IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Heuring v. Smith,*
2018 BCSC 233

Date: 20180219
Docket: M149695
Registry: New Westminster

Between:

Douglas Heuring

Plaintiff

And:

Erik Smith

Defendant

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

Counsel for the Plaintiff:	J. Dasanjh R. Pici
Counsel for the Defendant:	T. Pettit
Place and Dates of Trial:	New Westminster, B.C. June 12-16, 2017 June 19-20, 2017
Place and Date of Judgment:	Vancouver, B.C. February 19, 2018

I. INTRODUCTION

[1] The plaintiff, Douglas Heuring, advances a claim arising from injuries sustained as a result of a motor vehicle accident which occurred while he was cycling across the intersection of 13th Street and Grand Boulevard ("Intersection") in North Vancouver on October 11, 2011 ("Accident"). The defendant, Erik Smith, disputes any liability for the accident on the basis that the requisite standard of care was not breached. He submits that Mr. Heuring disobeyed a stop sign, illegally rode his bicycle across the Intersection and veered into the crosswalk where the accident occurred. In the alternative, the defendant submits that Mr. Heuring should be apportioned 75% fault for the accident. Mr. Heuring concedes there ought to be an apportionment of liability, but submits that liability should be apportioned in the range of 5-15% against him. Mr. Heuring advances a claim for non-pecuniary damages, past income loss, reimbursement for lost sick benefits, loss of income earning capacity (past and future), cost of future care, and special damages. The merits and quantum of these claims are disputed by the defendant including the issue of causation in regard to the extent and duration of Mr. Heuring's injuries.

II. FACTS

[2] Mr. Heuring is currently 65 years old and is retired. He is married with two adult children. He was 59 on the date of the Accident. Prior to his retirement and at the time of the Accident, he was a plumber welder with Vancouver Coastal Health ("VCH"), working full-time at Lions Gate Hospital ("Hospital'). He also had a second source of income working as a plumber and steamfitter for union jobs in Alberta and Northern British Columbia; specifically, he worked with two Locals of the United Association of Plumbers and Pipefitters: Local 170 in British Columbia and Local 488 in Alberta. Mr. Heuring would find union jobs on a dispatch board and use banked time from his work at the Hospital to attend the out of town union jobs. Mr. Heuring did not have a problem obtaining time off from the Hospital to pursue his union work. He enjoys an active life style, particularly with his family, as his health permits.

A. The Accident

[3] The Accident occurred between approximately 3:30 and 4:00 pm when Mr. Heuring was cycling home from work. Immediately prior to the Accident, Mr. Heuring was travelling east, along 13th Street; the defendant was travelling north along Grand Boulevard. Mr. Heuring stopped about 10 feet before the stop sign and then cycled past the stop sign into the Intersection. Before entering the Intersection, Mr. Heuring saw the defendant's vehicle travelling north on Grand Boulevard and he noticed that it was slowing down; he assumed it was going to stop. He sensed a vehicle was traveling behind him, wanted to ensure he was out of that vehicle's way, but did not disembark from his bicycle and instead chose to ride through the marked crosswalk. He testified he was almost half way across the north bound side of the Intersection when the impact occurred. He recalls he was not cycling very fast before the Accident.

[4] Mr. Heuring testified that: the defendant "drove over me"; he fell onto his left side and the defendant's vehicle "hit my right leg" and the "front fork" of his bicycle. Mr. Heuring described the defendant's vehicle as "not the biggest truck in the world". He testified that he grabbed the bumper and tried to "flatten" out. He heard someone say: "stop, stop, stop". He also recalled hearing cracking noises and that he felt his body being "squished". Someone came over to him, looked under the vehicle and asked him, "are you ok?" Mr. Heuring testified that the defendant then backed his vehicle "off of me". He also recalled seeing Mr. Smith on his cell phone immediately after the Accident.

[5] Mr. Heuring testified that he tried to ride his bicycle home but could not get his leg over his bicycle. He decided to push his bike home. He explains that at this juncture "everything was hurting," including his lower back and foot. He pushed his bicycle as far as a green belt area near his home, abandoned it, and walked the rest of the way home. He testified that his bicycle was badly damaged and that it was never retrieved from were he had left it. Mr. Heuring did not go to emergency, a hospital or a doctor's office that day. When he arrived home, his wife poured a hot bath for him and gave him some pain medication.

[6] The defendant testified that before the Accident occurred he approached the Intersection cautiously and slowly. He was driving a Dodge Dakota truck. He waited for the vehicle in front of him to clear the Intersection, pulled forward, and stopped. He observed the Intersection and then began to move slowly into it. At that point that he saw Mr. Heuring for the first time, riding his bicycle in the crosswalk in front of his vehicle, and he quickly applied his brakes. Mr. Smith described a mild impact and "modest contact". Mr. Smith recalled that Mr. Heuring managed to place his hands on the hood of the truck but the front end of the truck pushed Mr. Heuring eastward and Mr. Heuring fell over. Mr. Smith testified that he did not actually run over Mr. Heuring and that it was not necessary for him to "back up" his vehicle after the Accident so that Mr. Heuring could get up. He recalls that the impact was near the south side of the crosswalk; not the north side of the crosswalk as Mr. Heuring testified. Mr. Smith testified that after the Accident, he quickly got out of his vehicle and, by the time he reached the front of his vehicle where Mr. Heuring had fallen, Mr. Heuring was already getting back up on his feet and did not need help doing so. Mr. Smith offered to call an ambulance but Mr. Heuring declined. Mr. Smith testified that he called a colleague on his cell phone, but that he did so after the Accident and was not on the phone when the Accident occurred.

[7] Mr. Smith testified that Mr. Heuring's bicycle was not damaged in the Accident; the chain had come off the bicycle but the bicycle was otherwise fine. Mr. Smith offered to put the chain back on the bicycle. He also offered to drive Mr. Heuring home. Mr. Heuring declined both offers.

[8] On cross-examination, Mr. Smith candidly acknowledged that Mr. Heuring was quite visible on the road, given his larger size. Mr. Smith admitted that the "A" pillar (which he described as the part of his vehicle by the window on the driver's side) obstructed his left side vision somewhat (Mr. Heuring entered the Intersection to the left of Mr. Smith's vehicle). He admitted he did not move his head to look around the "A" pillar before entering the Intersection.

B. Pre-Accident Health, Work and Recreational Life

[9] During his direct examination, Mr. Heuring testified that, prior to the Accident, he was in excellent health, fully functional and active in all facets of his life, including recreational, home and work activities. On cross-examination, he admitted that in the years leading up to the Accident, he had seen a number of treatment providers from time to time. These treatment providers included: his family physician, Dr. Dean Brown; his chiropractor, Dr. Paul Wiggins; his massage therapist, Mr. Clifford Yip (at Second Narrows Massage Therapy Clinic); and a physiotherapist, Mr. David Harrington (at Lynn Valley Physiotherapy Centre).

[10] Mr. Heuring was cross-examined on medical records dating back several years prior to the Accident. Some of his physical complaints prior to the Accident were similar to those for which he sought treatment after the Accident; for example, he had previously complained of pain and weakness in his hips and left leg. Mr. Heuring agreed on cross-examination that he had ongoing low back and hip symptoms leading up to the Accident.

[11] Dr. Wiggins acknowledged that, prior to the Accident, he had last seen Mr. Heuring with a subjective hip complaint in December 2006 and that he had last seen Mr. Heuring for a low back complaint in May 2010. Dr. Wiggins also agreed that prior to the Accident he had treated Mr. Heuring in relation to a neck and upper back injury in July and August 2011.

[12] Mr. Heuring testified that prior to the Accident, he would walk three to four times a week for a minimum of an hour. He also enjoyed riding his bike. Weather permitting, he would ride to work every day. Mr. Heuring enjoyed “quadding” (driving his four wheel all terrain vehicle) and would do this with his children (who were 20 and 17 at the time of the Accident) at least four to five times a year. He would also go skiing with his family at Grouse Mountain two to three times a year.

[13] Mr. Heuring’s wife, Nada Heuring, also testified about Mr. Heuring’s activity level prior to the Accident. She described her entire family as active; they participated in activities like skiing, quadding, walking, hiking and bicycling together.

[14] Mr. Heuring testified that prior to the Accident, he was actively involved in all household chores with his wife, and would help with activities such as dinner, dishes and laundry. He would also mow the lawn, help Mrs. Heuring take care of the garden, and wash the family vehicles.

[15] Mr. Heuring testified that his work at the Hospital was not hard physically, although at times it required climbing or moving into awkward body positions. He testified that he did not have problems doing his work at the Hospital prior to the Accident. He also testified he did not have any problems doing his union work as a pipefitter or steamfitter prior to the Accident. His union jobs were typically industrial in nature, working at refineries or pulp and paper plants. For example, he would install 12 to 24 inch pipes and climb ladders on large towers, some of which could be as high as 100 feet.

[16] During his direct examination, Mr. Heuring testified that prior to the Accident he had planned to retire from his job at the Hospital in the summer of 2012 when he turned 60 years old with the intention of exclusively doing union work. He testified that he intended to work for as long as he could, doing the union work, after retiring from the Hospital.

[17] Mr. Heuring was cross-examined on his retirement plans with reference to his evidence during his examination for discovery on September 24, 2013. As indicated above, he testified at trial that he delayed his retirement in the summer of 2012 due to his injuries and that he consequently suffered a loss of income because he would have earned more money doing industrial union work, as compared to what he was earning at the Hospital from 2012, until his retirement there in 2015. Mr. Heuring stated at his examination for discovery in September 2013 that his plans were “to possibly retire in the next year or so from the hospital and go back to what I enjoy” (meaning the union work). Later in his examination for discovery, Mr. Heuring stated: “I like working in northern BC. It’s the type of work I like. I haven’t done it for a while, ’cause my kids were growing up, and university. They don't need me as much, so I can go away for longer periods of time.”

[18] On cross-examination at trial, Mr. Heuring acknowledged he could have responded more clearly at his examination for discovery about his retirement plans, although he understood that the question he was asked at the discovery referred to his plans at that juncture in September 2013. Mrs. Heuring also testified that she and her husband had planned to retire in the summer of 2012.

[19] The evidence established that in the summer of 2012, Mr. Heuring's daughter was 20 years old and in university and that his son was 18 and graduating from high school. His daughter graduated from her university program in April 2015. Mrs. Heuring retired in November 2016. The Heurings moved to Kelowna after Mrs. Heuring retired.

[20] Mr. Heuring was cross-examined about the significant conflict he was experiencing at work with his superiors at the Hospital prior to his retirement and he candidly acknowledged he found his work environment there toxic, preferring the union work in Alberta and Northern British Columbia.

C. Post-Accident Health and Recreational Life

[21] The day after the Accident, Mr. Heuring went to a medical clinic and saw Dr. Brown. When asked about his injuries immediately after the Accident, Mr. Heuring testified that his right knee and left foot were very sore, as were his left shoulder, hips and lower back. He did not suffer any fractures or sprains. Dr. Brown recommended Mr. Heuring take time off work and referred him to a physiotherapist. An x-ray taken the day after the accident showed mild osteoarthritis in Mr. Heuring's left hip.

[22] Mr. Heuring did not return to work at the Hospital until the following January 2012 and then only on a part-time basis doing light duties. He resumed work full-time at the Hospital in February 2012. He was scheduled to go to a three-week union job in MacKenzie, British Columbia at the end of the week following the Accident but was unable to do so due to his injuries.

[23] Mr. Heuring testified that ever since the Accident his health has been compromised and he continues to have hip and low back pain today; his sitting and walking is also affected. He described how during the first six months after the Accident, his whole body was "incredibly sore", including his right knee, lower back, shoulder and hip. He explained that his legs "started not to work", that he had to use handrails, and that he relied on his work cart as a third leg. He stated that he needed to be cautious and "watch every step I took". He testified he had a shooting pain in his knee if he was on a ladder. His work and recreational activities were curtailed. He also had trouble sleeping for the first three months or so. He testified that he used to be able to run up and down stairs and readily climb ladders but could no longer do so. Mr. Heuring's ability to assist with house work, gardening and house maintenance was also compromised. He described this period as "horrible". He could not crouch and "getting down low was really hard". He testified how his wife, children and co-workers had to assist him with doing tasks he ordinarily did on his own before the Accident.

[24] Within the first six months of the Accident, and after returning to work full-time in February 2012, Mr. Heuring started to walk to work but at a slower pace. During this period, he attended physiotherapy treatments at Lynn Valley Physiotherapy Centre, and also a program at KARP clinic as recommended by the Insurance Corporation of British Columbia. During this time, he reported he was feeling better. He agreed on cross-examination that he felt his injuries were resolving.

[25] It was approximately a year after the Accident that Mr. Heuring went back to see his chiropractor and his massage therapist for the first time after the Accident. As noted above, Mr. Heuring admitted on cross-examination that he had been seeing these specialists prior to the Accident. Mr. Heuring testified that while he was feeling better at this juncture, he still had a "huge concern" about his hips and lower back. He said his legs "were giving out on me" and that he could not climb a ladder or crouch down low. He also stated his ankle was sore but getting better.

[26] Currently, Mr. Heuring is able to go for longer walks and hikes but remains cautious with his footing and apprehensive about his legs "giving out". He

purchased a new bicycle in 2014 but had to mount it by first laying it on the ground, as he could not lift his leg high enough to get on the bike. He continues to ride his bicycle. Mr. Heuring testified he resumed quadding approximately three years after the Accident but found it was painful. He has not returned to skiing since the Accident.

[27] Mr. Heuring testified that he has now returned to doing household chores and yard work but not at the level he was able to do these chores before the Accident. For example, as he is not able to climb ladders, his son assists with cleaning gutters and trimming hedges.

[28] Mr. Heuring continues to receive chiropractic and massage treatment due to his ongoing problems with his hips and weakness in his legs. He testified that his knee injury resolved three years after the Accident.

D. Wage Loss

[29] The evidence established that in the three years after the Accident, most of Mr. Heuring's yearly income was generated from his work at the Hospital. Donna Zoretich testified in relation to the particulars of Mr. Heuring's income loss from his job at the Hospital.

[30] Ms. Zoretich is the manager of payroll accounting and benefits for BC Clinical and Support Services Society ("Society"). The Society was created in 2016 to provide payroll support services to the provincial health care system, including VCH. She testified that the Society handles all payroll and benefits inquiries for VCH and that, as a manager in payroll accounting and benefits, she has knowledge of the amount of wages lost or benefits received by employees at VCH, now and in the past. She provided a letter from VCH dated June 26, 2013 ("June 2013 Letter") addressing the time missed by Mr. Heuring at the Hospital following the Accident.

[31] Ms. Zoretich reviewed the June 2013 Letter. It contained an attached wage loss calculation for Mr. Heuring from October 4, 2011 to February 15, 2012, as well as a spreadsheet of payable time from October 3, 2011 to March 7, 2012. She

confirmed that Mr. Heuring was off work from October 4, 2011 through January 4, 2012. She also confirmed that Mr. Heuring began part-time hours on January 5, 2012 and returned to work full-time on February 16, 2012. Mr. Heuring testified that he received his Hospital wages, through his sick time benefits, for a portion of the time he was off work following the Accident. He returned to his union work in April 2012 for a one week period. He said that this experience "wasn't too bad" but that he did take pain killers.

[32] Mr. Heuring testified that in the fall of 2014, in October or November, he took a union job in Alberta. He said the job started off fairly well but when he realized he had to do a lot of work on ladders, he was not able to complete the job. He testified this was a six-month job, paying about $4,000 a week, but that he was "laid-off" after about six weeks. Mr. Heuring testified that "still to this day" he has problems with "my legs giving out."

[33] Mr. Heuring took another job at a gas plant in northern British Columbia, before the union job in Alberta; he testified that it went "pretty well". It was a seven-week long job and the work was on smooth ground so it did not cause him as much difficulty with his hips and legs.

[34] Mr. Heuring testified that after the Accident, he lost confidence in his ability to do the union work. He did try but found his physical capacity to do the out of town union work had diminished. Accordingly, he decided not to retire from his work at the Hospital in 2012 as originally planned. Instead, he retired from his work at the Hospital on April 15, 2015.

[35] Mr. Heuring testified that he still does union work out of town but finds the long drives to the sites difficult; some of these jobs require that he drives for 17 hours to the site. During these drives he stops and takes regular breaks about every hour, due to his hip and back pain. He finds he is still limited in the types of out of town union work he can do but would like to work a few months a year. He testified that he knows "some guys who work into their 80's".

[36] Mr. Heuring noted that he worked in Fort McMurray in 2016 but that his work there was cut short due to the forest fires. He earned about $56,000 from his work in Fort McMurray that year.

[37] Mr. Heuring's employment income, based on his evidence and his income tax returns (line 101, T4 income), may be summarized as follows:

Year	Income	
2010	$84,401	
2011	$68,134	
2012	$82,203	
2013	$91,534	
2014	$77,885	6 month leave of absence from Hospital
2015	$86,862	Retired from Hospital in April 2015

[38] From 2010 to 2015, Mr. Heuring's other employment income (line 104 on his income tax return) was relatively little: $2,124 in 2010; none reported in 2011; $124 in 2012; none reported in 2013; $197 in 2014; and $606 in 2015.

[39] Mr. Heuring testified that his net income for 2016 was $55,450, including employment income, employment insurance benefits, other income and a $15,000 pension from the hospital.

[40] **Mr. Heuring confirmed that his income, from 2010 to 2013 inclusive, came primarily from his Hospital job. In 2014, his employment earnings totalled approximately $78,000. He took a six month leave of absence from the Hospital which he testified he did in part to "test out" whether he could do the union work, presumably to a more significant degree than he had done previously.

[41] Mr. Heuring's income tax returns indicate that he earned approximately $30,467 from union work in 2013 and approximately $46,207 from union work in 2014. In 2015, Mr. Heuring testified that he worked 7.5 hours a day, five days a week until retirement in mid-April from the Hospital, earning $29.82 per hour. Accordingly, Mr. Heuring's income from the Hospital in 2015 was approximately

$15,655.55. He made $71,206.45 in earnings from union work that year for a 2015 total income of $86,862.00.

[42] No evidence was led regarding the increase in Mr. Heuring's Hospital pension, flowing from the three years that passed between the summer of 2012 and April 2015 when he retired.

E. Expert Evidence

[43] Dr. Underwood testified on behalf of Mr. Heuring. She was qualified as a physiatrist and opined that as a result of the Accident, Mr. Heuring suffered soft tissue injuries to the low back, to the muscles surrounding the pelvis including a contusion to the left hip, and a soft tissue injury to the right knee. Dr. Underwood also opined that the Accident caused an exacerbation of symptoms related to the arthritis in Mr. Heuring's hips.

[44] Dr. Underwood testified that Mr. Heuring's reported difficulties with crouching and climbing stairs, ramps and ladders, as well as his discomfort in sitting for prolonged periods of time, are in keeping with a soft tissue injury to the peri-pelvic muscles. As regards the x-ray of Mr. Heuring's hips on October 4, 2011, which showed an osteoarthritic condition in his hips, Dr. Underwood effectively agreed that the condition pre-dated the Accident. She stated that Mr. Heuring's osteoarthritis was asymptomatic prior to the Accident; notably, however, she was not provided with pre-accident records from physiotherapeutic, chiropractic and message treatments which documented Mr. Heuring's hip and back complaints dating back to 2005. Based on the incomplete information provided to her, Dr. Underwood opined that the pre-existing arthritic condition was likely exacerbated by the soft tissue injury.

[45] Dr. Underwood testified that in her opinion, Mr. Heuring was not able to work at all from October 3, 2011 to January 5, 2012. She explained that Mr. Underwood's injuries were such that he could not perform certain basic physical functions during this period which required crouching, squatting, and climbing ladders.

[46] Dr. Brown, Mr. Heuring's family physician, also testified on behalf of Mr. Heuring. Dr. Brown opined that Mr. Heuring suffered a soft tissue injury to Mr. Heuring's low back, both hips, right knee and left foot as a result of the accident. Dr. Brown was of the view that about three or four months after the Accident, Mr. Heuring had improved to the point that he did not require assistance with home or yard work.

[47] Dr. Brown also opined that the Accident caused the pre-existing arthritic condition in Mr. Heuring's hips to become symptomatic, the left more than right, and that the Accident likely exacerbated the arthritic process. Dr. Brown testified that Mr. Heuring's osteoarthritis is a progressively worsening condition that would cause increased pain and physical impairment over time. At page two of his report he states:

> The usual course is for slow steady worsening, with increasing pain and limitation, over many years, leading ultimately to joint replacement. He may be lucky enough to avoid all this, but that's unlikely.

[48] Dr. Brown testified that in 2012 he began to treat Mr. Heuring's hip complaints as osteoarthritis, with serial x-rays to monitor the progression of this disease.

[49] Dr. Brown also opined that Mr. Heuring was not able to work for a period of time after the Accident. He testified that he recommended that Mr. Heuring be off work for three-and-a-half months following the Accident and that he attend physiotherapy treatment.

[50] Dr. Brown also testified that Mr. Heuring came to see him in July 2014. Mr. Heuring was experiencing spasms and "quite severe pain" and tenderness in his lower back. Dr. Brown diagnosed a lumbar strain and prescribed pain medication. He testified that this was a "markedly different presentation" in his low back and admitted that it was possible that these symptoms had nothing to do with the Accident.

[51] Ms. Craig was qualified as physiotherapist and a functional capacity evaluator. She concluded that Mr. Heuring partially meets the physical demands of

the job of steamfitter, with accommodation to avoid ladders and minimize access to tight awkward places. She noted that Mr. Heuring had modified his work at the Hospital, and had passed along some tasks to his co-workers, such as accessing awkward or confined spaces and climbing ladders. Ms. Craig concluded that not all jobs are viable options for Mr. Heuring and that his competitive employability has been reduced.

[52] Ms. Craig concluded that Mr. Heuring can perform household chores but will need to pace himself. She notes that his balance is reduced sufficiently to preclude him from safely accessing steep vertical ladders required in his union jobs and with household and yard tasks that require climbing a ladder.

[53] Dr. J.S. Arthur testified on behalf of the defendant. He was qualified as an expert in orthopaedic surgery with expertise in treating patients who have suffered from osteoarthritis as well as soft tissue injuries to the hips and knees. Dr. Arthur was a particularly impressive and candid expert witness. He is a senior orthopaedic surgeon, having treated thousands of patients with hip, back and related musculature problems for over 38 years.

[54] Like the other medical experts, Dr. Arthur was also of the view that Mr. Heuring had suffered a soft tissue injury to his back and hips in the Accident. He also opined that Mr. Heuring's osteoarthritis would develop and worsen over time in regard to both hips. Dr. Arthur was of the view, that by the time of his independent medical examination of Mr. Heuring in March 2014, Mr. Heuring had "largely recovered" from the soft tissue injuries he had sustained in the Accident.

[55] In his medicolegal report dated April 9, 2014, Dr. Arthur stated:

> Examination of the lower back with him standing revealed forward flexion with the fingertips reach to the toes, slight decrease in extention and full lateral flexion without complaint. Alignment was normal with no areas of tenderness to palpation. Palpation of the sacroiliac joints was normal, and on stressing the sacroiliac joints there were no complaints.
>
> There were no signs of root tension present with straight leg raising to about 85 degrees bilaterally… . Motor and sensory examinations of the lower extremities I found to be entirely normal, and his reflexes were graded 2+bilaterally, which is within normal limits.

> Examination of the hips reveals no flexion deformity, flexion to about 120 degrees bilaterally, external rotation to 30 degrees bilaterally, internal rotation of 5 degrees bilaterally, with a feeling of tightness but no complaint.

[56] Dr. Arthur found no tenderness in the lower back or hips. He concluded in is medicolegal report that Mr. Heuring suffered: "a soft tissue insult as a result of this motor vehicle accident but had largely recovered. His ongoing complaints, in my opinion, are due to degenerative change in the lower back and hips". During his testimony Dr. Arthur confirmed that by the time of his medical examination in 2014, the soft tissue component had "settled down". Dr. Arthur cautioned, however, that as Mr. Heuring suffers from osteoarthritis, and as it is a degenerative disease, he was of the view that Mr. Heuring is likely to develop further degenerative change in the hips in the future.

[57] Of significance, Dr. Arthur concluded that the Accident did not exacerbate or accelerate the pre-existing osteoarthritis in Mr. Heuring's hip. He referred to a February 2012 bone scan of Mr. Heuring's hips. He testified that if the Accident had exacerbated Mr. Heuring osteoarthritic condition, this effect would have been identified and "picked up" by the bone scan. Dr. Arthur explained that bone scans are very sensitive such that if an injury exacerbates an osteoarthritic condition, there is metabolic activity or a "hot spot" that presents in the bone scan. He expressly stated in his Medicolegal Addendum Report on March 20, 2017 that if the Accident had accelerated a degenerative change in the hip joint "one would expect to see changes on the x-ray of February 25, 2015, and would also expect the bone scan to reveal increased uptake in the hips, which it did not."

[58] Dr. Arthur was very clear that if the Accident had rendered Mr. Heuring's left hip symptomatic, this effect would have been evidenced in the bone scan. Dr. Arthur testified that the bone scan would have been "positive or hot" if Mr. Heuring's osteoarthritis in the hips was symptomatic after the Accident; it was not. Both Dr. Arthur's report and his testimony were clear in this regard and he was not shaken in his conclusion on cross-examination.

[59] The evidence before me also indicates that Mr. Heuring had degenerative changes in his lower back. The October 2011 x-ray showed mild, generalized spondylosis, a condition which would have been present prior to the Accident. Dr. Brown stated in a reporting letter dated June 22, 2014 that this degenerative condition would naturally worsen over the years.

III. ANALYSIS

A. Issue 1: Liability

[60] I have concluded that the conduct of both parties departed from the standard of reasonable care and was blameworthy. In *Bradley v. Bath*, 2010 BCCA 10, the Court of Appeal reasoned as follows in assessing the apportionment of liability in cases such as that presently before me:

> [24] At common law, contributory negligence on the part of a plaintiff was a complete defence to his or her claim. This was considered to be unjust, and legislatures in many common law jurisdictions passed contributory negligence statutes (also referred to as apportionment legislation). The statute in this province is currently called the *Negligence Act,* R.S.B.C. 1996, c. 333, s. 1(1) of which reads as follows:
>
> > If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> If damage or loss has been caused by the fault of two or more persons, s. 4 of the Act requires the court to determine the degree to which each person was at fault. While the prerequisite to apportionment is that the damage or loss has been caused by the fault of two or more persons, the apportionment must be done on the basis of the degree to which each person was at fault, not on the basis to which each person's fault caused the damage: *Cempel v. Harrison Hot Springs Hotel Ltd.,* [1998] 6 W.W.R. 233, 43 B.C.L.R. (3d) 219 (C.A.).
>
> [25] The concept of contributory negligence was described in John G. Fleming, The Law of Torts, 9th ed. (Sydney: LBC Information Services, 1998) at 302, as follows:
>
> > Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury. The term "contributory negligence" is unfortunately not altogether free from ambiguity. In the first place, "negligence" is here used in a sense different from that which it bears in relation to a defendant's conduct. It does not necessarily connote

> conduct fraught with undue risk to others, but rather failure on the part of the person injured to take reasonable care of himself in his own interest. ... Secondly, the term "contributory" might misleadingly suggest that the plaintiff's negligence, concurring with the defendant's, must have contributed to the accident in the sense of being instrumental in bringing it about. Actually, it means nothing more than his failure to avoid getting hurt...

[61] In apportioning liability equally in that case, the Court of Appeal considered (at paras. 26-29) whether the plaintiff failed to take reasonable care for his own safety, concluding he had not.

[62] In *Hynna v. Peck*, 2009 BCSC 1057 at para. 88, the Court reasoned that, in such cases, it does not assess degrees of causation but, rather, degrees of fault:

> [88] In assessing apportionment, the Court examines the extent of blameworthiness, that is, the degree to which each party is at fault, and not the degree to which each party's fault has caused the loss. Stated another way, the Court does not assess degrees of causation, it assesses degrees of fault: *Cempel v. Harrison Hot Springs Hotel Ltd*., [1997] 43 B.C.L.R. (3d) 219, 100 B.C.A.C. 212; *Aberdeen v. Langley (Township)*, 2007 BCSC 993 [*Aberdeen*]; reversed in part, *Aberdeen v. Zanatta*, 2008 BCCA 420.
>
> [89] In *Alberta Wheat Pool v. Northwest Pile Driving* Ltd., 2000 BCCA 505, [2000] 80 B.C.L.R. (3d) 153, Finch, J.A. (now the Chief Justice), for the majority of the Court of Appeal, explained this important principle at paras. 45-47:
>
> > In my view, the test to be applied here is that expressed by Lambert, J.A. in *Cempel,* supra, and the Court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.
> >
> > Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[63] In *Aberdeen v. Township of Langley, Zanatta, Cassels*, 2007 BCSC 993, at para. 62, rev'd on other grounds 2008 BCCA 420, Mr. Justice Groves addressed the challenge of assessing blameworthiness under the *Negligence Act*, R.S.B.C. 1996,

c. 333, and considered the following factors identified by the Alberta Court of Appeal in *Heller v. Martens*, 2002 ABCA 122, in assessing relative degrees of fault:

> 1. The nature of the duty owed by the tortfeasor to the injured person...
> 2. The number of acts of fault or negligence committed by a person at fault...
> 3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault...
> 4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy... Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis...
> 5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy...

[64] Mr. Justice Groves considered it appropriate to add the following factors in assessing relative degrees of fault at para. 63:

> 6. the gravity of the risk created;
> 7. the extent of the opportunity to avoid or prevent the accident or the damage;
> 8. whether the conduct in question was deliberate, or unusual or unexpected; and
> 9. the knowledge one person had or should have had of the conduct of another person at fault.

[65] In light of these case authorities and the evidence before me, it is clear both parties are blameworthy and that fault ought to be apportioned to each. But the question remains, to what degree? Mr. Heuring did not take reasonable care of his own safety. Having chosen to enter the crosswalk, he failed to dismount from his bicycle and instead rode through it. Further, while he testified that he stopped approximately 10 feet back from the stop sign or stop line before entering the Intersection, he did not actually stop *at* the stop sign or stop line. Had he stopped at the stop sign or stop line and waited, or had he dismounted and walked his bike across the crosswalk, Mr. Heuring would have had a better view of oncoming traffic and he could have more accurately assessed whether Mr. Smith's vehicle was

actually coming to a stop or had stopped. However, Mr. Heuring's evidence establishes that he wrongly assumed Mr. Smith's vehicle was coming to a stop.

[66] Mr. Heuring not only violated ss. 183 (2)(b) and ss.186 (a) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, and compromised his own safety in doing so, he also breached the heightened duty of care placed upon him by the common law in such circumstances: see *Bradley* at para. 27. As stated by this Court *in Hadden v. Lynch*, 2008 BCSC 295 at para. 59, an "individual who is violating a traffic law assumes a heightened duty of care". Mr. Heuring testified that he saw Mr. Smith's vehicle and "assumed" it was going to stop. He did not attempt to make eye contact with Mr. Smith or to ensure that he did in fact stop. I am not satisfied that Mr. Heuring proceeded with the caution necessary to meet his heightened standard of care while cycling through the crosswalk.

[67] Mr. Heuring had an opportunity to prevent the Accident by stopping at the stop sign and waiting until the traffic had come to a complete stop before proceeding. Alternatively, he could have walked his bike across the Intersection through the crosswalk. Had he done so, he would not only have been more visible, he would have also provided Mr. Smith with a greater response time within which to stop.

[68] Mr. Smith also could have, and should have, taken greater care. While I accept his evidence that he stopped at the Intersection and was proceeding slowly at the time of impact, he candidly admitted he did not take steps to look around the "blind spot" in his field of vision (i.e., the "A" pillar in his car). Even though Mr. Heuring was not supposed to be cycling through the crosswalk, a marked crosswalk is "precisely the place where a motorist could reasonably expect to encounter another user of the road": *Niitamo v. Insurance Corporation of British Columbia*, 2003 BCSC 608 at para. 22 (cited in *Hadden*). Had Mr. Smith been more vigilant in observing the traffic around him, he too could have taken preventative measures.

[69] I accept the entirety of Mr. Smith's recollection of the events surrounding the Accident. He was very credible and his recollection was clear in recounting the

Accident. He responded to cross-examination in a forthright manner, openly acknowledging that he could have done more to prevent the Accident but also underscoring that he was being careful in his approach. I accept Mr. Smith's recollection that: he quickly applied his brakes and brought his vehicle to a stop when he saw Mr. Heuring; he was not on his cell phone at the time of the impact but called a colleague immediately afterward; he was just beginning to accelerate, after stopping at the Intersection, when the Accident occurred; the impact was "modest" (in his words); Mr. Heuring placed his hands on the front of the truck's hood to stop himself; he did not run over top of Mr. Heuring; he offered to put the chain back on the bike; and he offered to take Mr. Heuring to the hospital and drive him home but that Mr. Heuring declined. I also accept Mr. Smith's recollection that Mr. Heuring's bicycle was not damaged except that the chain had come off. I find it curious that Mr. Heuring threw his bicycle in the bushes and never bothered to retrieve it. Whether or not the bicycle had been badly damaged, he could have had a family member or friend retrieve it later that day. Mr. Heuring's recollection of the events surrounding the Accident lacked elements of inherent cohesiveness and logic. By comparison, Mr. Smith's recollection, his narrative of events, and his presentation as a witness were very forthright and more credible.

[70] Given the specific facts of this case, and the conduct of each party, I am of the view that liability should be apportioned 40% against Mr. Heuring and 60% against Mr. Smith. Accordingly, the loss assessment for each category of damages will be reduced by 40%.

IV. CAUSATION

[71] Counsel for Mr. Heuring relies on the reasons in *Barnes v. Richardson et al.*, 2008 BCSC 1349, aff'd 2010 BCCA 116, where Madam Justice Martinson summarized the applicable legal principles relating to causation as follows at paras. 17-23:

> [17] Determining the cause of loss and damage must be kept separate from the assessment of damages to compensate for that loss and damage, since different principles govern the two questions: *A.(T.W.N.) v. Clarke,* 2003 BCCA 670, 22 B.C.L.R. (4th) 1 at para. 16. Causation concerns whether the accident caused the pre-existing condition to be activated or

> aggravated. The assessment of damages considers whether there was a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence*: Hosak v. Hirst*, 2003 BCCA 42, 9 B.C.L.R. (4th) 203 at para. 10.
>
> [18] Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 13, 140 D.L.R. (4th) 235.
>
> [19] The Supreme Court of Canada considered the principles that apply to causation in *Resurfice Corp. v. Hanke,* 2007 SCC 7, [2007] 1 S.C.R. 333. The "but for" test applies, except in very limited circumstances. Mr. Barnes bears the burden of showing that, but for the negligent act of the driver, the injuries of which he complains would not have occurred. In special circumstances, the law has recognized exceptions to the basic "but for" test and applied a "material contribution" test: see *Resurfice* at paras. 24-25. Those circumstances do not apply in this case. See also *Bohun v. Sennewald,* 2008 BCCA 23, 77 B.C.L.R. (4th) 85, a medical malpractice case.
>
> [20] However, neither test requires that the plaintiff establish that the defendant's negligence was the sole cause of the injury. A defendant is liable as long as he or she is part of the cause of an injury, even though his or her act alone was not enough to create the injury: *Athey* at para. 17.
>
> [21] There is no reduction of liability because of the existence of other preconditions. The defendants remain liable for all injuries caused or contributed to by their negligence: *Athey* at para. 17. A non-tortious cause that precedes the accident but contributes to the injury, a precondition, is not relevant to causation unless symptomatic at the time of the accident: *Larwill v. Lanham*, 2003 BCCA 629, 190 B.C.A.C. 13 at para. 22. Even if a minor impact causes the plaintiff's symptoms, it is no answer for the defendant to say that the plaintiff was peculiarly vulnerable to injury because of a pre-existing susceptibility: *Rai v. Wilson* (1999), 120 B.C.A.C. 122 at para. 6, 196 W.A.C. 122.
>
> [22] The law does not excuse a defendant from liability merely because other causal factors for which he or she is not responsible also helped produce the harm. It is sufficient that the defendant's negligence was a cause of the harm: *Athey* at para. 19.
>
> [23] The finding of a contribution outside of the *de minimis* range is a material contribution and sufficient to render the defendant fully liable for the damages: *Athey* at para. 44. The British Columbia Court of Appeal clarifies in *Sam v. Wilson*, 2007 BCCA 622, 78 B.C.L.R. (4th) 199 at para. 109 that "material contribution", as used in *Athey*, is synonymous with "substantial connection", as used in *Resurfice,* and should not be confused with the "material contribution test".

[72] Counsel for Mr. Heuring submits that the “lay evidence establishes that the Accident caused the injuries complained of by Mr. Heuring by comparison of his pre

and post Collision condition". Counsel argues that prior to the Accident, Mr. Heuring was not suffering from any ongoing physical complaints. He participated in recreational activities like walking, bicycling, quadding and skiing. He could perform all the tasks required at both his Hospital job and through the unions. He did not have any problems participating in regular household chores. Following the Accident however, Mr. Heuring experienced pain in his low back, hips and right knee. The pain in his hips was, counsel submits, related to the sensation of his legs "giving out from time to time," and groin and buttocks pain. The pain symptoms experienced by Mr. Heuring following the Accident caused limitations in his ability to partake in recreational activities and household chores. Counsel argues that although he has seen improvement, Mr. Heuring today is not the same man he was prior to the Accident. He describes moving slowly and being fearful of taking a wrong step or making a movement which could aggravate his hip pain or cause one of his legs to give out. He no longer skis. He tries to walk and hike, but does so slowly and cautiously. He has returned to bicycling to a lesser extent, and describes that getting up onto a bike can cause pain. Mr. Heuring can perform household chores, but does so slower than he did prior to the Accident. He cannot do any household work that involves being on a ladder.

[73] The difficultly with this submission is that the evidence does not support the conclusion that prior to the Accident Mr. Heuring was not suffering from ongoing physical complaints and symptoms to his back and hips. Mr. Heuring admitted on cross-examination that he had ongoing physical complaints and symptoms in the years leading up to the Accident relating to his back and hips and that he had more pain and difficulty pre-Accident with his left hip, as compared to his right hip. This admission is borne out in a number of documents setting out his physical complaints and symptoms; Mr. Heuring's physical complaints reported in pre-Accident medical and treatment records were very similar in nature to those found in post-Accident records. For example, a February 10, 2007 massage therapy treatment record references periodic acute pain in Mr. Heuring's hips, with specific reference to his left hip being more problematic than the right. The record states that Mr. Heuring reported the hip and leg area being "weak and painful" and "can give way & has to

be careful – apprehensive". Mr. Heuring verified the accuracy of this note on cross-examination and acknowledged that the symptoms reported in 2007 are very similar to those he experienced after the Accident. He also confirmed there was no reference to any specific trauma or injury in 2007 which would have triggered these symptoms and he did not recall a particular injury that would have triggered these symptoms.

[74] Mr. Heuring underscored during his cross-examination that his current problems with his hips and legs are more pervasive and intense than they were in 2007. His evidence did not, however, persuade me that his physical symptoms with regard to his low back and hips were related only to specific injuries that resolved themselves prior to the Accident. I find, in light of the entirety of the evidence before me that Mr. Heuring's hip and back pain, including the higher degree of discomfort and pain in his left hip and the issue with his legs "giving out", existed well before the Accident and were continuing up to the time the Accident. These pre-Accident ailments were not simply related to specific injuries.

[75] Having so decided, I must now consider whether the Accident caused or contributed to these ongoing physical complaints and, in particular, to what extent if any the Accident exacerbated Mr. Heuring's osteoarthritis. Counsel for Mr. Heuring argues that causation is established by the expert opinions of Dr. Underwood and Dr. Brown that the Accident resulted in a soft tissue injury to Mr. Heuring's right knee, his hips and low back. Dr. Arthur also agrees that the Accident caused a soft tissue injury to Mr. Heuring's low back and left hip. While it is clear on the evidence before me that the Accident caused a soft tissue injury to these areas, I am not persuaded that the Accident accelerated Mr. Heuring's pre-existing generative condition in his hips or back.

[76] I accept Dr. Arthur's opinion that Mr. Heuring suffered a soft tissue injury that did not render his osteoarthritic condition symptomatic. I accept Dr. Arthur's testimony that if the Accident had rendered Mr. Heuring's osteoarthritis symptomatic (as submitted by Mr. Heuring), this effect would have been apparent in the February 2012 bone scan. Had Mr. Heuring's osteoarthritis been exacerbated or rendered

symptomatic his previously asymptomatic osteoarthritis, the bone scan would have shown such an effect. However, it did not.

[77] I do not find any inconsistency, as alleged by counsel for the plaintiff, in Dr. Arthur's medical opinions. As a very experienced and highly qualified expert who was specifically qualified in the areas of both osteoarthritis and soft tissue injuries, Dr. Arthur opined that Mr. Heuring's post-Accident symptoms, as reported by Mr. Heuring, initially reflected soft tissue injuries and, with the passage of several years since the Accident, most likely reflect degenerative changes associated with the progression of Mr. Heuring's osteoarthritic condition. Indeed, Dr. Brown's opinion provided on June 22, 2014 stated that Mr. Heuring's osteoarthritis would worsen over time and would likely lead to the need for a hip replacement. Dr. Brown also opined that Mr. Heuring had a mild degeneration in his lower spine that "will worsen over time".

[78] Simply put, Dr. Arthur's opinion and evidence ruled out any effect from the Accident on the course of Mr. Heuring's arthritic process. I accept Dr. Arthur's opinion in this regard and also note that his conclusion is most consistent with the evidence before me as a whole.

[79] It is also noteworthy that, on cross-examination, Dr. Brown acknowledged that by late 2012 he began to treat Mr. Heuring's hip complaints as osteoarthritis with a treatment plan that included serial x-rays to document the disease's progression. This evidence, taken with that of Dr. Arthur and Mr. Heuring's own evidence of ongoing back and hip problems prior to the Accident, supports the conclusion that Mr. Heuring's osteoarthritis continued to cause him problems after the Accident and that this would have been the case even if the Accident had not occurred.

[80] On a balance of probabilities, I am not persuaded that the Accident caused, contributed to, or accelerated Mr. Heuring's pre-existing osteoarthritis. The factual matrix before me does not support the conclusion that "but for" the negligence of Mr. Smith, Mr. Heuring's osteoarthritis would be asymptomatic. I am mindful that there is no reduction of liability because of the existence of physical preconditions; as such Mr. Smith would remain liable for all injuries caused or contributed to by his

negligence. While I have concluded that Mr. Smith caused Mr. Heuring's soft tissue injuries, I am simply not persuaded on the evidence before me that the Accident was *a* cause which impacted the course of Mr. Heuring osteoarthritis. In legal vernacular, Mr. Heuring's circumstances denote a "crumbling skull" rather than a "thin scull" scenario.

[81] In this light, the next question to be addressed involves the extent and duration of Mr. Heuring's soft tissue injuries. While Mr. Heuring felt well enough to return to work full-time in February 2012, I accept his evidence that his soft tissue injuries had not fully resolved by that juncture. In his opinion letter of June 22, 2014, Mr. Heuring's family practitioner, Dr. Brown, states:

> As to prognosis, I expect mild to moderate long term impact on both personal and employment activities. Specifically: he has ongoing modest symptoms from back and hips, that arose from the accident, that may last for another year or more.
>
> …
>
> As to disability: he was off entirely for about 3.5 months, then made a gradual return to work. The partial disability (at work but symptomatic) lasted for at least another 10 months.
>
> I'm not aware of a need for personal daily assistance after the accident, and I don't foresee that need now, unless he eventually comes to a joint replacement.
>
> He may have needed help for house and yard work for three or four months after the accident. I don't think it's needed now.
>
> Finally, I have no recommendation for further tests, scans of evaluation at present.

[82] Dr. Brown reported in June 2014 that Mr. Heuring was partially disabled after returning to work for at least ten months which would have meant Mr. Heuring was partially disabled after returning to work full-time and until at least the end of 2012. Dr. Brown also opined in June 2014 that he was of the view that the physical injuries suffered in the Accident by Mr. Heuring to his hips and legs "may last a year or more".

[83] In light of the particular factual matrix before me, assessing how long Mr. Heuring's soft tissue injuries continued unresolved after the Accident is

challenging. In this regard, I have considered all the evidence relating to Mr. Heuring's physical complaints after the Accident, including the evidence of Dr. Brown and Mr. Heuring as well as that of Dr. Arthur. Dr. Arthur was of the opinion that Mr. Heuring had "largely recovered" from his soft tissue injuries and that they had "settled down" by March 11, 2014 when he physically examined him. However, Dr. Arthur did not opine that Mr. Heuring had fully recovered at this point in time.

[84] Given the totality of the evidence, I find that on a balance of probabilities Mr. Heuring's soft tissue injuries resolved no later than the summer of 2015, which would have been a year after Dr. Brown's prognosis in June 2014 and more than a year after Dr. Arthur's assessment that Mr. Heuring had "largely recovered" from his soft tissue injuries in March 2014.

V. NON-PECUNIARY DAMAGES

[85] Based on the lay and expert evidence in this case, including Mr. Heuring's own testimony regarding the extent, effects and duration of his injuries, Mr. Heuring seeks an award within the range of $70,000 to $80,000 for non-pecuniary damages.

[86] Counsel for the defendant submits that non-pecuniary damages should be assessed on the basis of soft tissue injuries to the lower back and hips with associated injuries that resolved substantially by the spring of 2012. The defendant acknowledges Mr. Heuring suffered a soft tissue injury to the lower back and hips for approximately six to eight months before substantial recovery; and he acknowledges there might be "perhaps some related residual symptoms for up to 12 months". The defendant submits that non-pecuniary damages in the range of $20,000 is appropriate but, should the court find that there are some ongoing pain symptoms after 1.5 years attributable to the Accident, that Mr. Heuring should be awarded between $30,000 and $35,000 in non-pecuniary damages.

[87] I have reviewed the authorities provided by each of the parties in assessing and discerning the proper range of non-pecuniary damages in this case and considered their applicability to the facts before me. I am also mindful that each

case must be assessed based on the particular facts before the court and, more specifically, in light of the following factors delineated in *Stapley v. Hejslet*, 2006 BCCA 34:

> [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[88] I have considered each of the above factors in light of the circumstances before me. In doing so, I have taken into account not only the injuries caused by the Accident itself but also those injuries that have persisted since the Accident. I have also considered what Mrs. Heuring and Dr. Brown described as Mr. Heuring's stoic nature in not being "a complainer". As well, I have considered the manner in which Mr. Heuring's overall health, recreational activities and general lifestyle have been impaired as a result of the Accident.

[89] The evidence establishes that Mr. Heuring experienced pain-related limitations which prevented him from working at the Hospital from October 11, 2011 until early January 2012. Further, when he returned to work, he was only able to work part-time and did not return to a full-time schedule until mid-February 2012. When he did return to work at the Hospital, Mr. Heuring described limitations in his ability to maintain awkward positions because of low back and hip pain. Mr. Heuring

also testified to having difficulty sitting for long periods and difficulty driving to remote union jobs. He no longer climbs ladders as required by some union jobs and for maintenance work around his home. He continues to be apprehensive about his footing at job sites with uneven surfaces.

[90] Mr. Heuring's previously active recreational life has also been curtailed and, while he has been able to resume a fairly active lifestyle, he no longer skis, quadding can be painful and his cycling, hiking and walking activities have been diminished as compared to his pre-Accident condition.

[91] Counsel for Mr. Heuring relies on the decision of this court in *Clemas v. Gabrlik,* 2013 BCSC 1412. In that case, the plaintiff was awarded $75,000 in non-pecuniary damages, with a 15% reduction to account for the likelihood that he would have experienced similar back symptoms in the future without the Accident. The case is distinguishable in that Mr. Justice Skolrood found that the plaintiff's pre-existing asymptomatic back condition was rendered symptomatic at the time of the accident. Conversely, I have found that Mr. Heuring's injuries from the Accident did not render his osteoarthritis symptomatic.

[92] Counsel for Mr. Heuring also relies on *Preece v. Leonard*, 2014 BCSC 173, where the Court awarded $75,000 in non-pecuniary damages and *McCagherty v. Camps*, 2016 BCSC 1974, where the Court awarded $70,000 in non-pecuniary damages. Again, both these cases are distinguishable on the facts. In each case, the Court found that the injury sustained in the car accident triggered a previously asymptomatic but chronic degenerative arthritic condition. Again, I was not persuaded on the evidence before me that Mr. Heuring's pre-existing osteoarthritis was rendered symptomatic by the Accident but rather that his osteoarthritic condition would have progressed as it has even had the Accident not occurred.

[93] Counsel for Mr. Heuring also relies on the decision in *Catling v. Poteryko*, 2017 BCSC 311, where a 60-year-old male plaintiff, who suffered neck, back, knee and elbow pain post-accident was awarded $80,000 in non-pecuniary damages. The plaintiff had built his own plumbing business and could no longer run it after the

accident. He also could no longer golf, ski or use his ATV. The circumstances in *Catling* are distinguishable from those before me. In assessing non-pecuniary damages, Mr. Justice Thompson specifically stated: "[m]ost significantly, Mr. Catling suffers the frustration of prematurely losing his leadership role in the family company that he and his wife built" and that "Mr. Catling is no longer in charge of the company that he was instrumental in building and my sense of it is that this is a loss most keenly felt": *Catling* at paras. 20 and 22. No such evidence was presented in this case. While *Catling* is of some assistance, I am of the view that an $80,000 award for non-pecuniary damages in this case would be excessive.

[94] However, the defendant in this case, by submitting that Mr. Heuring had substantially recovered within six to eight months after the Accident (with residual symptoms for up to 12 months after the Accident) has significantly underestimated the appropriate amount of non-pecuniary damages. Counsel for Mr. Smith relies on the decision in *Scott v. Hoey*, 2015 BCSC 2037, where a 22-year-old plaintiff sustained soft tissue injury to her neck in an accident with associated symptoms resolving within 17 months of the accident. She was awarded $20,000 in non-pecuniary damages. As I have concluded, based on the evidence before me, that Mr. Heuring's soft tissue injuries did not likely resolve until almost four years after the Accident. The *Scott* case, as well as the cases of *Hill v. Swayne*, 2012 BCSC 1126, *Gendron and Moffat*, *Morrison v. Peng*, 2010 BCSC 562, and *Sun v. Sukhan,* 2012 BCSC 365, are distinguishable. As regards *Sun*, I note that the Court found that the plaintiff's injuries had "largely resolved" within one year and nine months of the collision: *Sun* at para. 55. In this case, Mr. Heuring established, on the balance of probabilities, that he suffered from his soft tissue injuries for a significantly longer period of time following the Accident.

[95] In the alternative, counsel for the defendant submits that if the Court finds that Mr. Heuring has some ongoing pain symptoms attributable to the Accident, an award of $30,000 to $35,000 in non-pecuniary damages is in order. Counsel relied on the case of *Rasmussen v. Blower,* 2014 BCSC 1697. In that case, a 47-year-old boating instructor who suffered whiplash-type injuries, with infrequent muscle

spasms was improving at the time of trial, but his injuries were not fully resolved. He was awarded $40,000 in non-pecuniary damages (which was reduced by 20% for failure to mitigate). Notably, the trial occurred almost six years after the accident. Counsel also relies on the decision in *Zajaczkowski v. Grauer*, 2014 BCSC 711. In that case, a 41-year-old plaintiff suffered injury to his lower back in a rear end accident in September 2008 which resulted in what the Court described as a minor "impact": *Zajaczkowski* at para. 2. The plaintiff continued to suffer from persisting low back pain at the time of trial in February-April 2014. He was awarded $30,000 in non-pecuniary damages. Although the plaintiff in this case had continuing pain at the time of the trial, the case is distinguishable on the basis that Mr. Heuring's soft tissue injuries were more extensive. Counsel's reliance on *Manson v. Kalar,* 2011 BCSC 373, may also be distinguishable on this basis. In that case, while the symptoms from the soft tissue injury had not resolved at the time of trial, which was almost three years after the accident, in Mr. Heuring's case, I have found that Mr. Heuring's soft tissue injuries took almost a year longer to resolve.

[96] While the cases cited by counsel for both parties were of assistance to the Court in considering a possible range of non-pecuniary damages, the facts of this case are unique. I am of the view that the sum of $40,000 is an appropriate award for Mr. Heuring. In arriving at this assessment, I have considered each of the factors in *Stapley,* in light of the entirety of the evidence before me, including the soft tissue injuries sustained by Mr. Heuring and their impact on his work, personal life, and recreational life, as well as his health and general well-being.

VI. PAST INCOME LOSS

[97] Mr. Heuring advances a two-pronged claim for past income loss arising from: (1) the lost employment opportunity through the union job in Mackenzie, BC which Mr. Heuring had scheduled to start the week following the Accident; and (2) lost employment as a result of being off work from his job at the Hospital.

[98] The parties have agreed that Mr. Heuring was not able to attend the union job in Mackenzie due to the injuries he sustained in the Accident. Further, the parties

have agreed that the individual who performed the job in Mr. Heuring's absence earned a gross income of $14,509.73. Mr. Heuring also testified that his lost income in relation to this union job was not replaced through the union. Counsel for the defendant correctly submits that this gross income loss must be reduced to reflect net income loss. Counsel for the defendant asserts the average income tax paid by Mr. Heuring for the years 2012, 2013 and 2014 was 18.5% and suggests that this is an appropriate percent reduction. I agree. Accordingly, Mr. Heuring's net income loss relating to the missed opportunity at the Mackenzie union job is $11,825.

[99] With regard to the second prong of past income loss, Mr. Heuring testified that he was absent from his job at the Hospital based on the recommendation of Dr. Brown. Dr. Arthur also testified that Mr. Heuring's time away from his work at the Hospital, after the Accident, was appropriate. I accept this evidence and find that Mr. Heuring's absence from work after the Accident was justified and that he should be compensated for any associated wage loss.

[100] Counsel for Mr. Heuring submits that, in reviewing the wage loss calculation set out in the June 2013 Letter and confirmed by Ms. Zoretich, the sum of $8,151.76 represents the appropriate calculation of wages and benefits lost directly by Mr. Heuring for days of work missed from the Hospital, which were not compensated by VCH in any way. Counsel underscored Ms. Zoretich's testimony that Mr. Heuring only received sick leave pay until November 30, 2011. As such, Mr. Heuring claims lost wages and benefits for the time missed by Mr. Heuring at the Hospital from December 1, 2011 through February 15, 2012 in the amount of $8,151.76. However, this gross income loss figure must also be reduced to reflect Mr. Heuring's net income loss after taxes. Applying an 18.5% tax rate, his net past income loss from the Hospital would be $6,643.68.

VII. REIMBURSEMENT FOR LOST SICK LEAVE BENEFITS

[101] Mr. Heuring submits that his losses include the sum of $14,837.17, representing the total wages and benefits paid by VCH to him when he was absent from his work at the Hospital after the Accident. He submits that even though he

retired in April 2015 from the Hospital, to the extent that he recovers any lost wages in this action, he is required under his collective agreement to repay the sick leave pay that VCH paid to him.

[102] Counsel for Mr. Heuring relies on the decision of *Bjarnson v. Parks,* 2009 BCSC 48 at para. 56, and submits that this Court has long recognized the loss of sick bank credits as a compensable loss. Counsel acknowledges that in this case, Mr. Heuring is not entitled to the $14,837.17 directly, since the sum will be reimbursed to VCH, but argues that Mr. Heuring is entitled to a 40% payout of his sick bank time at the time of retirement.

[103] The collective agreement reads as:

> **Article 31.12**
>
> In the event that an employee is absent from duty because of illness or injury in respect of which wage loss benefits may be payable to the employee of ICBC… To the extent that the employee recovers monies as compensation for wages lost, the employer shall be reimbursed any sick leave pay that it may have paid to the employee. Where the Employer recovers monies from ICBC, the employer's sick leave credits shall be proportionately reinstated.

[104] Ms. Zoretich confirmed that, upon reimbursement, Mr. Heuring would be entitled to receive a 40% payout of his sick leave bank upon retirement. However, on cross-examination, she conceded that while she believes Mr. Heuring ought to repay VCH in the amount of $14,837.17, she "has no idea" what would happen if he did not in fact repay that amount.

[105] Counsel for the defendant argues that it is not clear under what legal authority VCH could compel repayment of wage loss benefits, submitting further that the requirement to repay has not been made out on the evidence before me. Further, he argues that, in any event, the requirement is to repay "wage loss benefits" and not "total wages and benefits paid by the employer" calculated as the $14,837.17 sum. As such, the putative amount claimed by VCH is in excess of what is permitted by its own collective agreement which does not anticipate repayment of benefits received. Counsel argues that, accordingly, the calculation substantially overstates Mr. Heuring's income loss related to the Hospital. In the alternative, counsel argues

that Mr. Heuring would only receive back 40% of any monies repaid. Thus, any income loss would be 60% of net income loss.

[106] Counsel for the defence also argues that Mr. Heuring's calculation of lost benefits erroneously assumes that 'but for' the 2011 Accident, Mr. Heuring would have worked at the Hospital from October 4, 2011 to mid-February 2012. He submits that this is not accurate since he would have worked at the MacKenzie union job during this time and would have absented himself from the Hospital. Therefore, the proposed loss calculation substantially overstates income loss related to Hospital. I do not accept this argument. Mr. Heuring testified that, prior to the Accident, his established practice was to use banked time (e.g., from overtime) from the Hospital to attend union jobs. That is, prior to the Accident, and subsequently as well, Mr. Heuring would receive pay from the Hospital even while away performing union work. Counsel argues, therefore, in order to restore Mr. Heuring to the position he would have been in had the Accident had not occurred, his lost sick benefits ought to be reimbursed.

[107] I am not persuaded that this is the proper forum to interpret and enforce Mr. Heuring's collective agreement. Nevertheless, I am persuaded that Mr. Heuring is entitled to compensation for the sick leave benefits he lost as a result of the Accident. I accept counsel for Mr. Heuring's argument that there will be no double recovery since it was Mr. Heuring's practice to book his union jobs during times when he was using banked time off.

[108] The evidence established that Mr. Heuring surrendered a total of 316.54 hours of paid sick leave during the time he missed from work after the Accident, from October 4 to November 30, 2011. Accordingly, as found in *Bjarnson*, this is a loss that must be compensated.

[109] The case authorities differ somewhat with respect to how lost sick bank credits should be calculated. In *Roberts v. Earthy,* [1995] B.C.W.L.D. 1497 (S.C.), the plaintiff lost 37 days from his accumulated or banked sick leave time as a result of a motor vehicle accident and was awarded the full cost of replacing those sick

days, without any contingency attached. Mr. Justice Clancy reasoned as follows at para. 12:

> [12] …If the purpose of awarding damages in tort actions is to compensate a plaintiff as completely as possible for the loss suffered, Mr. Roberts should receive the value of his actual loss resulting from the accident. To protect him against some catastrophic illness he should have access to the full number of days in the sick leave bank that he had acquired prior to the accident.

[110] In *Collins v. Ma,* [1991] B.C.W.L.D. 025 (S.C.), the plaintiff missed two days of work as a result of a motor vehicle accident. He used up two days of sick leave, for which he was paid his wages. The plaintiff sought repayment of those two days' salary in order to buy back the two days of sick leave he lost, pursuant to a provision of his collective agreement with his employer. The plaintiff in *Collins* was not entitled to cash out any banked sick leave upon termination or retirement. Any sick leave remaining at the time of termination or retirement would be lost. On the basis that the plaintiff had accumulated about 300 days of sick leave and that he "obviously [was] not prone to illness", Mr. Justice Catliff held that the loss of two out of 300 days of sick leave must be "regarded as small": *Collins* at para. 7. Catliff J. awarded the plaintiff $100 "not … on the basis of any proportion … but simply as a reflection of a real deprivation (lost sick leave) which is not very likely to turn into a real loss (lost salary)": *Collins* at para. 9.

[111] The approach in *Collins* was followed in *Olson v. Nixon,* [1991] B.C.W.L.D. 513 (S.C.), a case involving a plaintiff who was off work for a total of about 11 months due to injuries resulting from a motor vehicle accident. The plaintiff in *Olson* used all her accumulated sick time, about 1,170 hours, as a result of the accident. At para. 42, Mr. Justice Boyle applied a 10% contingency, reasoning as follows:

> [42] … There is a high probability here of calling upon sick days during the remaining 15 years of employment. Of the [amount] claimed, 90% is allowed. That recognizes new hours being banked to the maximum during the years the plaintiff anticipates working…. As Huddart J. observed in *Anthony v. Balance*, B890130, November 15, 1990, S.C.B.C., the figure [awarded] is arbitrary.

[112] There was no discussion in *Olson* about whether the plaintiff was entitled to a cash payout for any unused sick time upon termination or retirement.

[113] In *Choromanski v. Malaspina University College*, 2002 BCSC 771, the Court rejected the defence's argument that any award to the plaintiff for lost sick leave time should be discounted to take into account future contingencies. *Choromanski* involved a slip and fall accident on a university campus. The plaintiff was off work for approximately 99 days following the fall and was paid for those absences with the benefits available to him through his employment. The Court dismissed the action on the issue of liability but, at the request of the parties, agreed to deal with the issue of damages: *Choromanski* at paras. 45-46. As in *Collins*, the plaintiff's banked sick leave time did not have a cash surrender value; any unused sick leave time at the time of the plaintiff's termination or retirement would be lost: *Choromanski* at para. 60. Mr. Justice Barrow followed *Roberts* and would have reimbursed the plaintiff for his lost sick leave time without applying any contingency, had his claim been successful: *Choromanski* at para. 62.

[114] None of the cases discussed above involve plaintiffs whose sick bank time is paid out upon retirement at a particular percentage, as is the situation in the instant case. Following the approach taken in *Roberts, Choromanski* and *Bjarnson,* Mr. Heuring's loss is to be calculated based on the actual hours he missed from work which was used as sick time, multiplied by his approximate average hourly rate, without deduction for income tax: see *Bjarnson* at para. 65. Ms. Zoretich testified that Mr. Heuring missed 316.54 hours at an hourly rate of $29.82 for a total loss of $9,439.23. However, I must also consider Ms. Zoretich's testimony that at his retirement in 2015, Mr. Heuring would have received approximately 40% of this amount. Accordingly, he is entitled to receive compensation in the amount of $3,775.69.

VIII. PAST LOSS OF EARNING CAPACITY

[115] Compensation for past wage loss or past loss of earning capacity is to be determined according to the loss in the value of the work that the injured plaintiff

would have performed, but was unable to perform, because of injury: *Rowe v. Bobell Express Ltd.,* 2005 BCCA 141 at para. 30. In Kenneth D. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 2015-06, the author states that such loss may be measured in a number of ways, including: (1) by reference to the earnings the plaintiff would have received; (2) by a replacement cost evaluation of tasks that the plaintiff is no longer able to perform; (3) by an assessment of reduced company profits; or (4) by the amount of secondary income lost, such as shared family income.

[116] In *Smith v. Knudsen*, 2004 BCCA 613 at paras. 24-28, the Court of Appeal confirmed the proper approach courts should take when assessing damages for hypothetical events such as loss of capacity for past and future earnings as follows: (1) a plaintiff is required to prove on a balance of probabilities that an injury had an effect on his or her ability to earn income; and (2) once that has been established, hypothetical events are given weight as to their likelihood and need not be established on a balance of probabilities: see also *Athey v. Leonati*, [1996] 3 S.C.R. 458; and *Gill v. Probert*, 2001 BCCA 331.

[117] Very recently, in *Rousta v. MacKay*, 2018 BCCA 29, our Court of Appeal has confirmed the standard of proof for hypothetical past events as follows at para. 17:

> [17] …the standard for the proof for hypothetical past events, like hypothetical future events, is the lesser "real and substantial possibility" threshold. This standard can be contrasted with the standard of proof for past events, which is on the ordinary civil balance of probabilities standard, and alleged events which do not rise to the "real and substantial possibility" standard because they constitute mere speculation.

[118] Mr. Heuring's claim for lost earning capacity focuses on the value of the work that Mr. Heuring would have performed but was unable to perform due to his injuries. His counsel submits the claim for past loss of earning capacity arises from the following evidence:

- Mr. Heuring testified that prior to the Accident he had intended to retire in the summer of 2012 to focus solely on union work.

His plans changed because of the injuries he sustained in the Accident. This evidence was confirmed by his wife.

- Mr. Heuring has had difficulty since the Accident completing any union work that involves activity on ladders because of the hip pain and related leg issues he has experienced following the Collision. He testified that he was laid off early from a job in 2014 at CNRL because he could not complete the ladder work. He tried to avoid jobs with the union that involve being up on a ladder due to his hip symptoms.
- Ms. Craig confirmed in her report that Mr. Heuring only partially meets the physical demands of his job as a steamfitter with accommodation to avoid ladders and minimize access to tight awkward places involving crouching and squatting.

[119] While Dr. Underwood opined on Mr. Heuring's compromised vocational abilities after the Accident, I prefer the expert evidence of Ms. Craig in this regard. In any event, her evidence was consistent with that of Dr. Underwood, and Mr. Heuring himself, with respect to the limitations on Mr. Heuring's work capacity.

[120] Counsel acknowledges that the quantification of Mr. Heuring's claim for past loss of earning capacity is somewhat difficult since he continued to pursue and obtain union work after the Accident and as early as April 2012. He also continued to work at the Hospital full-time. As such, counsel acknowledges the difficulty in assessing how much more Mr. Heuring could have earned on a yearly basis had he retired in 2012.

[121] Nevertheless, Mr. Heuring testified that with respect to the job he lost in 2014 at CNRL, he was earning $4,000 per week, but found he could not complete the job due to the ladder work involved; accordingly, he was laid off six weeks into the job. He anticipated that the job would have lasted a duration of at least 4.5 months, for a minimum of at least another $60,000.00 in earned income. Counsel acknowledged that no supporting documentation tendered supporting this claimed loss and submitted, in light of the acknowledgements difficulties in assessing loss, that Mr. Heuring should be award a "nominal amount" of $50,000 for past loss of earning capacity.

[122] Counsel for the defendant argues that there are numerous problems with Mr. Heuring's claim in this regard. First, he asserts that Mr. Heuring's testimony, at his September 2013 examination for discovery, to the effect that he was planning to retire in the "the next year or so", was inconsistent with his testimony at trial, where he stated that he planned to retire in the summer of 2012. Second, counsel for the defence argues that Mr. Heuring did not intend to actually retire until his children graduated from university, relying on his examination for discovery testimony reproduced above that he had not gone up to northern British Columbia to do union work "for a while, 'cause my kids were grown up, and university". Counsel argues that this evidence is consistent with Mr. Heuring remaining with his Hospital job and not retiring at least until April 2015 when his daughter graduated from university but that it is not consistent with Mr. Heuring retiring from VCH in the summer of 2012 while both children were still in university. Further, counsel argues that Mr. Heuring was still working at the Hospital with no intention of retiring until his work environment become toxic and he felt he had to leave.

[123] Counsel for the defendant further submits that Mr. Heuring's claim is predicated upon an assertion that he was not feeling physically well enough to leave his Hospital job in the summer of 2012. However, he asserts that while Mr. Heuring could at times do better focussing on industrial work (such as in 2015), he could also do worse (such as in 2014 and 2016). Counsel also underscores that Mr. Heuring's claim does not address the increase in pension generated by the plaintiff by not retiring earlier in the summer of 2012 but by staying on to April 2015.

[124] Each of the parties make good points on this issue. However, based on the evidence before me, I am satisfied that there was a real and substantial possibility that Mr. Heuring would have retired in 2012 but for the Accident. Further, the timeframe of his wage loss in 2014 falls within the period of time that I have concluded, as discussed above, that Mr. Heuring's soft tissue injury had not yet resolved. I find that Mr. Heuring was not able to finish his job at CNRL due to his soft tissue injuries and I accept his counsel's submission that he is entitled to $50,000 for past loss of earning capacity.

IX. FUTURE LOSS OF EARNING CAPACITY

[125] Mr. Heuring submits that he is entitled to damages for future loss of earning capacity. Counsel acknowledges that Mr. Heuring is required to prove that there is a real and substantial possibility of a future loss of income despite having returned to his usual employment. She submits that the factors to be considered under the capital asset approach as set out in *Brown v. Golaiy*, (1985) 26 B.C.L.R. (3d) 353 (S.C.) at para. 8 are applicable:

> [8] 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
>
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[126] Counsel for Mr. Heuring submits that three out of four of these factors "are broad enough to support an award in circumstances where the plaintiff is able to continue in an occupation, but the ability to perform and the earning capacity resulting from that ability are impaired by the injury": *Sinnot v. Boggs*, 2007 BCCA 267 at para. 14. Counsel also acknowledges that allowance must be made for contingencies that the assumption upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.). She also correctly submits that any assessment is to be evaluated in view of its overall fairness and reasonableness: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11. She submits that, in light of the above consideration, a "nominal" amount of $35,000 would be an appropriate award for loss of Mr. Heuring's capital asset.

[127] While counsel is correct in her recitation of the law, the difficulty Mr. Heuring faces in the this aspect of his claim is my finding on causation; that is, Mr. Heuring's soft tissue injury resolved no later than the summer of 2015 and any continuing impairment to his ability to do more lucrative union work in the future is a function of

his pre-existing osteoarthritic condition which, based on the evidence before me, was not accelerated or contributed to by the Accident. In addition, even if I were to have concluded otherwise, I would not, in any event, be persuaded that there is a real and substantial likelihood that Mr. Heuring is unable to do union work. Ms. Craig testified that Mr. Heuring could continue to do work as a steamfitter or pipefitter providing such work (which would include union work) did not involve the use of ladders. Indeed, Mr. Heuring has selected union work and has done union jobs after the Accident that accommodated his physical restrictions. In conclusion, I find that Mr. Heuring has not proven on the evidence before me that he is entitled to damages for the loss of earning capacity.

X. SPECIAL DAMAGES AND LOSS OF FUTURE CARE

[128] Mr. Heuring submits special damages amount to $4,079.36 based on “out of pocket” treatment expenses and mileage expenses (for travel to and from appointments) incurred from the date of the Accident to June 8, 2017. The defendant accepts that treatment and mileage expenses are proper special damages but submits that only those expenses incurred during the years 2011-2013 ought to be included. As I have found that Mr. Heuring’s soft tissue injury did not fully resolve until the summer of 2015, I find the treatment and mileage expenses incurred from the date of the Accident to the end of June 2015 are proper special damages. This amount will fall between the higher range identified by Mr. Heuring of $4,079.36 and the lower range asserted by the defendant of $2,135.18. The parties may agree to an amount based on this finding or, alternatively, may proceed to a reference with the Registrar for an accounting pursuant to Rule 18-1(1) of the *Supreme Court Civil Rules*. It is hoped that a hearing before the Registrar will be unnecessary.

[129] As I have found that Mr. Heuring’s injuries were limited to soft tissue injuries which resolved in 2015, no award for future care is warranted.

XI. DISPOSITION

[130] In summary, I order that Mr. Heuring is entitled to the following damage awards:

1. $40,000 in non-pecuniary damages;
2. In regards to past income loss:
   (a) $6,643.68 for his net income loss from the Hospital;
   (b) $11,825 for his net income loss from the lost opportunity at the Mackenzie union job;
   (c) $3,775.69 representing his loss of sick leave benefits; and
   (d) $50,000 representing lost union work.

These amounts come to a total of $112,244.37 but must be reduced by 40% to $67,346.62 to reflect the apportionment of liability between the parties. Special damages in the categories agreed to by the parties must be added to this amount. These are to include treatment and mileage expenses incurred from the date of the Accident to June 30, 2015, with a 40% deduction representing Mr. Heuring's apportionment of liability. If the parties are unable to agree, the matter shall proceed to a reference before the Registrar.

[131] As success was divided between the parties, there shall be no award of costs.

"MORELLATO J."