a regular event that "goes with the territory" and that he still experiences the odd right ankle cramp from a work injury he sustained in Alberta.

[41] At the time of the Accident, Mr. Flynn was working for Glastech. Mr. Idington was then a foreman for Glastech. He helped Mr. Flynn find this job, saying Mr. Flynn had a mechanical background and knew his way around tools. Glastech paid Mr. Flynn \$20/hour; he said that this hourly rate would have increased to \$25/hour after he completed the mandatory probationary period. According to Mr. Flynn, the Accident occurred three days before the end of his probationary period. Based on the Glastech T4 record in evidence, Mr. Flynn earned income from Glastech in 2016 in the amount of \$8,520.80.

[42] Ms. Sheidow thought that Mr. Flynn had worked for Glastech for one or two weeks before the Accident. Before he secured this job, she agreed that it had been several months since he had last earned any income and that this had caused friction in their marriage and many arguments. Despite the plan that she and Mr. Flynn then had for her to remain at home while their children were young, Ms. Sheidow admitted she had considered looking for a job before the Accident.

#### **IV. THE ACCIDENT**

[43] At the time of the Accident, Mr. Flynn was in the back seat of a Buick sedan behind driver, Mr. Idington. Mr. Idington is a large man; he testified that he always drives with his seat positioned as far back as it will go. He and Mr. Flynn both recalled that Mr. Idington was driving in this manner the day of the Accident. Mr. Idington agreed that five people (including Mr. Flynn, himself, and three other large men) were packed “pretty tight” into the Buick the day of the Accident.

[44] Mr. Idington testified that the Buick was stopped in traffic when it was struck from behind and pushed into a truck fitted with a rear trailer hitch. Mr. Flynn recalled that the Buick was hit suddenly from behind and that his head hit the back of Mr. Idington’s seat. Mr. Idington remembers feeling something strike the back of his seat on impact; he presumed that it was Mr. Flynn’s body. Both said that everyone in the Buick was wearing their seatbelt.

#### **V. AFTER THE ACCIDENT**

##### **A. Immediate Aftermath**

[45] Mr. Flynn recalls getting out of the Buick, walking around, and having some discomfort in his neck immediately after the Accident. There is no evidence that any airbags in the Buick deployed on impact or that any emergency vehicles attended at the Accident scene. Mr. Flynn did not go to the hospital.

##### **B. Injuries, Treatment, and Subsequent Course**

[46] Mr. Flynn recalls that he began to experience progressive, right-sided, low back pain the day after the Accident. At some point, he developed symptoms in his

right leg: he described a sensation of heat and cold, an inability to put pressure on his right leg, and a feeling that his right leg was “not there” and not moving properly.

[47] On October 19, 2016, the day after the Accident, Mr. Flynn went to see Dr. Crothers. Dr. Crothers testified at trial and his complete clinical records are in evidence. Dr. Crothers retired in February 2022, after 44 years in general family practice. He has no independent recollection of his patient encounters with Mr. Flynn. He based his trial evidence on a review of his clinical notes and records. He testified that he designed his clinical notes to be functional and to permit quick and easy identification of his clinical findings, diagnoses, differential diagnoses, and treatment recommendations.

[48] On October 19, 2016, Dr. Crothers recorded Mr. Flynn’s subjective report of “neck pain 1 day”. On examination, he noted tenderness in the right and left trapezius muscles and in the cervical spine, with a decreased range of motion. Mr. Flynn’s peripheral nervous system was noted to be normal. Dr. Crothers diagnosed a soft tissue injury. His plan was for Mr. Flynn to apply heat or ice, use analgesic and anti-inflammatory medication, take some time off work, and return for a reassessment in one week.

[49] Mr. Flynn did not recall that he reported neck pain only to Dr. Crothers on October 19, 2016. When confronted in cross-examination with Dr. Crothers’ clinical notes for this visit, Mr. Flynn testified that he would definitely also have reported injuring his low back, describing this as his “main injury”. However, Mr. Flynn conceded that, apart from this one detail, he has no memory of this visit.

[50] Dr. Crothers reassessed Mr. Flynn on November 4, 2016, at which time he noted that it had then been about two weeks since the Accident. He recorded Mr. Flynn’s complaints of back pain and his previous report of neck pain. Dr. Crothers confirmed that he intended his November 4, 2016 note to indicate that Mr. Flynn reported gradually developing post-Accident back pain, in addition to neck pain. He noted that Mr. Flynn had tried unsuccessfully to return to light work duties. On examination, Mr. Flynn reported tenderness in the right sacroiliac area of his low



back. Dr. Crothers' diagnosis and treatment plan remained unchanged. He recommended activity as tolerated, saying he always encouraged early rehabilitation after any soft tissue injury. He agreed that Mr. Flynn's most pressing problem was then his low back pain.

[51] When cross-examined about Dr. Crothers' November 4, 2016 note, Mr. Flynn admitted he could not recall this visit or his conversation with Dr. Crothers that day.

[52] Mr. Flynn did not attend his next scheduled appointment with Dr. Crothers on November 7, 2016. He returned to see Dr. Crothers on December 19, 2016 and reported ongoing low back pain and pain radiating down his right leg. Dr. Crothers requested an x-ray of the low back to identify any bony pathology, malalignment, or congenital issues. This x-ray demonstrated the presence of degenerative disc disease in Mr. Flynn's lumbosacral spine. Dr. Crothers recommended that Mr. Flynn take a muscle relaxant and pursue physiotherapy.

[53] When Mr. Flynn was cross-examined about Dr. Crothers' December 19, 2016 clinical note, he admitted having no recollection of this visit. He agreed that his neck symptoms were then improving but he could not recall whether or not he was then attending physiotherapy. When confronted with the records of a Port Coquitlam physiotherapy clinic, Mr. Flynn remembered attending there only once after the Accident for an initial assessment on January 12, 2018 (at which time he could not recall receiving any treatment).

[54] Mr. Flynn denied being able to work for the first few weeks after the Accident. On his evidence, he hung out at home, lay on the couch, and tried to figure out what his future would look like. He was unable to recall precisely how he was doing by either Christmas 2016 or New Year's 2017, apart from saying that his low back and right leg symptoms were getting worse. On his evidence, he went to a "pretty dark place" for awhile in early 2017.

[55] Glastech issued a record of employment indicating that it employed Mr. Flynn for about three months between October 11, 2016 and January 16, 2017. Mr. Flynn

testified that he started as a helper and carried tools and hardware for the glaziers. On his evidence, he was not permitted on the scaffolding. Mr. Flynn agreed that Glastech was prepared to offer him a position as an apprentice and that he obtained scissor and boom lift certifications during his employment. He denied having any lifting duties at Glastech. He agreed that the demands of his job were lighter than those of a mechanic. He said that he did not like working at heights and that his Glastech position would ultimately have required him to do so.

[56] Mr. Flynn quit his Glastech job and has made no effort to return to it. He said that people were “playing games” and making fun of him. Mr. Idington described the Glastech work environment as “cutthroat”: on his evidence, employee weaknesses were quickly exposed and exploited until the individual in question either changed their behaviour or quit. In his view, that is what happened to Mr. Flynn.

[57] Thereafter, Mr. Flynn agreed that his family struggled financially and that this caused stress in his relationship with Ms. Sheidow, evidence she corroborated. He said that he was then emotional and depressed and that his friends did not want to be around him. On his uncorroborated evidence, the accuracy of which is unclear, he was out of work for one or two months after he quit his Glastech job.

[58] According to Mr. Flynn and Ms. Sheidow, one of their neighbours had a painting business and offered Mr. Flynn some painting work after the Accident. It is unclear precisely when, or how long, Mr. Flynn did this work and how much he was paid. Mr. Flynn suggested that he lasted only three or four days in this job, saying he found moving big ladders and painting difficult and that he was unable to continue. He thinks his neighbour paid him about \$20/hour; on Ms. Sheidow’s uncorroborated evidence, Mr. Flynn earned about \$5,000 in total doing painting work after the Accident. This unidentified neighbour did not testify at trial. Mr. Flynn reported none of this painting income to the CRA.

[59] Dr. Crothers reassessed Mr. Flynn on February 16, 2017, approximately four months after the Accident. He noted that Mr. Flynn reported significant discomfort

and no improvement in his pain. He recommended a CT scan of the lumbar spine and pelvis.

[60] On March 2, 2017, Mr. Flynn saw Dr. Crothers again. Dr. Crothers noted Mr. Flynn's complaint of upper back pain for five days, in the absence of any new trauma or other precipitating event. A CT scan of Mr. Flynn's lumbar spine and pelvis was done on April 5, 2017. This investigation was reported by the reviewing radiologist as demonstrating the presence of a small to moderate right paracentral and subarticular disc protrusion at L5-S1 which could explain a right S1 radiculopathy.

[61] On April 12, 2017, Dr. Crothers discussed these CT findings with Mr. Flynn and referred him for an epidural steroid injection in an attempt to decrease swelling of the protruding disc, thereby relieving pressure on the nerve root and alleviating leg symptoms. Dr. Crothers confirmed that he would have informed Mr. Flynn, based on the April 2017 CT scan, that he had degenerative disc disease which looked significant and explained his right leg symptoms. Dr. Crothers agreed that he would have explained to Mr. Flynn the purpose of the recommended steroid injection.

[62] By July 11, 2017, Mr. Flynn had still not attended for this epidural steroid injection. Dr. Crothers admitted he was frustrated by Mr. Flynn's failure to do so. He advised Mr. Flynn to attend at a radiology clinic for this purpose. Mr. Flynn eventually did so and reported that the steroid injection was of limited assistance.

[63] On Mr. Flynn's evidence, he was earning no money in 2017, finances were tight, and he and Ms. Sheidow were fighting constantly. Mr. Flynn admitted he felt useless, was doing nothing, and that he started to consume about a bottle of hard liquor daily. Ms. Sheidow agreed that she and Mr. Flynn hit a "rough patch" in 2017: they had no money, were "scraping by", and not getting along. She admitted Mr. Flynn was then drinking heavily and that things "got nasty". Ultimately, she asked him to leave in June 2017.

[64] Mr. Flynn returned home about five months later; Ms. Sheidow recalls that he was back by December 2017. According to Mr. Flynn, he wanted his family back and stopped drinking and smoking “cold turkey”. Thereafter, he recalled that his back pain was unchanged but no longer numbed by alcohol. Before returning home, Mr. Flynn spent some time living with his father who provided him with substantial financial and emotional support, evidence Mr. Flynn Sr. corroborated.

[65] On January 12, 2018, Dr. Crothers reassessed Mr. Flynn. He recorded Mr. Flynn’s reports of improvement in his marital discord but not having worked for one month due to back pain. Dr. Crothers requested an MRI of the lumbar spine. This investigation was completed on January 22, 2018 and demonstrated the presence of a large disc bulge at L5-S1. Dr. Crothers referred Mr. Flynn to a neurosurgeon.

[66] Mr. Flynn conceded that he reported no post-Accident emotional symptoms to Dr. Crothers, saying he did not think a doctor would be “into the emotional part” and that he considered this to be “more of a counselling issue”. On some unknown date, he sought counselling from an unidentified “shrink”, something he found to be helpful. Based on the documents in evidence in support of Mr. Flynn’s claim for special damages, he attended counselling from January 9, 2018 until December 12, 2019. It is unclear whether he saw a psychiatrist, psychologist, or counsellor. No counselling records are in evidence and no counsellor testified at trial.

[67] Mr. Flynn resumed working as a mechanic in 2019. It is unclear precisely when he did so. Based on the record of employment that Diesel Tech issued, Mr. Flynn worked for Diesel Tech from November 4, 2019 until March 2, 2020. On Mr. Flynn’s uncorroborated evidence, he earned \$31.50/hour in this job, plus time and a half for overtime in the amount of \$47.50/hour. Based on 2019 and 2020 T4 records in evidence, Mr. Flynn earned employment income from Diesel Tech in the amount of \$7,689.94 in 2019 and \$9,359.84 in 2020.

[68] On Mr. Flynn’s evidence, he left Diesel Tech for a higher-paying job with Key West, a long-haul trucking company where his father works as a part-time driver.

According to Mr. Flynn, his duties at Key West included fixing lights and changing oil in trucks, and were lighter than they had been at Diesel Tech. He said that he initially earned \$37/hour at Key West and that this rate later increased to \$42/hour, with an overtime rate of \$64/hour.

[69] According to Mr. Flynn, all of Key West's equipment is new and under warranty. He said that his job at Key West involved limited bending, lifting, and moving around and was confined to maintenance work, including oil changes, grease jobs, and light repairs. He enjoyed the work and described his days as predictable. He worked with only one other mechanic and liked this arrangement. He admitted he was not required to do any large truck repairs at Key West. At some point, he said that he switched to four ten-hour shifts per week as it was easier on his back to have one extra day off during the week. No one from Key West testified at trial.

[70] Dr. Samantha Hage-Moussa assumed responsibility for Mr. Flynn's primary medical care after Dr. Crothers retired. She testified as a treating physician; her clinical notes and records are in evidence. On May 10, 2021, Dr. Hage-Moussa recorded that she highly recommended Mr. Flynn pursue physiotherapy for his ongoing back pain. Mr. Flynn could not recall this treatment recommendation but conceded that he expected Dr. Hage-Moussa made the recommendations that she recorded in her clinical notes with a view to improving his condition.

### **C. August 3, 2021 Back Surgery**

[71] On August 3, 2021, Dr. Sahjpaal performed a microdiscectomy on Mr. Flynn's back.

[72] According to Mr. Flynn, he spent about three months recovering from this surgery at home before returning to his Key West job in November 2021. He agreed that he was happy to return to work. He recalled that he was "okay" for about one week before the numbness in his right leg and tingling in his toes returned. Mr. Flynn admitted he is not scheduled to undergo any further back surgery and that he is currently receiving no treatment for his back.

**D. September 30, 2022 Hernia**

[73] On September 30, 2022, while working at Key West, Mr. Flynn sustained a hernia. Mr. Flynn agreed that he has been unable to work since then and that he has also developed painful hemorrhoids which require him to use a cushion for sitting.

[74] According to Mr. Flynn, laying down is the only thing that alleviates his hernia symptoms. He understands that his hernia is repairable, that this surgery will proceed soon, and that he can expect a six-week recovery period thereafter.

[75] Mr. Flynn was investigated for a possible cardiac arrhythmia after his hernia. Dr. Hage-Moussa confirmed that a cardiologist has now cleared him for hernia repair surgery. She explained that a hernia is a protrusion and that Mr. Flynn requires surgery so that his hernia will not protrude. Although this surgery has not yet been scheduled, Dr. Hage-Moussa hopes it will be booked soon. She agreed that Mr. Flynn's hernia is the main issue she is now managing for him and that she is not currently treating his back pain.

[76] Mr. Flynn remains an employee of Key West while he is off work awaiting his hernia repair. On his uncorroborated evidence, he was informally accommodated at Key West and his co-workers periodically assisted him with tasks that he was able to do himself before the Accident.

**E. Current Condition**

[77] Mr. Flynn complains of ongoing sharp incisional pain in the area of his back surgery. He described a "pins and needles" sensation in his toes and said that his right leg periodically "gets in the way". He reported a burning sensation in his shoulders if he does overhead work for an extended period and the occasional "knot" in his neck. He said that his upper back symptoms are dependant on his activities. Mr. Flynn complains that he does not sleep as well as he did before the Accident, saying he sometimes awakens with stiff shoulders if he sleeps in an awkward position.

[78] Mr. Flynn is now less engaged in activities that he once enjoyed. He no longer coaches soccer, saying he cannot kick a soccer ball. He no longer travels with his daughter when she attends cheerleading competitions outside BC. He said that he no longer swims because he cannot kick with his legs, that he has not been fishing since the Accident, and that he no longer walks his dogs.

[79] Mr. Flynn conceded that his unrepaired hernia interferes with his ability to engage in household chores. He is currently doing no yard work pending his hernia repair; Ms. Sheidow, Mr. Flynn Sr., and Mr. Idington all agreed that his back yard is currently in a state of disarray.

[80] On Mr. Flynn's evidence, he now finds it difficult to relax and no longer enjoys being away from home or travelling long distances. He described being anxious when driving and said that Ms. Sheidow now does most of the family driving. Mr. Flynn finds it difficult to sit for extended periods; however, it is unclear to what extent this is due to his hemorrhoids and untreated hernia.

[81] Mr. Flynn said that he is no longer very sociable, evidence Mr. Idington corroborated. He observed that Mr. Flynn has lost weight since the Accident, is more withdrawn, and always seems to be in visible pain. They now interact minimally.

[82] About six months ago, on Ms. Sheidow's suggestion, Mr. Flynn started taking Venlafaxine. On his evidence, it alleviates his symptoms of anxiety and depression.

## **VI. EXPERT MEDICAL EVIDENCE**

[83] The plaintiff called three medical experts at trial: neurosurgeons, Drs. Ailon and Sahjpaul, and Dr. Faraday, a general practitioner with expertise in musculoskeletal injuries.

[84] Dr. Ailon has been a neurosurgeon since 2013. After completing his neurosurgical training, he obtained a Master of Public Health from Harvard University, followed by a complex spine and spinal deformity fellowship at the University of Virginia. He has been in active clinical practice as a spinal

neurosurgeon since 2015; his practice is dedicated to treating spinal conditions. Dr. Ailon was qualified as an expert in neurosurgery, able to opine in this area.

[85] Dr. Sahjpaul has been in active clinical practice as a neurosurgeon since 1995. In addition to his neurosurgical training, he completed a Masters of Science degree in clinical epidemiology and has fellowships in epilepsy surgery, complex spine surgery, and image-guided neurosurgery. His current practice primarily involves the treatment of spinal disorders and general neurosurgery. Dr. Sahjpaul has been a visiting neurosurgical specialist for WorkSafeBC since 2001; in this capacity, he assesses injured workers with spinal injuries, provides diagnostic clarification within his speciality, recommends surgical and non-surgical treatment, undertakes neurosurgical treatment if indicated, and offers opinions regarding vocational capacity and workplace restrictions. He is the co-Head of the Surgical Neuromodulation Program at St. Paul's Hospital where his practice focuses on the assessment and surgical treatment of patients with chronic pain.

[86] Dr. Sahjpaul was qualified as an expert in neurosurgery, able to opine on the cause, diagnosis, prognosis, and vocational recommendations for chronic spinal pain and related soft tissue injuries.

[87] Dr. Faraday has been a general practitioner for approximately 30 years. His practice has focused almost exclusively on injury management for about the last 15 years. Most of his work experience (in both his clinical practice and during his 16 years as a Medical Advisor for WorkSafeBC) has involved musculoskeletal conditions. He testified that he has seen many thousands of patients with neurological issues and that he often diagnoses and treats mental health disorders.

[88] Dr. Faraday was qualified as an expert in the general practice of medicine and in the areas of occupational medicine and disability management, able to offer opinions regarding the treatment of musculoskeletal and musculoligamentous injuries and chronic pain.



[89] The defendants called one expert: Victoria radiologist, Dr. Douglas Connell. Dr. Connell has been a radiologist since 1983. He has a subspecialty in musculoskeletal radiology and is the current Head of Musculoskeletal Radiology and MRI with the Vancouver Island Health Authority. He interprets radiology studies, including radiographs, CT scans, and MRI imaging, and practices as an interventional radiologist. He was qualified as an expert in radiology, able to opine regarding musculoskeletal radiology and the interpretation of medical imaging.

#### **A. Disc Herniation and Radiculopathy**

[90] Dr. Ailon assessed Mr. Flynn once in August 2017, more than six years ago, thereafter authoring a report dated August 8, 2017. When Dr. Ailon wrote his report, Mr. Flynn had not yet attended for the steroid injection Dr. Crothers recommended. Dr. Ailon did not reassess Mr. Flynn, did not update his report, and was unaware that Mr. Flynn had undergone spinal surgery in August 2021.

[91] Dr. Ailon diagnosed post-traumatic mechanical low back pain and a right S1 radiculopathy. He explained that radiculopathy is pain that arises from a nerve root. He opined in his August 2017 report that Mr. Flynn's lack of improvement almost 10 months after the Accident was a poor prognostic indicator for further spontaneous recovery. He stated that, with appropriate treatment, Mr. Flynn could expect to obtain significant improvement or complete resolution of his right leg symptoms.

[92] Dr. Ailon noted in his report that the course of low back pain following trauma is highly variable. He stated that, to the extent Mr. Flynn's low back and right leg pain are related to the same underlying pathology (i.e., the L5-S1 disc herniation), treatment of one should improve the other. Dr. Ailon indicated that he would not expect Mr. Flynn's low back pain to deteriorate over time and that he would expect improvement with appropriate treatment.

[93] Dr. Sahjpaal assessed Mr. Flynn on July 8, 2022 and authored a medical legal report dated August 4, 2022. He initially assessed Mr. Flynn on June 14, 2018, at the request of plaintiff's counsel. Dr. Sahjpaal noted in his August 2022 report that an April 5, 2017 CT of Mr. Flynn's lumbar spine demonstrated a right L5-S1 disc

protrusion that was compressing the right S1 nerve root. He confirmed that a June 22, 2018 MRI of the lumbar spine showed a loss of disc signal at L4-L5 and L5-S1, and a moderate to large right-sided L5-S1 disc herniation with right S1 nerve root compression.

[94] On August 3, 2021, Dr. Sahjpaul performed a right L5-S1 microdiscectomy. He saw Mr. Flynn in follow-up on September 17, 2021, at which time Mr. Flynn reported improved right-sided sciatica but ongoing low back discomfort, and on April 21, 2022, at which time Mr. Flynn reported resolved right-sided sciatica and ongoing low back discomfort with work. When Dr. Sahjpaul reassessed Mr. Flynn in August 2022, Mr. Flynn reported left medial scapular pain over the last several months, occasional right-hand tingling, incisional back pain, bilateral low back pain that was worse in the morning and at the end of a workday, an occasional heat sensation in his right leg, occasional discomfort in the right buttock, and worsened right leg discomfort over the past several months. Dr. Sahjpaul agreed that the surgery he performed was expected, but not guaranteed, to improve Mr. Flynn's leg symptoms.

[95] In his August 2022 report, Dr. Sahjpaul diagnosed mechanical low back pain with a probable discogenic component as a result of the Accident. He also diagnosed a probable traumatic disc herniation which, in his opinion, was contributing to Mr. Flynn's back pain and causing his right leg pain.

[96] Dr. Faraday assessed Mr. Flynn on December 10, 2022, and authored a report dated February 28, 2023. He diagnosed right leg sciatica and ongoing pain due to right S1 nerve root irritation as a result of the Accident.

## **B. Soft Tissue Injuries**

[97] Based on Mr. Flynn's reported history, Dr. Ailon understood that the Accident had temporarily aggravated pre-existing neck pain for about one month. Mr. Flynn reported no residual neck pain at the time of Dr. Ailon's August 2017 assessment. Because Mr. Flynn reported no significant back pain before the Accident, Dr. Ailon concluded that the Accident probably caused the onset of low back pain. In his

opinion, Mr. Flynn developed low back pain after the Accident, in part, due to injury to the L5-S1 disc and, in part, due to soft tissue injury.

[98] Dr. Sahjpaul understood that Mr. Flynn reported a history of right neck pain following the WCB Injury, about six months before the Accident, and that his pre-Accident neck symptoms resolved after about six weeks of physiotherapy. Mr. Flynn reported ongoing post-Accident neck pain, radiating into the trapezius area, which gradually improved but did not resolve. Dr. Sajhpaul diagnosed myofascial neck and low back pain as a result of the Accident.

[99] Dr. Faraday diagnosed Mr. Flynn with musculoligamentous injuries to the neck, upper, and lower back, with ongoing symptoms, as a result of the Accident. Dr. Faraday is of the opinion that Mr. Flynn's recovery has plateaued and that his prognosis is now guarded (or uncertain).

### **C. Psychological Symptoms**

[100] Dr. Faraday diagnosed ongoing symptoms of depression and anxiety as a result of the Accident. Given the length of time since the Accident and that no further improvement is expected in Mr. Flynn's pain symptoms, he concluded that Mr. Flynn's prognosis for further improvement in his psychological condition is guarded. Dr. Faraday did not diagnose Mr. Flynn with any psychiatric conditions. No psychiatrist or psychologist testified at trial.

[101] Mr. Flynn said that he sought counselling for anger management and for his drug and alcohol use after the Accident. It is unclear when this counselling occurred, who provided it, and whether these issues arose from the Accident. Based on the documents in evidence regarding Mr. Flynn's special damages claim, he attended 31 counselling sessions between March 2018 and December 2019.

## **VII. CAUSATION**

[102] Causation issues are central to the parties' dispute.

### A. Legal Framework

[103] The basic test for determining causation is the "but for" test. The plaintiff bears the burden of establishing that "but for" the defendant's negligent act or omission, the injury would not have occurred: *Resurface Corp. v. Hanke*, 2007 SCC 7 at para. 21; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–14, 1996 CanLII 183 [*Athey*]. The "but for" test must be proven on a balance of probabilities: *Athey* at para. 13. The Accident need not be the only cause of the plaintiff's injuries but it must be a causal factor beyond the "*de minimis*" range: *Athey* at para. 15. If a defendant's negligence exacerbates or aggravates an existing condition, the defendant is liable for causing the resulting injury: *Athey* at para. 47.

[104] The most basic principle of tort law is that the plaintiff must be placed in the same position they would have been "but for" the defendant's negligence. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for another person. However, a defendant need not compensate a plaintiff for any debilitating effects of a pre-existing condition that the plaintiff would have experienced anyway: *Dornan v. Silva*, 2021 BCCA 228 at paras. 44–45.

[105] As noted by former Chief Justice McLachlin in *Blackwater v. Plint*, 2005 SCC 58 at para. 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.

[106] Justice Smith, speaking for the Court in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 48 [*T.W.N.A.*], explained how to address the possibility of a plaintiff's pre-existing condition becoming manifest, absent the tort:

... Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the

award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

[107] If an intervening event would have adversely affected a plaintiff's original position in any event, the net loss attributable will not be as great and damages will be reduced proportionately: *T.W.N.A.* at para. 36. This principle is applicable to an assessment of damages for past loss or impairment of earning capacity: *Burke v. Schwetje*, 2017 BCSC 2098 at para. 141. I conclude that Mr. Flynn's September 2022 hernia was such an intervening event.

## **B. Expert Evidence**

### **1. Dr. Ailon**

[108] Dr. Ailon opines that the Accident caused an acute S1 radiculopathy and that the distribution of pain and numbness in Mr. Flynn's right leg is consistent with this diagnosis. Based on Mr. Flynn's reported history of experiencing back pain within one day of the Accident, an extension of his symptoms to the right sacroiliac region within one week, and (as recorded by Dr. Crothers on December 19, 2016) to the right leg within two months, Dr. Ailon concluded that this radiculopathy was temporally related to the Accident.

[109] In Dr. Ailon's opinion, two possibilities could explain Mr. Flynn's presentation:

- a) He sustained an acute disc herniation at the time of the Accident that became increasingly symptomatic with back and right leg pain over the subsequent weeks; or
- b) He had a pre-existing asymptomatic disc protrusion that was rendered symptomatic by the Accident.

[110] Dr. Ailon concedes that the absence of any pre-Accident imaging precludes a definitive conclusion regarding which one of these two events occurred. He agreed that the degenerative changes present in Mr. Flynn's spine and demonstrated on imaging studies likely pre-dated the Accident. However, in his view, the complete absence of any radicular symptoms before the Accident implicates the Accident as

the cause of acute trauma to the disc (with a resulting protrusion and mass effect on the nerve root) or aggravation of a pre-existing disc protrusion.

[111] Dr. Ailon noted that the April 5, 2017 CT of Mr. Flynn's lumbar spine demonstrated a right L5-S1 disc protrusion with mass effect (i.e., pressure) on the S1 nerve root, findings he confirmed are consistent with Mr. Flynn's symptoms and examination results. Both Dr. Ailon and Dr. Crothers (at his February 16, 2017 examination) found that Mr. Flynn had a positive straight leg test. Dr. Ailon explained that this is a sign of nerve root tension which often accompanies radiculopathy. He noted that Mr. Flynn also demonstrated reduced sensation and subtle weakness with independent toe raises on the right, another finding that he described as being consistent with S1 nerve root pathology.

[112] Dr. Ailon conceded that Mr. Flynn's self-reported history was important. He acknowledged that Mr. Flynn's primary complaint was neck pain when he saw Dr. Crothers one day after the Accident. Dr. Ailon wrote in his report that:

At the time of the [A]ccident, [Mr. Flynn] noted immediate increase in his neck pain. There was no immediate back or lower extremity symptoms.

[113] When cross-examined about this recorded subjective history, Mr. Flynn agreed that he answered Dr. Ailon's questions truthfully and understood that Dr. Ailon would rely on his answers in making his assessment. Mr. Flynn had no recollection of making the above-noted statements and denied that they made sense. He also conceded that he was not working as a mechanic at the time of the Accident, contrary to Dr. Ailon's recorded history (based on Mr. Flynn's report).

[114] It was Dr. Ailon's impression that Mr. Flynn complained of about two weeks of back pain, with tenderness over the sacroiliac joint, when he saw Dr. Crothers on November 4, 2016. Notably, this assumption is inconsistent with Dr. Crothers' evidence that he intended reference to two weeks in his November 4, 2016 note to indicate that it had then been about two weeks since the Accident.

[115] Ultimately, Dr. Ailon testified that, if some degree of back and progressive leg pain arose within three months after the Accident, he would consider the Accident to be a plausible mechanism of injury for Mr. Flynn's disc herniation. Dr. Ailon did not retreat from the causation opinions set out in his report in cross-examination.

## 2. Dr. Sahjpaul

[116] Dr. Sahjpaul diagnosed:

- a) Myofascial neck pain due to the Accident;
- b) Myofascial and mechanical low back pain, with a probable discogenic component, due to the Accident; and
- c) Right leg pain/sciatica related to a probable traumatic L5-S1 disc herniation due to the Accident.

[117] Mr. Flynn was 34 years old at the time of the Accident. In Dr. Sahjpaul's opinion, the degree of degeneration in his spine was then likely fairly minimal. He admitted that it is possible, but very unusual, for a degenerative spine condition to progress to disc herniation without trauma. He agreed that he would want to know about any work-related event (if there had been one) that caused Mr. Flynn to experience symptoms. There was no trial evidence about any such event.

[118] Mr. Flynn admitted in cross-examination that he told Dr. Sahjpaul the truth about his symptoms and the progression of his injuries; he denied any recollection of their conversation the day of Dr. Sahjpaul's assessment. Dr. Sahjpaul wrote:

[Mr. Flynn] reports immediate onset of discomfort in low back after the [A]ccident.

[119] Mr. Flynn denied the accuracy of Dr. Sahjpaul's statement (apparently based on his reported history) that his symptoms from the WCB Injury resolved after six weeks of physiotherapy. At trial, Mr. Flynn admitted he did not have six weeks of physiotherapy after the WCB Injury. He also conceded that he was not working as a

full-time heavy-duty mechanic at the time of the Accident, contrary to the history he provided to Dr. Sahjpaul, as recorded in his report.

[120] Dr. Sahjpaul noted that the treatment for disc herniation is the same, regardless of the cause. While he agreed that patient history is important, he said that imaging findings (as here) can be so profound that they bear the weight of decision-making for a surgeon.

### 3. Dr. Faraday

[121] Dr. Faraday testified that a rear-end collision is consistent with flexion-extension forces being applied to the body. He understood that Mr. Flynn also struck his head on the seat ahead of him in the Accident.

### 4. Dr. Connell

[122] Dr. Connell did not interview or assess Mr. Flynn. He reviewed the following imaging of Mr. Flynn's lumbar spine before authoring his February 9, 2023 report:

- a) Plain x-rays of the lumbar spine from January 3, 2017; and
- b) An MRI of the lumbar spine completed on January 22, 2018.

[123] Dr. Connell opined as follows:

- a) The 2018 MRI demonstrates a right posterior disc protrusion at the L5-S1 level that displaces the S1 and S2 nerve roots and would likely cause radicular pain radiating to the buttocks and posterior lower extremity;
- b) Most disc bulges and disc protrusions occur on a degenerative basis;
- c) 32% of asymptomatic individuals Mr. Flynn's age will demonstrate a disc protrusion;
- d) A disc protrusion occurring secondary to a traumatic event is rare, with only several case reports having been documented in the medical literature; and
- e) In order for the Accident to be considered a possible cause of Mr. Flynn's disc protrusion, there would need to be a close documented temporal



relationship between his recorded clinical history, physical findings, and the Accident.

[124] Dr. Connell cited a meta-analysis entitled: “Systematic Literature Review of Imaging Features of Spinal Degeneration in Asymptomatic Patients” (the “Review”). The Review authors considered over 1,000 other studies dating back to the late 1980s and conducted a scientific analysis of the 33 that they determined had the most relevance for the purposes of the Review.

[125] The Review authors sought to estimate by age the prevalence of common degenerative spine conditions with a systematic study of spine degeneration demonstrated on imaging in asymptomatic individuals. They concluded as follows:

- a) Imaging findings of spine degeneration increase with age and are present in high proportions of asymptomatic individuals;
- b) Many imaging-based degenerative features are likely part of normal aging and not associated with pain; and
- c) Imaging findings must be interpreted in the context of a patient’s clinical condition.

[126] The Review authors noted that disc protrusion was moderately prevalent across all age categories of patients in their study but did not substantially increase with age. They found that over 50% of asymptomatic individuals 30–39 years of age have disc degeneration, height loss, or bulging; in their view, this finding suggests that, even in young adults, degenerative changes may be incidental and not causally related to presenting symptoms. They concluded that the Review results strongly suggest that, when degenerative spine findings are incidentally seen (i.e., as part of imaging for an indication other than pain or an incidental disc herniation at a level other than where a patient’s pain localizes), these findings should be considered as normal age-related changes rather than pathologic processes.

[127] Dr. Connell admitted in cross-examination that it is unknown whether or not someone with a disc herniation will remain asymptomatic in the future. He stated

that most individuals with degenerative discs will become symptomatic over time, regardless of trauma, and that most have no relation to trauma. He agreed that imaging findings must be interpreted in the context of a patient's clinical condition.

### C. Analysis and Conclusions

[128] On Mr. Flynn's evidence, he now experiences the occasional "knot" in his neck and some burning in his shoulders if he engages in extended overhead work. I find that his soft tissue injuries to his neck and upper back have largely resolved and that any residual symptoms he now experiences are comparable to those he had following the WCB Injury. I find that his ongoing low back pain is probably due, at least in part, to unresolved soft tissue injuries as a result of the Accident. However, Mr. Flynn's predominant low back complaint is incisional pain.

[129] I accept that Mr. Flynn is now a more anxious driver, and that he socialises less often due to anxiety and pain, as a result of the Accident. Mr. Flynn continues to drive. He has been diagnosed with no psychiatric disorder. He conceded that he has been anxious about the need to undergo hernia surgery and the possibility of having a cardiac arrhythmia. Based on Mr. Flynn's own evidence, I conclude that his anxiety is likely to improve following his hernia repair.

[130] The defendants submit that any connection between Mr. Flynn's low back and right leg symptoms and the Accident is tenuous. Justice Erhcke discussed the significance of a temporal connection when assessing causation in *White v. Stonestreet*, 2006 BCSC 801 at para. 75:

In searching for causes, a temporal connection is sometimes the only thing to go on. But if a temporal connection is going to form the basis for a conclusion about the cause of an event, then it is important to examine that temporal connection carefully. Just how close are the events in time? Were there other events happening around the same time, or even closer in time, that would provide an alternate, and more accurate, explanation of the true cause?

[131] As in *Khudabux v. McClary*, 2016 BCSC 1886 at para. 174, the problems inherent in assessing Mr. Flynn's evidence spill over into an assessment of the experts' evidence which relies, at least in part, on Mr. Flynn's self-reported history. I

accept that Mr. Flynn provided Drs. Ailon and Sahjpaul with a history of his presenting symptoms that is inconsistent with his contemporaneous recorded reports to Dr. Crothers after the Accident. I conclude that Mr. Flynn's reports to his treating GP, shortly after the Accident and before he commenced this litigation, are likely more accurate than the retrospective accounts he provided to the experts he retained in this litigation.

[132] I accept Dr. Ailon's opinion that the Accident is a plausible cause of Mr. Flynn's back pain, which progressed to right leg pain within three months. There is no evidence, beyond speculation, that Mr. Flynn suffered any other trauma to his back before developing back and leg symptoms in late 2016. As noted by Dr. Ailon, Mr. Flynn had no leg symptoms before the Accident.

[133] I find that the Accident probably caused either: (1) a disc herniation; or (2) a previously asymptomatic prolapsed disc to become symptomatic. I prefer the opinions of the two neurosurgeons on this point to those of radiologist, Dr. Connell. Dr. Connell's review was confined to radiology imaging and medical literature. He did not assess Mr. Flynn. Unlike Drs. Ailon and Sahjpaul, he does not surgically treat patients with disc herniation or radiculopathy.

[134] Notably, the Review authors confirm that radiology findings must be correlated with clinical findings. In Mr. Flynn's case, radiology findings were not incidental but were instead demonstrated on imaging studies obtained specifically to investigate his clinical symptoms.

[135] In summary, I find that the Accident caused Mr. Flynn to sustain:

- a) Neck and upper back soft tissue injuries that are now largely resolved;
- b) Low back soft tissue injuries that have improved but not fully resolved;
- c) A disc herniation and radiculopathy which have resulted in persistent low back pain and ongoing right leg symptoms; and
- d) Symptoms of anxiety and depression that fall short of a psychiatric diagnosis.

[136] Although pleaded, Mr. Flynn complained of no ongoing post-Accident headache pain at trial. There is no evidence from any qualified expert linking Mr. Flynn's hernia to the Accident. While Mr. Flynn offered his own views about this matter, he is not qualified to do so and I place no weight on them. I find that his hernia is a non-tortious intervening event.

### VIII. MITIGATION

[137] A plaintiff in a personal injury action has a duty to take reasonable steps to mitigate their loss. A defendant bears the burden of proving: (1) that the plaintiff acted unreasonably in not doing what the defendant asserts ought to have been done; and (2) the extent to which the plaintiff's loss would have been reduced had they acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Haug v. Funk*, 2023 BCCA 110 at para. 22 [*Haug*].

[138] Justice Voith (then of this Court) considered the plaintiff's alleged failure to mitigate in *Liu v. Bipinchandra*, 2016 BCSC 283 [*Liu*]. His comments are instructive:

[102] The legal question of whether a plaintiff would have been assisted by a procedure or course of treatment is to be determined on a subjective basis. Nevertheless, a defendant need not lead direct evidence that the particular plaintiff at issue would have benefited from a specific treatment. The outcomes of many treatments, or therapies, or procedures are uncertain. A plaintiff who acts unreasonably in the face of the medical advice they are given cannot take refuge in that uncertainty.

[103] Instead, it is open to a defendant to establish the second aspect or branch of the mitigation test indirectly. Thus, if most persons are assisted by a particular treatment the Court can, as a matter of inference, determine that it is probable that a particular plaintiff would have benefited from that treatment.

[139] In *Liu*, there was indirect evidence that two-thirds of persons with the same form of headache pain as the plaintiff benefit from Botox treatment. Accordingly, Voith J. found that this evidence established, as a matter of inference, that Ms. Liu would probably also benefit from such treatment: *Liu* at para. 104.

[140] As noted by Justice Crerar in *Mocharski v. Ly*, 2022 BCSC 996 at para. 100, citing *Kempton v. Struke Estate*, 2020 BCSC 2094 at para. 199 and *Qiao v. Buckley*, 2008 BCSC 1782 at para. 61, there need not be an overt statement in an expert

report that a given course of treatment would definitely assist a plaintiff; a treating physician's prescription or recommendation in itself indicates that it would have a reasonable chance of success.

[141] The defendants submit that Mr. Flynn has failed to mitigate his loss by not following the treatment recommendations of his treating physicians and the experts who assessed him in connection with this litigation, including, in particular, to:

- a) Pursue physiotherapy, as recommended by Dr. Crothers in December 2016; and
- b) Undergo an epidural steroid injection, as recommended by Dr. Crothers in April and July 2017.

[142] The defendants submit that Mr. Flynn's general damages are appropriately discounted by 25% as a result of his failure to mitigate. They also argue that any award for income loss ought to be discounted by 50% due to Mr. Flynn's failure to pursue timely treatment so as to maximize his ability to work, and his decision to quit his Glastech job (a position they describe as light duty work for an accommodating employer) in the absence of any evidence that his employment was going to be terminated.

#### **A. Failure to Pursue Timely Treatment**

[143] I accept that Mr. Flynn was consistently a poorly compliant, and occasionally a non-compliant, patient. He denied remembering the treatment recommendations that his treating physicians and the involved experts made after the Accident but he did not dispute that they did so. Based on the documents in evidence regarding Mr. Flynn's special damages claim, he pursued minimal treatment after the Accident. Those documents suggest that he attended no physiotherapy in 2016 or 2017 and that he did so on only two occasions in 2018. The same documents indicate that Mr. Flynn attended only three physiotherapy sessions in October 2021.

[144] Dr. Crothers admitted in cross-examination that his expectation when making treatment recommendations is that they might benefit his patients. Dr. Hage-Moussa testified that, once Mr. Flynn was scheduled for back surgery, his back was "beyond

the focus for physiotherapy”. I interpret this statement to mean that she was then of the view that physiotherapy would not improve Mr. Flynn’s condition.

[145] Dr. Ailon agreed that, ideally, patients follow the treatment recommendations they are given. However, he noted that treatment for radiculopathy is not always effective and that there is no evidence that passive treatments (including, physiotherapy, massage therapy, and chiropractic therapy) lead to a faster resolution of radiculopathy. The epidural steroid injection was of limited assistance.

[146] In Dr. Sahjpaul’s opinion, conservative measures were unlikely to change Mr. Flynn’s significant neurological deficits. Accordingly, it was irrelevant to him whether or not Mr. Flynn had pursued physiotherapy before his back surgery. While he admitted that post-operative physiotherapy can be a helpful adjunct to treatment, he does not consider it to be crucial; in his view, it would not have changed Mr. Flynn’s long-term outcome.

[147] Dr. Faraday prefers his patients to pursue early intervention following injury. He agreed that not doing so can delay recovery. However, Dr. Faraday also noted that disc herniations sometimes do not resolve no matter what patients do.

[148] I accept that earlier additional physiotherapy would likely have promoted the recovery of Mr. Flynn’s soft tissue injuries. However, the evidence also supports the conclusion that Mr. Flynn has enjoyed substantial improvement in his post-Accident neck and upper back symptoms. I conclude that these symptoms are essentially the same now as they were after the WCB Injury and before the Accident. Accordingly, I am not persuaded that earlier or additional physiotherapy would have altered this largely favourable outcome.

[149] I acknowledge that Mr. Flynn’s ongoing lower back pain may be partly due to an unresolved soft tissue injury that would have benefited from timely physiotherapy, as recommended by Dr. Crothers. I also accept the evidence of Drs. Ailon and Sahjpaul that passive treatments would not likely have changed the course or outcome of Mr. Flynn’s demonstrated neurological deficits. Mr. Flynn’s current

complaints predominantly relate to right leg symptoms and incisional pain in the area of his microdiscectomy.

[150] On the trial evidence, Mr. Flynn's financial circumstances were somewhat precarious after he quit his Glastech job; a decision (as discussed below) that I do not agree constitutes an unreasonable failure to mitigate. I conclude that Mr. Flynn's finances were likely a factor in his decision not to pursue physiotherapy. Financial circumstances are relevant to the overall reasonableness assessment of whether a plaintiff has failed to mitigate their losses: *Trites v. Penner*, 2010 BCSC 882 at paras. 209–210 [*Trites*]. Ultimately, I am not persuaded that Mr. Flynn's failure to pursue timely physiotherapy after the Accident was either unreasonable in the circumstances or materially affected his long-term outcome.

#### **B. Quitting the Glastech Position**

[151] On the uncontroverted evidence of Mr. Idington, the work environment at Glastech was not an accommodating one. The precise nature of Mr. Flynn's Glastech work duties is unclear; the information Mr. Flynn provided about that matter to the experts who assessed him was inconsistent with his trial evidence. Mr. Idington testified that Mr. Flynn was required to lift glass panes at work; this evidence contradicts the defendants' assertion that Mr. Flynn's Glastech work was a light strength position.

[152] If Mr. Flynn had accepted an apprenticeship with Glastech, I conclude that he would eventually have been required to work at heights and to perform physically demanding tasks, including lifting heavy panes of glass. Mr. Flynn neither enjoyed nor was well-suited to work as a glazier. He disliked heights, was uncomfortable operating a boom lift and, on the trial evidence I accept, was effectively driven out of the industry in the context of a hostile work environment. Accordingly, I am not persuaded that Mr. Flynn's decision to quit his Glastech job can reasonably be construed as a failure to mitigate.

## IX. GENERAL DAMAGES

[153] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties; fairness is measured against awards made in comparable cases. Such cases, while helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites* at para. 189.

[154] The Court of Appeal outlined the non-exhaustive factors to be considered when assessing non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 [*Stapley*]. They include the: plaintiff's age; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and plaintiff's stoicism, a factor which generally ought not to penalize a plaintiff.

[155] Mr. Flynn seeks general damages in the range of \$200,000 to \$225,000 and relies on the following authorities:

- a) *Hoang v. Dean*, 2021 BCSC 2211 (\$200,000);
- b) *Khashei v. Pirro*, 2020 BCSC 1048 (\$200,000);
- c) *Bhatti v. Jones*, 2020 BCSC 1935 (\$190,000);
- d) *Bynoe v. Chuah*, 2020 BCSC 2242 (\$190,000);
- e) *McCullagh v. Rozinbaum*, 2020 BCSC 429 (\$175,000); and
- f) *Culver v. Skrypnyk*, 2019 BCSC 807 (175,000).

[156] Assuming the Accident is found to have caused Mr. Flynn's disc herniation, the defendants assess general damages in the range of \$90,000 to \$110,000, less a discount of 25% for a failure to mitigate (i.e., \$67,500 to \$82,500), citing the following authorities:

- a) *Thomas v. Campbell*, 2023 BCSC 36 (\$90,000);
- b) *Anderson v. Steffen*, 2021 BCSC 2248 (\$130,000, including loss of housekeeping capacity);



- c) *De La Garza v. Carson*, 2018 BCSC 1858 (\$115,000);
- d) *Erwin v. Buhler*, 2017 BCSC 362 (\$40,000); and
- e) *Nijjar v. Hill*, 2016 BCSC 546 (\$76,500).

[157] I accept that Mr. Flynn was generally healthy, actively engaged in his daily life and, apart from the aches and pains periodically associated with his physically demanding work as a heavy-duty mechanic, physically functional before the Accident. There is no evidence that he had any radicular symptoms in his right leg.

[158] On Mr. Flynn's evidence, as corroborated by Ms. Sheidow, he now has a sedentary life and spends most of his time sitting on the couch, reading, and watching television. He is no longer involved in coaching his children's sports activities. He is no longer comfortable being away from home for extended periods of time, is a somewhat anxious driver, and no longer accompanies his children when they travel out of town on trips with their sports teams. He is more withdrawn, less socially engaged, and less involved in household chores.

[159] I accept that interventional pain management might improve Mr. Flynn's back and leg symptoms. However, the expert evidence supports the conclusion that his symptoms are now likely chronic and that his prognosis is probably guarded.

[160] Mr. Flynn is currently awaiting a hernia repair. While not yet scheduled, I accept the uncontroverted evidence of Dr. Hage-Moussa that Mr. Flynn has been cleared by a cardiologist for this surgery and that she is hopeful it will be booked soon. I conclude that Mr. Flynn's physical and emotional condition will probably improve once he has this surgery.

[161] Some of the cases on which Mr. Flynn relies involve plaintiffs who sustained substantially worse injuries than he did, including, for example, multiple psychiatric diagnoses resulting in cognitive impairment and, taken in isolation, a complete inability to work, multiple surgeries, multiple discrete disc injuries, disc extrusion (a more severe injury than disc herniation), and more significant personality changes.

[162] By contrast, the authorities the defendants cite generally involve plaintiffs who sustained substantially less serious injuries (including some who suffered soft tissue injury but no disc herniation, radiculopathy, or psychological difficulties), whose symptoms had mostly resolved by the date of trial and/or had a less significant impact on their ability to engage in activities, and whose prognoses were more favourable.

[163] While these cases are useful in establishing a range of damages, all have unique facts. Having regard to the *Stapley* factors, the trial evidence as a whole, Mr. Flynn's condition before and after the Accident, and the authorities cited, I assess non-pecuniary damages in the amount of \$135,000. In awarding damages in this amount, I have considered the real and substantial possibility that Mr. Flynn's pre-existing degenerative disc disease would have progressed, absent the Accident. I have also considered his loss of housekeeping capacity, as discussed below.

#### **X. LOSS OF HOUSEKEEPING CAPACITY**

[164] The principles that govern when a plaintiff may recover damages for loss of housekeeping capacity are canvassed in *Riley v. Ritsco*, 2018 BCCA 366 at para. 101 and *Kim v. Lin*, 2018 BCCA 77 at paras. 27–37 [*Kim*]. The Court of Appeal recently affirmed these principles in *Haug* at paras. 98–107 and *McKee v. Hicks*, 2023 BCCA 109 at para. 112 where the Court held:

To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[165] Depending on the facts, a loss of housekeeping capacity may be compensated by pecuniary or non-pecuniary damages: *Campbell v. Banman*, 2009 BCCA 484 at para. 13, citing *McTavish v. MacGillivray*, 2000 BCCA 164. In *Kim*, the Court of Appeal considered the valuation of a claim for loss of housekeeping capacity at para. 33:

Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[166] Mr. Flynn seeks a separate award for the loss of housekeeping capacity in the amount of \$75,000. The defendants deny he is entitled to such an award. Alternatively, they submit that any loss of housekeeping capacity is appropriately considered as part of a non-pecuniary damages award.

[167] Mr. Flynn admitted he told Dr. Faraday that he was able to manage housework independently. He testified at trial that he is not currently doing chores at home because of his hernia and his right leg symptoms. Ms. Sheidow agreed that Mr. Flynn has struggled more with housework since he sustained his hernia.

[168] Dr. Faraday opines that Mr. Flynn is unable to manage his yard work independently and will require ongoing assistance. Mr. Flynn agreed that his yard has been more of a mess since his hernia injury. While Mr. Flynn conceded that he was able to do some yard work after the Accident and before he sustained his hernia, he denied that he could spend the whole day outside working like he once did. On the evidence of Mr. Idington, Mr. Flynn had a neat yard with cut grass and a pool before the Accident. Ms. Sheidow and Mr. Flynn both said that they removed the pool after the Accident as Mr. Flynn could no longer maintain it. According to Mr. Flynn Sr., he recently did some repairs to the fence in his son's back yard.

[169] I conclude that Mr. Flynn's ability to do chores at home will likely improve substantially following his hernia repair. In my view, his loss of housekeeping capacity claim is best assessed as a loss of amenities. I have considered this loss in my assessment of non-pecuniary damages.

## XI. SPECIAL DAMAGES

[170] Claims for special damages are generally subject only to the standard of reasonableness. When a claimed expense has been incurred for treatment aimed at promoting a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness: *Redl v. Sellin*, 2013 BCSC 581 at para. 55.

[171] The parties reached no agreement on special damages. Mr. Flynn claims special damages in the amount of \$6,244.45, as set out below.

Date	Item	Cost
January 22, 2018 September 22, 2019	Privately funded MRIs of the Lumbar Spine	\$700.00 \$1,100.00
January 12, 2018 February 28, 2018 October 12–28, 2021 July 16, 2022 August 27, 2022	Physiotherapy	\$65.00 \$35.00 \$255.00 \$65.00 \$65.00
March 9, 2018 to December 12, 2019	Counselling	\$3,323.25
August 1, 2017 to October 16, 2019	Taxi Expenses	\$636.20

[172] While the defendants accept that Mr. Flynn incurred these costs, they do not agree that they were necessitated by the Accident.

**A. Privately-funded MRIs**

[173] In his report dated August 4, 2017, Dr. Sahjpaul recommended a repeat MRI of the lumbar spine to confirm the presence and degree of compression on the right S1 nerve root, given a worsening of Mr. Flynn's low back and right leg symptoms. Dr. Sahjpaul did not suggest that these investigations needed to be funded privately or obtained on an emergent or urgent basis. I award no special damages for the cost of obtaining privately-funded MRIs.

**B. Physiotherapy**

[174] Drs. Crothers and Hage-Moussa recommended that Mr. Flynn pursue physiotherapy after the Accident. I award this cost.

**C. Counselling**

[175] I accept that Mr. Flynn has experienced some driving anxiety, emotional distress, and marital discord as a result of the Accident, and that he increased his use of drugs and alcohol for a period of time thereafter. However, the evidence of Mr. Flynn and Ms. Sheidow also supports the conclusion that they encountered significant financial stress and corresponding marital discord after Mr. Flynn lost his job with Fremantle in April 2016, before the Accident. While Mr. Flynn pursued counselling after the Accident, it is unclear that he did so because of the Accident.

[176] Mr. Flynn testified that saw an unidentified counsellor after the Accident about anger management and his drug and alcohol use. No counselling records are in evidence and no counsellor testified at trial. The trial evidence supports the conclusion that Mr. Flynn may have had substance use issues before the Accident.

[177] Ultimately, it is unclear on the trial evidence whether or not the Accident necessitated the counselling Mr. Flynn received after the Accident. Accordingly, I make no award for these costs.

#### D. Taxi Expenses

[178] Mr. Flynn provided no explanation for why he incurred the taxi costs he now seeks to recover as special damages. I agree with defence counsel that, if these costs were incurred to attend independent medical examinations in this action, they can be considered as costs in this action. I award no special damages for taxi costs.

[179] In summary, I award special damages of \$485 for physiotherapy costs.

### XII. INCOME LOSS

#### A. Legal Framework

[180] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 [*Rowe*]; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The burden of proof regarding actual past events is a balance of probabilities. When courts are assessing past loss of income, they are really assessing lost earning capacity: *Rowe* at para. 30.

[181] An assessment of the loss of both past and future earning capacity involves a consideration of hypothetical events: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 [*Grewal*]. The plaintiff is not required to prove these hypothetical events on a balance of probabilities; a hypothetical possibility will be considered as long as it is a real and substantial possibility and not mere speculation: *Grewal* at para. 48.

[182] A claim for future loss of earning capacity requires the court to compare the plaintiff's likely future working life if the accident had not happened with the likely one after its occurrence, accounting for negative and positive contingencies: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32 [*Gregory*].

[183] Depending on the facts of the case, the loss may be quantified on either an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [*Perren*]. The earnings approach is typically used in cases where there is an identifiable loss of income: *Kringhaug v. Men*, 2022 BCCA 186 at para. 43. The

capital asset approach is typically used when this is not the case and the court makes an award for the loss of opportunity.

[184] The Court of Appeal recently clarified the law regarding the assessment of lost future earning capacity in a trilogy of cases: *Dorman v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345 [*Rab*]; *Lo v. Vos*, 2021 BCCA 421. In *Rab* at para. 47, Justice Grauer set out a three-step process for assessing future income loss:

... [A] three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dorman* at paras 93–95.

[185] The assessment of damages is a matter of judgment and not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. While assessing an award for future loss of income is not a purely mathematical exercise, the court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36–37; *Morgan v. Galbraith*, 2013 BCCA 305 at para. 54.

## **B. Lay Evidence**

### **1. Mr. Flynn**

[186] Mr. Flynn has no formal training as a mechanic and is not Red Seal certified. He confirmed that, in order to become a Red Seal mechanic, he would need to complete high school and pass the Red Seal examination. Unlike Mr. Flynn, Red Seal certified mechanics are qualified to inspect commercial trucks and trailers and to certify them as roadworthy. As an uncertified mechanic, Mr. Flynn cannot do safety inspections and must have another licensed mechanic inspect his work.

[187] Mr. Flynn likened himself to a machine, saying he often worked 12 to 14 hours a day before the Accident. He said that he no longer works as fast, is less able to focus, and now takes many breaks. On his uncorroborated evidence, Key West has no part-time mechanic jobs or light duty positions available to him. According to Mr. Flynn, he does not intend to return to his Key West job, or to any other kind of physical work, following his hernia repair. He denied knowing what he is going to do or what his future looks like. He is not optimistic that he can pursue retraining. Mr. Flynn conceded that he had not considered returning to school to become a Red Seal certified mechanic before the Accident.

[188] Mr. Flynn admitted in cross-examination that there have been significant changes in the way vehicles (including trucks and trailers) are manufactured since he obtained his practical skills as a heavy-duty mechanic. He agreed that his skills were acquired on old equipment and are now dated, that he has no experience with electric vehicles or any of the new technology, and that, going forward, mechanics will be expected to work on electric vehicles. Mr. Flynn did not think the changes in his industry would happen as quickly as they have. They concern him given his limited education, dated experience, and lack of a Red Seal certification. He agreed that most prospective employers now want Red Seal mechanics rather than apprentices. He conceded that he would struggle with computerized vehicles and that he would now be required to learn this new technology in order to become a Red Seal certified mechanic. He does not think WorkSafeBC will provide him with the kind of retraining necessary to help him find a different job.

## **2. Ms. Brady**

[189] The defendants called Ms. Brady. She has been employed with Fremantle since 2008. Ms. Brady completed Fremantle's payroll records and was aware of Mr. Flynn's hours of work. She handles Fremantle's finances but not its crew. She confirmed that Fremantle terminated Mr. Flynn in April 2016 but relied on information from others about why this occurred; she has no personal knowledge of what caused Mr. Flynn's absences from work.



[190] According to Ms. Brady, Mr. Flynn could now earn \$22–\$28/hour working for Fremantle as an uncertified mechanic; she said that Fremantle now pays its certified mechanics \$36/hour. She denied there is currently a high demand for mechanics at Fremantle. She admitted Fremantle has a few part-time employees who are in their 70s: one is a mechanic; the other employee delivers parts, does odd jobs, and earns \$20/hour. Ms. Brady confirmed that Fremantle offers no modified or light duties to its injured employees; they either remain off work until they recover or find another job.

### **3. Mr. Idington**

[191] Mr. Idington was a foreman at Glastech when Mr. Flynn worked there in late 2016 and early 2017. On his evidence, Mr. Flynn seemed less inclined to “go after the work” at Glastech after the Accident. He agreed that, if Mr. Flynn had remained at Glastech, he could have pursued a Red Seal apprenticeship program and ultimately earned \$45/hour. He admitted there is quite a bit of lifting in glazier work.

### **4. Mr. Chittick**

[192] Mr. Chittick has worked at Key West for about 20 years power-washing trucks and trailers. He has periodically observed Mr. Flynn limping, stretching his back, and occasionally needing help to lift or carry heavy items like tires and brake drums while working at Key West. It was his impression that Mr. Flynn seemed “pretty good” in the mornings but typically slowed down by the end of the day. He admitted there is a good team environment at Key West and that employees help each other out as necessary. He agreed that brake drums and tires are very heavy and difficult for one person to lift. He conceded that he observed Mr. Flynn at Key West only briefly, about once every half hour, and that they were not friends outside work.

## **C. Expert Evidence**

### **1. Dr. Ailon, Neurosurgeon**

[193] In his August 2017 report, Dr. Ailon opined that it is unlikely Mr. Flynn will tolerate his symptoms and the associated aggravation with manual labour jobs until

he has definitive treatment. Notably, Dr. Ailon wrote his report before Mr. Flynn had his August 2021 microdiscectomy.

## **2. Dr. Sahjpaul, Neurosurgeon**

[194] In Dr. Sahjpaul's opinion, Mr. Flynn now has chronic low back pain that will probably continue without meaningful improvement. He stated in his August 2022 report that Mr. Flynn's job as a heavy-duty mechanic is contributing to his worsening symptoms of pain and that, ideally, he would not be doing this kind of manual work.

[195] According to Dr. Sahjpaul, Mr. Flynn faces a 5–8% risk over ten years of a recurrent herniation that could manifest in a worsening of sciatic symptoms or low back pain and might require further surgery. In his view, Mr. Flynn is a candidate for assessment in a chronic pain management program. While he agreed that Mr. Flynn might benefit from interventional pain procedures, he said that the corresponding benefit is usually only partial and temporary.

## **3. Dr. Faraday, GP**

[196] Although Mr. Flynn has been able to find and maintain full-time work as a heavy-duty mechanic since the Accident, Dr. Faraday opines that this type of work is not sustainable for him in the long-term due to his Accident-related injuries. In his view, Mr. Flynn would be best served by finding a lighter duty position where he can avoid heavy lifting and carrying, frequent and sustained bending, working in awkward positions, and prolonged sitting.

[197] Dr. Faraday's February 28, 2023 report was put to Mr. Flynn in cross-examination; Mr. Flynn admitted he might have told Dr. Faraday that he would like to work on smaller vehicles (i.e. motorcycles) and that, although he has limited experience with this kind of work, he would be mechanically inclined for it.

## **4. Dr. van den Berg, Vocational Consultant**

[198] The plaintiff called vocational rehabilitation consultant, Dr. Pieter van den Berg. Dr. van den Berg is a registered psychologist and senior vocational evaluator with Vocational Solutions in Vancouver. He conducted a vocational assessment of

Mr. Flynn on August 21, 2017, and prepared a report dated September 26, 2017. He was qualified as an expert in the area of registered clinical psychology, able to opine regarding vocational assessment and rehabilitation. He agreed that his assessments represent a snapshot in time, in this case, more than six years ago.

[199] Based on Mr. Flynn's self-report, Dr. van den Berg understood that he had completed grade 10; in fact, Mr. Flynn completed grade 9 and only part of grade 10. Dr. van den Berg noted that Mr. Flynn had completed some short vocational training related to the use of a forklift, hydraulic brakes, wheel bearing, and boom and scissor lift operation. Mr. Flynn reported that he was receptive to further education and that he had considered a career as a parts person.

[200] Based on Mr. Flynn's vocational test results, Dr. van den Berg opined as follows:

- a) The Accident resulted in a loss of vocational opportunity and a reduction in Mr. Flynn's earning capacity;
- b) Absent significant improvement in his medical symptoms, Mr. Flynn is likely to be relegated to part-time, supported employment with accommodations and to remain at high risk for performance decompensation and vocational instability;
- c) Mr. Flynn's vocational prognosis is dependant on his response to treatment for his low back and right leg pain;
- d) As complete recovery of his low back pain is not expected, Mr. Flynn will likely be left with a partial vocational disability;
- e) To increase his chances for full-time gainful employment, Mr. Flynn will likely require retraining for a less physically demanding occupation;
- f) Based on his educational history, vocational training, and the results from Dr. van den Berg's cognitive testing, Mr. Flynn has the capacity for applied vocational or hands-on, but not lengthy classroom, training;

- g) A heavy-duty mechanic job is no longer a viable and sustainable vocational option for Mr. Flynn;
- h) It is unlikely that Mr. Flynn would be able to perform the job duties of a glazier in a reliable manner up to the age of retirement; and
- i) Considering Mr. Flynn's limited transferrable skills outside heavy-duty mechanics and glazier work, he would likely benefit from retraining to increase his range of vocational options and his vocational stability.

[201] Notably, Dr. van den Berg offered these opinions before Mr. Flynn had his back surgery in August 2021; he did not reassess Mr. Flynn thereafter. Dr. van den Berg testified that individuals with chronic pain are at increased risk of job loss and periods of unemployment and vocational instability.

[202] Mr. Flynn expressed an interest in working as a parts person (\$41,712/year), automotive estimator (\$52,140/year), or service advisor (\$39,626/year). In Dr. van den Berg's opinion, those options would be available to Mr. Flynn with significant improvement in his medical condition. However, in his view, Mr. Flynn would likely still require a slower-paced work environment that allowed him to take micro-breaks. He would require an ergonomic chair to perform clerical/data entry work related to these positions. When he wrote his report, the Automotive Training Centre offered a 17-week combined Service Advisor and Parts Specialist program at a cost of \$9,783 and a 13-week Collision Estimator program at a cost of \$6,688, including tax and supplies. After comparing the incomes for these positions to that of a heavy-duty mechanic, Dr. van den Berg concluded that Mr. Flynn had sustained a 30% reduction in his earning capacity.

[203] Dr. van den Berg agreed that a parts person position would be a natural fit for Mr. Flynn and a natural extension of his interests. In his opinion, Mr. Flynn has the educational capacity to complete the short vocational training required to do this work. He agreed that Mr. Flynn is interested in the area, that this kind of work would fit his profile very well, and that Mr. Flynn would do best with hands-on learning.

## D. Analysis and Conclusions

### 1. Past Loss

[204] Plaintiff's counsel estimates Mr. Flynn's pre-trial income loss based on two hypothetical without-Accident scenarios: (1) he would have returned to Alberta and found full-time work as a heavy-duty mechanic, earning \$38/hour (\$79,040/year); or (2) he would have remained in BC and found full-time work in early 2017 doing the same kind of work but instead earning \$27/hour (\$56,160/year). Those assumptions produce pre-tax without-Accident estimates for past income in the range of \$365,040–\$474,240. The average of these figures produces a hypothetical without-Accident estimate of gross past income in the amount of \$419,640.

[205] After deducting Mr. Flynn's actual income from 2017 to 2022 in the amount of \$250,062, as reported to the CRA, this estimate of past income loss is reduced to \$169,578. Plaintiff's counsel reduces this figure by a further 15% for statutory deductions, resulting in an estimated net past loss of \$144,142. Mr. Flynn seeks to recover this amount. Plaintiff's counsel submits that this estimate of without-Accident earnings is conservative because it does not factor in any overtime income or increase in Mr. Flynn's hourly rate between 2017 and the date of trial.

[206] The defendants' primary position is that Mr. Flynn is entitled to no award for past income loss. Alternatively, they suggest a nominal award in the amount of \$10,000–\$15,000. In the third alternative, they submit that, if any award for past loss of earning capacity is made, an amount of \$37,980.20, based on one year of Mr. Flynn's income while working as a glazier, before discounting for tax, is appropriate. The defendants submit that this figure must be further discounted by 50% to reflect Mr. Flynn's alleged failure to mitigate by:

- a) Not pursuing timely treatment to maximize his ability to work; and
- b) Quitting his Glastech job in the absence of any evidence that his employment was going to be terminated.

[207] After applying all of these proposed discounts, the defendants' third alternative results in an estimated net past loss in the amount of \$16,141.58 (assuming statutory deductions of 15%).

[208] I have found that the evidence does not support a finding that Mr. Flynn failed to mitigate his damages. Accordingly, I have not discounted past income loss for this reason.

[209] I have also found that the evidence does not support the conclusion that the Accident either caused or materially contributed to Mr. Flynn's hernia. Accordingly, I have assessed Mr. Flynn's past income loss up to September 30, 2022, the date he sustained his hernia (i.e., from mid-January 2017 to September 30, 2022 or about 68.5 months). After September 30, 2022, I conclude that Mr. Flynn was in the same position he would have been absent the Accident and before trial: namely, off work and in receipt of WCB benefits.

[210] Mr. Flynn reported income to the CRA before trial as set out below.

<b>Tax Year</b>	<b>Income Source</b>	<b>Total Income</b>
2014	T4 Earnings	\$71,739
2015	T4 Earnings: \$40,508 WCB Benefits: \$12,977	\$53,485
2016 (Year of Accident)	T4 Earnings: \$22,097 EI Benefits: \$9,738 WCB Benefits: \$3,327	\$35,162
2017	T4 Earnings	\$974
2018	T4 Earnings	\$1
2019	T4 Earnings	\$7,689
2020	T4 Earnings: \$70,594 Other Income: \$8,500	\$79,094

2021	T4 Earnings: \$63,206.90 EI Benefits: \$7,500 Other Income: \$3,500	\$74,206.90
2022	T4 Earnings: \$69,195.63 EI Benefits: \$5,782 Other Income: \$1,000 WCB Benefits: \$12,120.41	\$88,098.04

[211] Plaintiff's counsel submits that, absent the Accident, Mr. Flynn would likely have continued working at Glastech as an apprentice glazier earning \$20/hour until about January 2017, when he would likely have returned to full-time work as a heavy-duty mechanic to the date of trial (a period of roughly 6.5 years).

[212] In my view, it is not appropriate to assess past income loss based on Mr. Flynn's Glastech earnings for the same reasons I have found that his decision to quit this job did not constitute a failure to mitigate. He neither enjoyed nor was well-suited to this work.

[213] After quitting his Glastech job, Mr. Flynn did some painting work for one of his neighbours. The precise amount of income that he earned from this work is unclear; it was neither reported to the CRA nor corroborated with any documentation. According to Ms. Sheidow, who prepared Mr. Flynn's income tax returns, he earned a total of about \$5,000 from this work over about six months. I accept this as the best available evidence; it is consistent with the evidence of both Mr. Flynn and Ms. Sheidow that they were then struggling financially.

[214] I acknowledge that Mr. Flynn and Ms. Sheidow enjoyed living in Alberta and were reluctant to leave in 2015. On the uncontroverted trial evidence of Mr. Flynn, Ms. Sheidow, and Ms. Brady, Mr. Flynn did not have the option to remain in Alberta as an employee of Fremantle. In my view, if Mr. Flynn had then had other work connections or viable employment opportunities in Alberta, he would likely have pursued them when he was in Alberta, before uprooting his family and returning to BC. I find it improbable that he would have returned to Alberta after he had just left, with all the corresponding disruption to his family. In my view, it would be unduly

speculative to assess past income loss on the assumption that Mr. Flynn would have returned to Alberta to find work after 2015 and before trial.

[215] The full-time earnings of a heavy-duty mechanic at the rate of \$27/hour from January 2017 until September 30, 2022 (\$4,680/month x 69 months) total \$322,920. Mr. Flynn's actual earnings pre-trial earnings during this period, as reported to the CRA (excluding his WCB benefits of \$12,120.41 received after September 30, 2022, and including an estimated \$5,000 of painting income in 2017) total \$229,660.53. The difference between these figures is \$93,259.47. I have not deducted Mr. Flynn's pre-trial EI benefits from this amount: *Antignani v. Heaney*, 2022 BCSC 228 at paras. 99–101.

[216] In my view, this figure must be discounted to reflect negative contingencies. I conclude on the trial evidence that, absent the Accident, there was a significant real and substantial possibility that Mr. Flynn would have encountered difficulty finding and maintaining work. He had been terminated from his last position, had a grade 9 education, no formal training as a mechanic, no Red Seal certification, and a somewhat spotty work record. Additionally, there was a real and substantial possibility that his pre-existing degenerative disc disease would have impaired his ability to engage in physically demanding work, absent the Accident. I accept Dr. van den Berg's evidence that trades workers often find jobs based on connections; when Mr. Flynn returned to BC in 2015, he would have been out of this loop for reasons unrelated to the Accident.

[217] Recognizing that this is an assessment and not a mathematical calculation, I award \$60,000 for net past income loss. This figure incorporates a deduction of about 20% for the above-noted negative contingencies, plus a 15% discount for statutory deductions (in accordance with the approach adopted by both parties). In my view, this award is reasonable and fair to all parties.

## 2. Future Loss

[218] The parties provided dramatically different estimates of future income loss.



[219] Mr. Flynn seeks damages for the future loss of earning capacity in the range of \$1,749,855.74 to \$1,895,995.92. This estimate is based on the present value of full-time earnings as a heavy-duty mechanic at the hourly rate of \$42 to age 65, and part-time work of 20 hours per week thereafter to age 70 (at the same hourly rate). It assumes that Mr. Flynn has no residual earning capacity. Alternatively, plaintiff's counsel estimates this loss in the range of \$1,516,796.73 to \$1,706,396.32, representing an 80–90% loss of capacity to age 70.

[220] The defendants submit that Mr. Flynn is currently off work because of his hernia. They deny there is any evidence that he will ever be able to return to work after his hernia repair. Accordingly, their primary position is that Mr. Flynn is entitled to no award for the future loss of earning capacity.

[221] Alternatively, the defendants submit that, if Mr. Flynn recovers from his hernia surgery, he retains his skills as a mechanic and might be able to resume this kind of work. They also suggest that he might be able to retrain, possibly with WorkSafeBC assistance, and find work in another field. They rely on Dr. Faraday's evidence that WorkSafeBC assists injured workers in finding suitable employment, as necessary.

[222] The defendants' third alternative position is that an award in the amount of \$55,000, representing a figure in the "intermediate range" of up to two years' work (based on the combined average income of a glazier and a mechanic), discounted by 50% for Mr. Flynn's alleged failure to mitigate, would be appropriate (i.e., a total net loss of \$27,500).

[223] The defendants deny that Mr. Flynn has been rendered less marketable as a result of the Accident. I disagree. On the evidence of Drs. Ailon, Sahjpaal, Faraday, and van den Berg, he is no longer well-suited to heavy strength work as a mechanic. In my view, the combined effect of Mr. Flynn's age, work history, grade 9 education, lack of Red Seal certification, and limited aptitude for returning to school, magnify the competitive disadvantages that he now faces as a result of his inability to do physically demanding labour on a sustainable, long-term basis. Mr. Flynn's past

work history has involved manual labour jobs exclusively. I conclude that the first and second steps in *Rab* are met here. The challenge is to value the loss.

[224] The defendants note that Mr. Flynn has taken no steps to retrain since the Accident. Notably, he has been off work for about ten months awaiting hernia surgery.

[225] It appears that Mr. Flynn has found a reasonably accommodating employer in Key West. On his own evidence, he is able to avoid the heaviest commercial truck and trailer mechanic jobs in his current position. He maintains new vehicles only and described his work as lighter and more predictable than his past jobs at Fremantle and Diesel Tech.

[226] I acknowledge that Mr. Flynn has worked as a mechanic since the Accident, before his hernia injury. However, I am not persuaded that heavy-strength physical work is sustainable for him on a long-term basis. This view is reinforced by Mr. Flynn's recent decision to switch to four 10-hour work days in order to have the benefit of one additional day off during the week to manage his ongoing back pain.

[227] However, I do not agree that Mr. Flynn has no residual earning capacity or that he has suffered an 80–90% loss of capacity to work. He was working full-time as a mechanic until he sustained his hernia injury in September 2022. In my view, Mr. Flynn has substantially overvalued his loss.

[228] I also do not agree that, absent the Accident, Mr. Flynn would have enjoyed continuous full-time work as a heavy-duty mechanic to his age 65, and part-time mechanic work thereafter to his age 70. Mr. Flynn's estimated loss of future earning capacity overlooks the multiple vocational challenges that placed him at a significant competitive disadvantage before the Accident. I conclude that his grade 9 education, lack of formal apprenticeship training, and status as an uncertified mechanic, with no Red Seal qualifications, would have made it difficult for Mr. Flynn to find and maintain work as a heavy-duty mechanic until his retirement, absent the Accident.

[229] There are notable unexplained gaps in Mr. Flynn’s work history. On his own evidence, he was terminated at least twice, including once for attending work while inebriated. Other poorly explained work incidents were referenced at trial, including Mr. Flynn’s uncorroborated account of his former boss at Diesel Tech throwing a hammer at him and telling him to “get out” before Mr. Flynn quit. By Mr. Flynn’s own admission, his resume is “not the greatest”.

[230] On the uncontroverted trial evidence, Mr. Flynn has weak math skills, is unfamiliar with computers, and is resistant to returning to school to obtain his high school diploma. He conceded that technology in his industry is changing rapidly, that he has not kept pace with any of these changes, and that he would struggle to learn the new technology required to work on computerized and electric vehicles. He agreed that he did not think these industry changes would occur as quickly as they have. None of these significant competitive disadvantages is related to the Accident.

[231] In the result, I conclude there is a significant real and substantial possibility that Mr. Flynn would have encountered difficulties finding and maintaining work as a heavy-duty mechanic, absent the Accident. In my view, given his dated skills and rapidly changing technology within his industry, he also faced a real and substantial possibility of needing to retrain in the relatively near future if he wished to remain competitively employed in a job that paid more than minimum wage.

[232] On the uncontroverted expert evidence, Mr. Flynn had a pre-Accident degenerative spine condition. Dr. Connell agreed that most degenerative disc disease becomes symptomatic over time, absent trauma. In my view, Mr. Flynn faced a real and substantial possibility of disc herniation, or of a pre-existing asymptomatic disc protrusion becoming symptomatic and impairing his ability to work in a physically demanding job, absent the Accident. He was engaged in the kind of manual labour which, on the evidence of Dr. Sahjpaul, typically aggravates spinal conditions.

[233] I conclude that Mr. Flynn's without-Accident future lifetime earnings must be substantially discounted to reflect the cumulative impact of these significant negative contingencies.

[234] I accept that, absent the Accident, Mr. Flynn would almost certainly have resumed working as a heavy-duty mechanic, if he could have found and kept this kind of job. Accordingly, I begin my assessment of his without-Accident lifetime earnings by considering the present value of the annual full-time income of a heavy-duty mechanic earning \$42/hour (Mr. Flynn's current hourly rate) to age 65, before applying contingencies. The present value of lifetime earnings in the annual amount of \$87,360 (based on an hourly rate of \$42 and full-time work of 40 hours per week for 52 weeks per year) commencing one year from trial, is \$1,579,988. I assume that Mr. Flynn will undergo and recover from his hernia surgery in the next six months, during which time his WCB benefits will continue. Accordingly, I have added \$43,680 ( $\$87,360/2$ ) to account for six months of income in 2024, thereby increasing estimated without-Accident income to \$1,623,668. I conclude that this figure must be discounted in the range of 25–35% to reflect the significant workplace challenges Mr. Flynn would have faced, absent the Accident. Doing so reduces estimated without-Accident earnings to the range of \$1,055,384 - \$1,217,751.

[235] Mr. Flynn described work as his "happy place". I accept that he enjoyed his job as a mechanic, that it gave him a sense of purpose and self-worth, and that he liked being able to provide for his family. In my view, it would be beneficial for him to return to some kind of work. I conclude that he is capable of pursuing a short, practical, "hands-on" retraining program and that doing so will permit him to find work to which he is suited and can perform sustainably.

[236] I accept Dr. van den Berg's evidence that Mr. Flynn is capable of completing the practical retraining programs he identified in his report and thereafter earning an income commensurate with any of those positions. Adjusting the average income for the positions Dr. van den Berg references in his report slightly to account for the passage of time, I conclude that Mr. Flynn could likely earn an annual income of

about \$50,000, after completing the kind of practical retraining that Dr. van den Berg describes. The present value of \$50,000/year, commencing in July 2024 (on the assumption that Mr. Flynn will undergo a hernia repair and retrain within one year from the date of trial) to his age 65, is approximately \$900,000.

[237] The difference between without-Accident earnings (discounted by 25-35% to reflect Mr. Flynn's pre-existing competitive disadvantages) and estimated with-Accident earnings (of approximately \$900,000) results in an estimated loss in the range of about \$155,000 - \$320,000.

[238] Mr. Flynn was working as a full-time mechanic after the Accident, until he sustained his hernia. Notwithstanding his trial evidence to the contrary, I conclude there is a real and substantial possibility that he might return to this work after his hernia repair. On the trial evidence, Key West is a reasonably accommodating employer and provides Mr. Flynn with predictable work and lighter duties than any of his past mechanic jobs. If Mr. Flynn returns to work as a full-time mechanic, his with-Accident earnings will not differ significantly from his without-Accident income. However, in my view, this work is not sustainable for Mr. Flynn in the long-term and he risks further injury by returning to it. My task is to assess lost earning capacity.

[239] I have considered additional contingencies. There is a real and substantial possibility that Mr. Flynn might not have his hernia repair surgery this year, in which case, on his own evidence, his WCB benefits will continue. In my view, there is a real and substantial possibility that Mr. Flynn will transition to part-time or more formally accommodated heavy-duty mechanic work at some point in the future. Assuming 20 hours of work per week at a rate of \$42/hour, he would earn an annual income that is roughly commensurate with the average earnings for the jobs that Dr. van den Berg identified in his report as being suitable for Mr. Flynn (approximately \$44,000/year based on 2017 incomes).

[240] I do not accept the defendants' submission that there is no evidence Mr. Flynn will ever be able to return to work after his hernia repair and, accordingly, that he has established no future loss. In my view, all the trial evidence supports the

opposite conclusion: namely, that Mr. Flynn's hernia can and soon will be repaired. None of the trial evidence suggests that Mr. Flynn's hernia will end his working career. If the defendants make this assertion, they bear the onus of proving it on a balance of probabilities: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 321, 1990 CanLII 70. They have not met this burden.

[241] I have not assessed future income loss to age 70. I appreciate that Mr. Flynn Sr. is still working as a part-time long-haul trucker at the age of 79. However, I am not persuaded that Mr. Flynn's situation is analogous to that of his father. There is no evidence that Mr. Flynn Sr. has a degenerative spinal condition. He is not working in a physically demanding job. Rather, he periodically drives trucks between Vancouver, Merritt, and Princeton, on a flexible schedule of his choice. While I accept that, absent the Accident, there is a real and substantial possibility that Mr. Flynn might have worked part-time to age 70, I conclude there is an equally real and substantial possibility that he would not have done so.

[242] Taking all of these factors into account, together with the real and substantial possibility that Mr. Flynn's pre-existing disc disease is likely to progress and would have done so absent the Accident, and recognizing that this is an assessment and not a precise mathematical calculation, I award \$250,000 for the loss of future earning capacity. In my view, this award is reasonable and fair to all parties.

### **XIII. FUTURE CARE COSTS**

#### **A. Legal Framework**

[243] Justice Kent conveniently summarized the governing principles regarding an assessment of future care costs in *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244:

The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;

- the focus is on the injuries of the innocent party [...] Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of “medical justification” is not the same or as narrow as “medically necessary”;
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, *et cetera*) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[244] An assessment of future care costs is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. The court must identify the specific amount awarded for each item claimed: *Sunner v. Rana*, 2015 BCCA 406 at para. 50. The cost of each particular item is an important consideration in assessing whether it meets the test of reasonableness: *Elzinga v. Sharpe*, 2019 BCSC 314 at para. 210. The plaintiff must prove there is a real and substantial possibility that the cost will be incurred: *Owen v. Folster*, 2018 BCSC 143 at para. 314. A court may decline to award future care costs for items or services that a plaintiff is unlikely to use: *Liu* at para. 163.

## B. Analysis and Conclusions

[245] Mr. Flynn seeks future care costs of \$70,620.59 to age 70 as set out below.

Item or Service	Annual Cost	Present Value
Massage Therapy	\$380	\$8,300.87

Physiotherapy	\$720	\$15,727.68
Kinesiology Referral	\$960 (One-time cost)	\$960
TENS Machine	\$94.99/5	\$414.83
Venlafaxine	\$270	\$5,897.99
Tylenol and Advil	\$240	\$5,242.56
Cannabis	\$7,800/5	\$34,076.66

[246] The defendants deny that Mr. Flynn has proven these costs. Alternatively, they submit that a nominal amount in the amount of \$2,500 adequately compensates him for his future care costs.

[247] Plaintiff's counsel proposes that, if the amount of any claimed costs for future care is unclear, it is open to me to make an award based on entitlement and to leave it to the parties to reach agreement or to speak to quantum at a later date, as necessary. Given the manner in which this trial proceeded, I conclude that the parties are unlikely to reach agreement on any disputed matters. I have assessed future care costs based on the trial evidence.

### 1. Physiotherapy

[248] Dr. Faraday opines that Mr. Flynn will probably experience acute exacerbations of his pain symptoms in the future; he estimates that this will likely occur about once annually on average. He suggests that Mr. Flynn will likely require increased pain medication and his choice of passive paramedical care during these periods (i.e., four visits over two weeks).

[249] Mr. Flynn testified that, apart from physiotherapy and marijuana, there is nothing else he would like to try to manage his current symptoms. Mr. Flynn



engaged minimally in physiotherapy after the Accident, despite Dr. Crothers' recommendations that he do so. In his report dated August 8, 2017, Dr. Ailon recommended a six to eight-week course of physiotherapy, including range of motion and core strengthening exercises, as tolerated. Mr. Flynn did not follow this recommendation. Based on the documents in evidence, Mr. Flynn first attended physiotherapy briefly in January 2018, more than one year after Dr. Crothers first advised him to do so in December 2016.

[250] Mr. Flynn testified that he is now prepared to attend physiotherapy. On his own evidence, his neck and shoulder complaints have largely resolved and his low back pain is predominantly in the area of his surgical incision. It is unclear on the evidence to what extent physiotherapy would alleviate this kind of pain, if at all.

[251] Ultimately, I accept Dr. Faraday's evidence that Mr. Flynn might periodically encounter acute pain flares in the future and that they might be alleviated by short-term physiotherapy. I award a contingency fund of \$5,000 to allow Mr. Flynn to access this kind of therapy, as necessary.

## **2. Massage Therapy**

[252] There is no evidence that Mr. Flynn has engaged in any massage therapy since the Accident almost seven years ago. I have found that his soft tissue injuries are now largely resolved. I am not persuaded that Mr. Flynn would derive any significant benefit from massage therapy now, or that he would attend for it, if funding were provided. I have awarded a contingency fund to allow Mr. Flynn to access his preferred form of passive therapy to manage pain flares as necessary, in accordance with Dr. Faraday's recommendation. I am not persuaded on the evidence that Mr. Flynn requires physiotherapy and massage therapy, or that he would attend both. I make no separate award for the cost of massage therapy.

## **3. Kinesiology Referral**

[253] Dr. Faraday notes that Mr. Flynn has not been involved in an active rehabilitation program since the Accident. He recommends 12 sessions of

supervised exercise with a kinesiologist to help Mr. Flynn develop a personalised exercise program and to reinforce the concept of “hurt versus harm”.

[254] On Ms. Sheidow’s evidence, Mr. Flynn is currently “glued” to the couch. Mr. Idington commented on Mr. Flynn’s weight loss since the Accident and I accept that he is now somewhat deconditioned. While I conclude that Mr. Flynn’s current sedentary lifestyle is due, at least in part, to his unrepaired hernia, I find that the Accident has materially contributed to his inactivity and deconditioning. In my view, Mr. Flynn could benefit from the assistance of a kinesiologist to help him become more active, after his hernia repair. I award this one-time cost in the amount of \$960.

#### **4. TENS Machine**

[255] Dr. Faraday suggested in his report dated February 28, 2023 that a TENS machine would be one option for Mr. Flynn to self-manage his symptoms. He notes that TENS machines are typically used in physiotherapy and chiropractic clinics and that they provide electrical stimulation of muscles to control pain symptoms. He suggests that a TENS machine would require replacement every five years.

[256] Mr. Flynn did not say that he would use a TENS machine if one was provided to him. Based on his minimal participation in physiotherapy after the Accident, I conclude that he would be unlikely do so. I have provided funding for future physiotherapy, as necessary. I do not award this cost.

#### **5. Venlafaxine**

[257] Mr. Flynn testified that his anxiety is improved on Venlafaxine. Although Dr. Faraday suggested that Mr. Flynn will likely need to take this medication indefinitely, he provided no information about its cost.

[258] While I accept that Mr. Flynn has derived some benefit from Venlafaxine for his anxiety, the evidence does not permit me to assess this cost. Accordingly, I make no award for the future cost of this medication.

## 6. Advil and Tylenol

[259] According to Mr. Flynn, none of the medications he took after the Accident, including Advil and Tylenol, alleviated his pain. He said that he tries to avoid taking Advil and Tylenol and that he does so very rarely because it upsets his stomach and is not that effective. I make no award for this cost.

## 7. Cannabis

[260] Mr. Flynn currently smokes marijuana; on his evidence, it relaxes him, makes him feel more comfortable, and alleviates his symptoms more than Advil or Tylenol. He estimated that he currently spends about \$150 per week on marijuana.

[261] Mr. Flynn admitted he told Dr. Faraday he had been smoking five joints of marijuana per day for pain management and relaxation since he has been off work with his inguinal hernia. He agreed that he used to smoke one marijuana joint when he was working, at the end of his work day. According to Mr. Flynn, he now smokes marijuana for his anxiety and pain, saying it helps him to relax. He conceded that he is currently attempting to reduce his consumption of marijuana.

[262] No involved treating physician or medical expert supported Mr. Flynn's lifetime use of cannabis for the management of his Accident-related symptoms. On Mr. Flynn's own evidence, he was using marijuana recreationally before the Accident and is trying to reduce his consumption. There is no evidence that any physician involved in Mr. Flynn's care has prescribed medical marijuana for the management of his symptoms. I make no award for this cost.

[263] In summary, I award total future care costs in the amount of \$5,960.

## XIV. DISPOSITION

[264] I award damages as follows:

- a) General Damages (including lost housekeeping capacity) - \$135,000
- b) Special Damages - \$485

- c) Past Income Loss - \$60,000
  - d) Future Income Loss - \$250,000
  - e) Future Care Costs - \$5,960
- TOTAL - \$451,445

[265] Absent information of which I am unaware that might alter this view, Mr. Flynn is entitled to costs on the ordinary scale.

“Douglas J.”