

CANADA / JUDGMENT

Alragheb v. Francis

2020 BCSC 1712

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1712 Alragheb v. Francis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Alragheb v. Francis,

2020 BCSC 1712

Date: 20201112

Docket: M185216

Registry: Vancouver

Between:

Samer Alragheb

Plaintiff

And

Mark Francis and Nicole Gibbon

Defendants

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Plaintiff:

D.W. Grunder

Counsel for the Defendants:

G.M. Hagel

C. Rubinstein

Place and Dates of Trial:

Vancouver, B.C.

June 22-26, June 29-30, July 2, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 12, 2020

Table of Contents

1. introduction. 3
2. possible divergent interests of the defendants. 4
3. reductions related to plaintiff's 50% fault for the first mva. 6
 - a) Reduction related to the time after the Second MVA. 6
 - b) Reduction related to the time before the Second MVA. 12
4. Stare Decisis. 13
5. background facts. 20
6. The First MVA - June 22, 2016. 24
7. The Second MVA - January 19, 2017. 24
8. medical evidence. 25
 - a) Dr. I. Abou-Gareeb (Family Physician) 26
 - b) Dr. D. Powers (Vocational Rehabilitation Professional) 27
 - c) Dr. M. Gupta (Neurology) 29
 - d) Dr. H. Acharya (Physical Medicine and Rehabilitation) 29
 - e) Dr. K. Heng (Psychiatry) 31
9. Findings on the plaintiff's medical conditions. 36
10. Assessment of award. 38
 - a) Non-Pecuniary Damages. 38
 - b) Pre-trial (Past) Loss of Earning Capacity. 41
 - c) Future Loss of Earning Capacity. 43

d) Costs of Future Care. 46

e) Special Damages. 47

11. conclusion. 47

12. costs. 48

1. introduction

[1] The plaintiff is a Syrian refugee. In 2015, he came to Canada with his spouse and their then only child. He is now 35 years old with three young children.

[2] The plaintiff speaks Arabic. His English language skills are poor. He has a Grade 6 education. He is an earnest man.

[3] In May 2014, when the plaintiff was living in Lebanon he returned to Syria to collect some important family documents. He was arbitrarily incarcerated for about one month and during this period he was tortured. He was released after his brother paid an approximately \$35,000 bribe.

[4] The plaintiff has been involved in two motor vehicle accidents since he came to Canada.

[5] On June 22, 2016, the plaintiff was riding his bike and collided with a car driven by the defendant, Mark Francis (the "First MVA"). The parties agree that the plaintiff and Mr. Francis are equally liable.

[6] On January 19, 2017, the plaintiff was driving a car which, when stopped at a red light, was rear-ended by a car driven by the defendant, Nicole Gibbon (the "Second MVA"). Ms. Gibbon has admitted that the Second MVA "occurred solely as a result of her negligence".

[7] In each accident, the plaintiff suffered injuries. As described below, the injuries are indivisible as opposed to divisible. "Divisible injuries are those capable of being separated out and having their damages assessed independently. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes": *Bradley v. Groves*, 2010 BCCA 361, para. 20.

[8] The plaintiff seeks the following damages:

a) Non-pecuniary damages:

\$126,000

b) Pre-trial (past) loss of earning capacity:

\$37,998

c) Future loss of earning capacity:

\$600,000

d) Cost of future care:

\$8,124

e) Special damages:

\$11,736

Total

\$783,858

[9] The defendants say that the appropriate award is:

a) Non-pecuniary damages:

\$63,000 to \$82,500

b) Pre-trial (past) loss of earning capacity:

\$0

c) Future loss of earning capacity:

\$225,000 to \$325,000

d) Cost of future care:

\$8,124

e) Special damages:

\$7,919

Total

\$304,043 to \$423,543

[10] For the reasons that follow, the Court will award:

a) Non-pecuniary damages:

\$100,000

b) Pre-trial (past) loss of earning capacity:

\$28,652

c) Future loss of earning capacity:

\$275,000

d) Cost of future care:

\$8,124

e) Special damages:

\$8,879

Total

\$420,655

2. possible divergent interests of the defendants

[11] On first impression, one may think that the two defendants, Mr. Francis and Ms. Gibbon, have divergent interests from each other. For example, while each of the defendants share a common interest to allocate as much fault as possible to the plaintiff, each defendant would possibly wish to allocate as much of the assessed damages as possible as solely relating to the accident for which that defendant's actions were not a cause.

[12] In *Mara (Guardian of) v. Blake*, 1996 CanLII 2650 (BC CA), our Court of Appeal addressed the issue of the same counsel acting for more than one defendant where there may appear to be divergent interests. Where, as here, each defendant has the same insurer, a conflict of interest does not arise. As the Court of Appeal in *Mara* explained:

[12] In British Columbia, the authority of the insurer under a policy of motor vehicle insurance is ensconced in the Regulations to the Insurance (Motor Vehicle) Act, ss. 74 and 74.1 of which provide as follows:

74. On receipt of notice of a claim for damages brought against an insured for which indemnity is provided under this Part and subject to an act or omission by the insured entitling the corporation to raise any question as to whether or not the interest is entitled to indemnity, the corporation, at its expense, shall

(a) assist the insured by investigating and negotiating a settlement, where in the corporation's opinion its assistance is necessary, and

(b) defend in the name of the insured any action for damages brought against the insured.

74.1 Upon assuming the defence of an action for damages brought against an insured, the corporation shall have exclusive conduct and control of the defence of the action and, without limiting the generality of the foregoing, the corporation shall be entitled to

(a) appoint and instruct counsel to defend the action,

(b) admit liability, in whole or in part, on behalf of the insured,

(c) participate in any non-judicial process which has as its goal the resolution of a claim, and

(d) compromise or settle the action.

Each defendant in this case has, therefore, granted to the insurer the exclusive right to control and conduct the defence to the action against him. Subject to the duty of good faith, the insurer alone is entitled to appoint and instruct counsel, to settle within the limits of the policy

notwithstanding that the "insured" may object, or to defend the claim notwithstanding that the "insured" may wish to settle. Essentially, by taking up the policy of insurance, the insured has agreed that, subject to "good faith" remedies, his interest (at least in non-financial terms) and his wishes will be subordinated to those of the insurer in return for the latter's obligation to indemnify him for damages arising from the final award or settlement made against him. This reality would appear to have been accepted by the defendants in this case, none of whom have objected to I.C.B.C.'s appointment of one counsel to defend the four actions.

[13] I wish to emphasize that counsel for the defendants has each acted with the highest regard for the relevant professional rules and ethics.

[14] For the case at bar, the practical relevance is that the Court does not need to address certain issues of apportionment of liability for damages as between the two defendants that would arise if either one or both of them were not covered by insurance from the same insurer or did not have insurance coverage.

3. reductions related to plaintiff's 50% fault for the first mva

a) Reduction related to the time after the Second MVA

[15] A legal issue arises with respect to the award of damages related to the time after the Second MVA for the plaintiff's indivisible injuries. To what extent should the plaintiff's damages be reduced as a result of the plaintiff being equally at fault with the defendant, Mr. Francis, for the First MVA?

[16] Should the damages be reduced by 25% because there were two accidents and the plaintiff's actions were a cause of the First MVA and he has admitted that he was 50% at fault with respect to the First MVA? Should the damages for the plaintiff's indivisible injuries be reduced by 33 1/3% because, viewed together, the plaintiff and each of the two defendants were a cause of one of the accidents? In other words, "but for" the negligence of each, at least one of the accidents would not have occurred. Should the plaintiff's damages be reduced based on his relative degree of fault to the fault of each of the defendants? Or should these damages be reduced at all?

[17] The plaintiff says that damages related to this aspect should not be reduced at all. The defendants say that the damages should be reduced by 33 1/3% because the plaintiff and each of two defendants were equally at fault (blameworthy).

[18] Based on the relevant statute and my reading of the evolving jurisprudence, the answer to the posed question is that the plaintiff's damages with respect to the foregoing aspect of damages should be reduced by 25%.

[19] Sections 1, 2, 4, 5, and 6 of the Negligence Act, R.S.B.C. 1996, c. 333 read:

Apportionment of liability for damages

- 1 (1) 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.
- (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
- (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

Awarding of damages

2 The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:

- (a) the damage or loss, if any, sustained by each person must be ascertained and expressed in dollars;
- (b) the degree to which each person was at fault must be ascertained and expressed as a percentage of the total fault;
- (c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;
- (d) as between 2 persons each of whom has sustained damage or loss and is entitled to recover a percentage of it from the other, the amounts to which they are respectively entitled must be set off one against the other, and if either person is entitled to a greater amount than the other, the person is entitled to judgment against that other for the excess.

Liability and right of contribution

- 4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.
- (2) Except as provided in section 5 if 2 or more persons are found at fault
- (a) they are jointly and severally liable to the person suffering the damage or loss, and
- (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

Negligence of spouse in cause of action that arose before April 17, 1985

5 (1) In an action founded on fault or negligence and brought for loss or damage resulting from bodily injury to or the death of a married person, if one of the persons found to be at fault or negligent is the spouse of the married person, no damages, contribution or indemnity are recoverable for the portion of loss or damage caused by the fault or negligence of that spouse.

(2) The portion of the loss or damage caused by the fault or negligence of the spouse referred to in subsection (1) must be determined although that spouse is not a party to the action.

(3) This section applies only if the cause of action arose before April 17, 1985.

Questions of fact

6 In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

[20] Two key words in foregoing provisions of the Negligence Act are "caused" and "fault". Causation and fault are separate concepts.

[21] Causation generally engages the "but for" test. As the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458 stated:

[14] The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.

[22] With respect to fault, Justice Cohen in *Karran v. Anderson*, 2009 BCSC 1105 stated:

[106] The Negligence Act, R.S.B.C. 1996, c. 333, s. 1(1), requires that apportionment of liability must be made on the basis of "the degree to which each person was at fault". As stated in *Cempel v. Harrison Hot Springs*, [1998] 6 W.W.R. 233, 43 B.C.L.R. (3d) 219 at para. 19 (C.A.), the assessment to be made is of degrees of fault, not degrees of causation, with "fault" meaning blameworthiness. Courts must gauge the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all of the circumstances.

[107] In assessing the respective fault and blameworthiness of the parties as contemplated in *Cempel*, courts are to evaluate the extent or degree to which each party departed from the standard of care each party owed under the circumstances: *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505 at para. 46. Finch J.A. (as he then was) described the range of blameworthiness, as follows:

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.

- [23] The First MVA and the Second MVA were independent events each giving rise to a separate cause of action. Each accident caused the indivisible injuries from which the plaintiff now suffers.
- [24] With respect to fault (blameworthiness), a 25% reduction in the plaintiff's damages or loss for the time after the Second MVA will recognize that he was 50% at fault for the First MVA. Each of the accidents were independent events, yet each caused the damages or loss (before reduction) related to the time after the Second MVA. Each accident was a constituent cause.
- [25] Fault is determined by looking at an initial and a successive accident separately. If the fault analysis were to blend an initial accident and a successive accident, then the percentage of a plaintiff's fault in the initial accident would decrease to the extent that a defendant's conduct in the successive accident approached "reckless indifference" as opposed to a "minor lapse of care".
- [26] Further, a defendant in the successive accident would seek to show that the plaintiff in the initial accident was more at fault than may have been previously acknowledged or found. Where the prior accident was many years before the successive accident, the principle of finality would be disturbed by the reopening of possibly much older litigation: *Johnson v. Laing*, 2004 BCCA 642 at para. 11, leave to appeal ref'd [2005] S.C.C. No. 91.
- [27] The use of the words "every action" in ss. 2 and 6 of the Negligence Act shows that the Legislature intended that fault should be determined on an accident by accident basis. Similarly, s. 5(3) contemplates a separate cause of action. For every action where the plaintiff is to some degree at fault, fault for each person is ascertained and expressed as a percentage of total fault: Negligence Act, s. 2(b). The degree of fault is a question of fact: Negligence Act, s. 6. An initial accident and a successive accident are viewed separately. Otherwise, the findings in the successive accident could disturb the findings of fact (fault) in the initial accident.
- [28] Further support for treating the First MVA and the Second MVA as separate accidents in the apportionment of fault may be found in an analysis of ss. 1 and 4 of the Negligence Act.
- [29] In *Leischner v. West Kootenay Power & Light Co. Ltd.* (1986), 24 D.L.R. (4th) 641 (B.C.C.A.), our Court of Appeal (sitting as a five-member panel) first stated that they had "little to add to the careful reasons of the trial judge with which we agree", referred to ss. 1, 2(c), and 4 of the Negligence Act, and then continued (at p. 665-666):

Sections 1 and 4 apply to different situations; s. 4 applies to cases where two or more persons cause damage to the plaintiff; s. 1 applies where the plaintiff himself is one of the persons found to have caused his damage or loss; s. 2(c) provides that in a s. 1 case the plaintiff shall recover from a defendant only the proportion of the loss that corresponds to that defendant's fault.

This interpretation is borne out by the legislative history of the Act; at common law a plaintiff at fault could not recover from a defendant at fault; to remedy this our Legislature in 1925 borrowed the wording of s. 1 of the Maritime Conventions Act, 1911 and later in 1936 added the words which now appear in s. 2(c) of the present Act; the Legislature did not choose the words used in s. 2 of the Maritime Conventions Act, 1911 which do provide for joint and several liability in the case of personal injury.

In the result where a plaintiff is blameless, he obtains joint and several judgment against any number of defendants responsible for his loss; where a plaintiff shares in the blame, then by ss. 1 and 2(c) he obtains several judgments against the defendants liable for his loss.

[30] In *Orange Julius Canada et al. v. Surrey (City) et al.*, 2000 BCCA 467, Justice Finch (as he then was), writing for our Court of Appeal, stated:

[76] It is now settled law in British Columbia that s. 1 of the Negligence Act only applies where the plaintiff is found to be contributorily negligent for its own losses. In such circumstances, liability between two or more tortfeasors is several, not joint, and there is therefore no basis for third party claims for contribution or indemnity. See *Cominco Ltd. v. Canadian General Electric Co.* (1983), 4 D.L.R. (4th) 186 (B.C.C.A.); and *Leischner v. West Kootenav Power & Light Co.* (1986), 24 D.L.R. (4th) 641 (B.C.C.A.).

[77] As Madam Justice Southin observed in *United Services Funds (Trustees of) v Richardson Greenshields of Canada Ltd* (1988) 48 D.L.R. (4th) 98 (B.C.S.C.) the purpose of s. 1 of the Negligence Act is not to create new duties, but rather to relieve plaintiffs from the harsh result of having their actions dismissed because they were contributorily negligent.

[31] The fact that ss. 1 and 4 of the Negligence Act apply to different situations requires that, in the finding of the degree of fault where there are two accidents giving rise to an indivisible injury, the finding of the degree of fault for each accident must be made separately. Otherwise, s. 1(3) of the Negligence Act would not be given meaning. A defendant in a successive accident cannot be held liable for the plaintiff's pain and suffering for the period between the initial accident and the successive accident.

[32] Moreover, if a plaintiff was not liable for an initial accident involving two or more defendants but was found to be a cause of a successive accident and was even partially at fault, the plaintiff would lose the ability to pursue the defendants in the initial accident as jointly and severally liable (at least for the damages related to the time before the successive accident).

[33] I conclude that the weighing of the plaintiff's degree of fault in an initial accident (as in the case at bar) with the fault of a tortfeasor in a successive accident would be contrary to the two different situations contemplated by ss. 1 and 4 of the Negligence Act.

- [34] In my view, the rule may be stated: Where an initial accident and a successive accident result in indivisible injuries to an at-fault plaintiff, the damages or loss relating to the time after the successive accident are apportioned on the basis that each accident was a cause of the plaintiff's indivisible injuries with the relative fault determined on the basis that each accident is given equal weight.
- [35] In sum, the plaintiff's damages for the time after the Second MVA will be reduced by 25%. In other words, each of the two accidents were constituent causes of the plaintiff's indivisible injuries and the plaintiff was 50% at fault for the First MVA.
- [36] With respect to the evolving jurisprudence, I note that the *Long v. Thiessen* (1968), 65 W.W.R. 577 (B.C.C.A.) line of authorities no longer applies. In *Bradley*, our Court of Appeal stated *Long* to have been overruled (at para. 35).
- [37] In *K. Cooper-Stephenson and E. Adjin-Tettey, Personal Injury Damages in Canada*, 3d ed. (Toronto, ON: Thomson Reuters, 2018), the authors state at p. 1080:

The method required by *Long v. Thiessen* [(1968), 65 W.W.R. 577] was for a judge to estimate the damages which would have been recoverable against the defendant responsible for the first accident as if assessment had been made immediately before the second accident occurred. The second defendant then would what is left of the total damages. ...

And further at p. 1081:

It is now recognized that the *Long* method of assessment does not fairly apportion if both accidents were necessary to produce the aggravated loss. The method excuses the first tortfeasor from liability for aggravated harm for which he or she was a contributory necessary cause. A hypothetical of Devlin J. in *Associated Newspapers Ltd. v. Dingle* demonstrates this: "The earning capacity of a man who has lost one eye may be diminished perhaps 10 per cent. If he loses the other eye, his earning capacity will probably disappear altogether." If caused by two successive accidents, it is clear that 90% of the disability is jointly caused by both defendants. The risk created by the first accident (vulnerability to total blindness) has been realized through the second. Evaluation of the first injury must take into account such a subsequent event occurring between the first accident and the trial, and the first accident thus becomes a joint necessary cause of total blindness. The hypothetical and reasoning from *Dingle* were then used in the Canadian case of *Beam v. Pittman*, [1994 CanLII 4428 (N.L.S.C.)]

[Emphasis in original.] [Footnotes omitted.]

- [38] The rule I have stated above is consistent with *Long* having been overruled.

b) Reduction related to the time before the Second MVA

- [39] With respect to the plaintiff's damages or loss arising before the Second MVA, the amount the plaintiff would otherwise be awarded should be reduced by 50% as a result of the plaintiff being 50% at fault for the First MVA. The fault of Ms. Gibbon for the Second MVA did not contribute to the damages or loss suffered by the plaintiff between the First MVA and the Second MVA: Negligence Act, s. 1(3).
- [40] The assessment of the damages and loss caused by the First MVA for the time before the Second MVA can be determined based on known evidence without any futurity.
- [41] The damages and loss otherwise determined are then reduced based on the plaintiff's degree of fault (50%) for the First MVA.
- [42] The foregoing approach should not be mistaken as adopting the Long approach. Unlike the approach in Long, damages for the plaintiff's indivisible injuries after the Second MVA will still be determined and a reduction of 25% will be made to account for the fault of the plaintiff in the first MVA (as described above).

4. Stare Decisis

- [43] In *Re Hansard Spruce Mills Limited.*, [1954] 4 D.L.R. 590 (B.C.S.C.), Justice Wilson (as he then was) addressed horizontal stare decisis. Justice Wilson stated (at 592):

I will only go against a judgment of another Judge of this Court if:

- (a) Subsequent decisions have affected the validity of the impugned judgment;
- (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
- (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.

- [44] In *Derksen v. Nicholson*, 2015 BCSC 1268, Justice Grauer (then sitting in this Court) considered successive accidents where the plaintiff was wholly at fault for the third of three accidents. He prefaced his analysis with the comment that the matter involved a "deceivingly complicated question". In the end, Justice Grauer considered the plaintiff's injury from the third accident to be a divisible injury. He found that the second and third accidents gave rise to only "two blips of exacerbation".
- [45] In the case at bar, the First MVA and the Second MVA were significant and each was a constituent cause of the plaintiff's indivisible injuries.

- [46] In *Bilanik v. Ferman*, 2014 BCSC 732, Justice Harvey had to address two accidents. For the first accident, the defendant admitted liability. Liability was disputed with respect to the second accident. Justice Harvey apportioned liability to the plaintiff as 20% and to the defendant in the second accident as 80%.
- [47] With respect to finding the degrees of fault in relation to the two accidents, Justice Harvey stated:
- [175] In this case, the injuries are indivisible and the global assessment of damages at \$60,000 stands. *Long v. Thiessen* has no application here. Hence, the necessary inquiry is to determine the degree of fault of each of, Mr. Ferman, Mr. Jones and the plaintiff in respect of her indivisible injury based on the extent to which each party departed from the standard of care owed in the circumstances. The defendants are not jointly liable for the global assessment of damages.
- [176] The first accident was undoubtedly less severe than the second accident. Mr. Ferman showed a minor lapse of care in conduct. The plaintiff appeared on the road to recovery prior to the August 11, 2008 accident. Mr. Jones showed a more major lapse of care in his conduct, showing a disregard for the safety of others. The plaintiff's symptoms from the May accident not only returned but worsened as a result of it. The major residual complaint that the plaintiff has today - headaches - arose from the August 2008 accident. The plaintiff, found to be 20% liable for causing the second accident, is in my view, less blameworthy in terms of her departure from the standard of care owed in the circumstances. Her lapse of care in conduct was minor, comparatively.
- [177] If fault is to be determined in percentages than I would apportion the respective degrees of fault for the indivisible injury as follows:
- Mr. Ferman:
- 15%
- Mr. Jones et al:
- 70%
- Ms. Bilanik:
- 15%
- [178] The result, subject to the defendants' submission that those damages ought to be reduced by virtue of the plaintiff's failure to mitigate, is an award of general damages of \$9000 in the *Ferman* action and \$42,000 in the *Jones* action.
- [48] In *Saidy v. Louzado*, 2019 BCSC 281, Justice Giaschi (at para. 262) followed the approach taken in *Bilanik*.

- [49] In *Lakatos v. Lakatos*, 2017 BCSC 1990, Justice Steeves noted that the question was "an intricate matter not without some degree of uncertainty" (at para. 174). Justice Steeves followed *Bilanik* (at paras. 209, 222 to 227).
- [50] In *Lane v. Wahl*, 2015 BCSC 1779, *aff'd Lane v. Pierce*, 2017 BCCA 450, Justice Sewell (at para. 83) also adopted the *Bilanik* approach. Our Court of Appeal's reasons were brief. They read:
- [1] The appellant appeals from three orders from a trial in the Supreme Court of British Columbia in respect to three motor vehicle accidents. The appellant contends that the trial judge failed to "give correct consideration to the whole substance of the appellant's case". He seeks to have us overturn findings of fact which are grounded in findings of credibility and to order new trials in respect of each appeal.
- [2] Absent error, which we are unable to detect, we cannot accede to the appellant's arguments. In essence the appellant is asking us to retry the cases.
- [3] For substantially for the reasons of the trial judge, we would dismiss the appeal.
- [51] It is not clear to me that the possible engagement of both ss. 1 and 4 of the Negligence Act where there is a successive accident was squarely placed before my colleagues or our Court of Appeal.
- [52] For the case at bar, I am also uncertain as to the scope of guiding principles from *Athey* and *Bradley*. In *Bilanik*, Justice Harvey referred at para. 172 to the "nuance created by *Bradley v. Groves*" and quoted paras. 32 to 37 of *Bradley*. These paras. read:
- [32] There can be no question that *Athey* requires joint and several liability for indivisible injuries. Once a trial judge has concluded as a fact that an injury is indivisible, then the tortfeasors are jointly liable to the plaintiff. They can still seek apportionment (contribution and indemnity) from each other, but absent contributory negligence, the plaintiff can claim the entire amount from any of them.
- [33] The approach to apportionment in *Long v. Thiessen* is therefore no longer applicable to indivisible injuries. The reason is that *Long v. Thiessen* pre-supposes divisibility: *Long* requires courts to take a single injury and divide it up into constituent causes or points in time, and assess damages twice; once on the day before the second tort, and once at trial. Each defendant is responsible only for their share of the injury and the plaintiff can recover only the appropriate portion from each tortfeasor.
- [34] That approach is logically incompatible with the concept of an indivisible injury. If an injury cannot be divided into distinct parts, then joint liability to the plaintiff cannot be apportioned either. It is clear that tortfeasors causing or contributing to a single, indivisible injury are jointly liable to the plaintiff. This in no way restricts the tortfeasors' right to apportionment as between themselves under the Negligence Act, but it is a matter of indifference to the plaintiff, who may claim the entire amount from any defendant.

- [35] This is not a case of this Court overturning itself, because aspects of *Long v. Thiessen* were necessarily overruled by the Supreme Court of Canada's decisions in *Athey, E.D.G.*, and *Blackwater [v. Plint]*, 2005 SCC 58]. Other courts have also come to this same conclusion: see *Misko v. Doe*, 2007 ONCA 660, 286 D.L.R. (4th) 304 at para. 17.
- [36] It may be that this represents an extension of pecuniary liability for consecutive or concurrent tortfeasors who contribute to an indivisible injury. We do not think it can be said that the Supreme Court of Canada was unmindful of that consequence. Moreover, apportionment legislation can potentially remedy injustice to defendants by letting them claim contribution and indemnity as against one another.
- [37] We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

[Emphasis of Justice Harvey.]

- [53] In *Bradley*, the plaintiff suffered indivisible injuries in two separate accidents. The plaintiff was not contributorily negligent with respect to either accident.
- [54] In my view, uncertainty arises as to whether paras. 32 to 37 from *Bradley* above were intended to cover the type of situation at bar where the plaintiff has admitted that he is equally liable for the First MVA and then to determine the relative fault of the plaintiff and each defendant by, in essence, conflating the two accidents into one accident.
- [55] In *Bradley*, the Court of Appeal was addressing whether *Athey* had overruled *Long*. In my view, it is within this context the Court referred to *Athey*.
- [56] In *Athey*, the plaintiff had also not been contributorily negligent. Justice Major, writing for the Court, stated at the outset:

- [1] The appellant suffered back injuries in two successive motor vehicle accidents, and soon after experienced a disc herniation during a mild stretching exercise. The herniation was caused by a combination of the injuries sustained in the two motor vehicle accidents and a pre-existing disposition. The issue in this appeal is whether the loss should be apportioned between tortious and non-tortious causes where both were necessary to create the injury.
- [7] The respondents were represented at trial by the same counsel. All parties proceeded as if there were only one defendant and only one accident, and no attempt was made to apportion fault between the respondents or between the accidents. The respondents admitted liability. There was no allegation of contributory negligence with respect to the accidents, or negligence by Mr. Athey or his doctor in resuming the exercise program. The only issue was whether the disc herniation was caused by the injuries sustained in the accidents or whether it was attributable to the appellant's pre-existing back problems.
- [57] In *Athey*, Justice Major, in his analysis of key principles, stated (in part):
- [17] It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.
- [22] The respondents argued that apportionment between tortious and non-tortious causes should be permitted just as it is where multiple tortfeasors cause the injury. The two situations are not analogous. Apportionment between tortious causes is expressly permitted by provincial negligence statutes and is consistent with the general principles of tort law. The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.
- [58] Returning to *Bradley*, the Court also states:
- [23] In *E.D.G. [v. Hammer]*, 2003 SCC 52 the majority of the Court per McLachlin C.J.C., said as follows:
3. Did the Trial Judge Properly Apportion the Damages Between Mr. Hammer and E.D.G.'s Subsequent Abusers?

- [28] Since I have concluded that the Board is not liable to E.D.G. for any of the damage caused by Mr. Hammer, it is not strictly necessary to consider the issue raised on the Board's cross-appeal. However, because the Board rests its challenge on the claim that Vickers J. misapplied a principle laid out in *Athey v. Leonati*, [1996] 3 S.C.R. 458, it will be useful to consider the Board's challenge.
- [29] The Board's challenge concerns that portion of the damages that was, in the view of Vickers J., caused jointly by Mr. Hammer and the subsequent abusers. Vickers J. held Mr. Hammer liable for the sum total of these damages, stating that "[a]s long as he [Mr. Hammer] is a part of the cause of the injury, even though his acts alone did not create the entire injury, his responsibility for the [entire] damage that flows from that injury is established" (para. 57). As an authority for this proposition, Vickers J. cited Major J.'s claim in *Athey*, *supra*, at para. 17, that "[a]s long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury". ([underline] emphasis of McLachlin C.J.C.).
- [30] In the Board's submission, Vickers J. was incorrect in applying this principle to the case at bar. The principle applies, the Board claims, only where the other cause is non-tortious and is a precondition of the injury, not where it is tortious and occurs subsequently.
- [31] In my view, the Board's reading of the principle articulated in *Athey* is overly narrow. After making the claim cited above, Major J. further expanded upon his reasoning, stating at para. 19 that:

The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm It is sufficient if the defendant's negligence was a cause of the harm.... [First emphasis added; second emphasis in original.]

This principle is not confined to cases involving non-tortious preconditions. It applies to any case in which the injuries caused by a number of factors are indivisible.

- [32] The matter is governed by the Negligence Act, R.S.B.C. 1996, c. 333, s. 4, which provides that "[i]f damage or loss has been caused by the fault of 2 or more persons", then "(a) they are jointly and severally liable to the person suffering the damage or loss". This rule implies that Mr. Hammer is liable to E.D.G. for the full cost of any injuries that are indivisible and caused both by Mr. Hammer and by the subsequent tortfeasors.

[Underline emphasis of McLachlin C.J.C.; bold emphasis added by the Court of Appeal.]

- [24] We take from this that indivisible injuries, whether occasioned by a combination of non-tortious and tortious causes or solely by tortious causes, result in joint liability for tortfeasors. This does not prevent jointly liable parties from seeking contribution and indemnity from each other under the Negligence Act, R.S.B.C. 1996, c. 333.

- [59] Bradley is addressing a situation where s. 4 of the Negligence Act is engaged and not a situation where both ss. 1 and 4 of the Negligence Act are engaged. In my view, this is the source of the uncertainty. As may be seen above, the Supreme Court of Canada in *E.D.G. v. Hammer*, 2003 SCC 52 was also considering only a s. 4 Negligence Act situation: *E.D.G.*, para. 32.
- [60] In the end, I am concerned that if I hold myself bound by *Bilanik* and following authorities, I will not be serving justice where, in my view, there is "some degree of uncertainty" and a "deceivingly complicated question" arises. For the plaintiff and the defendants, the difference is significant. A reduction of 331/3% versus 25% of the damages relating to the time after the Second MVA involves a considerable sum.
- [61] As noted, the defendants sought a 331/3% deduction. This was based on looking at both accidents together (and not as separation actions) with the relative fault of the plaintiff and each defendant determined accordingly. The defendants viewed that the plaintiff and each of them were equally blameworthy. I have rejected this approach for the reasons above.
- [62] In written submissions, plaintiff's counsel argued:
19. The plaintiff's position is that the court should make a global award for non-pecuniary damages and then reduce that award by 10%. The First Accident was minor in comparison to the Second Accident. Mr. Alragheb had substantially recovered from the injuries he sustained in the First Accident by the time the Second Accident occurred, and Mr. Alragheb is 50% at fault for the First Accident.
 20. Again, it is the plaintiff's position that there is no call to apply an apportionment to the future loss of working capacity, the costs of future care, or the impairment of homemaking capacity. The plaintiff had experienced a substantial improvement by the time of the Second Accident and would not have incurred damages for those last three heads of damage but for the Second Accident. Other than the non-pecuniary damages, which are indivisible, the other damages should be treated discretely.
- [63] As set forth below, I have found that the plaintiff suffered indivisible injuries and that his injuries from the First MVA contributed in combination with his injuries from the Second MVA to result in his current condition. There is not a basis to treat some of the heads of damages discretely.
5. background facts
- [64] In their written submissions, the defendants stress that they do not suggest that the plaintiff was not a credible witness or was otherwise dishonest or untruthful. They say that the plaintiff "gave his evidence sincerely, but he is a poor historian, and his evidence is not reliable".

- [65] I found the plaintiff to be a credible witness. His family physician, Dr. Iman Alou-Graeeb, speaks Arabic and kept detailed records of the plaintiff's visits with her. Dr. Abou-Gareeb's records include, for each visit, the symptoms and conditions the plaintiff described to her, her own impressions and findings, and her recommendations. In his testimony, the plaintiff viewed Dr. Abou-Gareeb's records as more reliable than his memory.
- [66] In making findings as to the plaintiff's description of his medical conditions at any particular time after the First MVA, I have relied on Dr. Abou-Gareeb's records over the plaintiff's testimony.
- [67] I found the plaintiff to be earnest and generally forthcoming. He was reticent with respect to his incarceration in Syria.
- [68] While the plaintiff was under cross-examination, a lunch break was taken. Immediately prior to the break, in accordance with my practice, I warned the plaintiff not to discuss his testimony or anything about the case with anyone.
- [69] Immediately upon resumption of the trial, the plaintiff stated that he wished to speak to his lawyer.
- [70] I asked the plaintiff what he would like to say. He then told the Court that he had been left a voicemail by Ms. Ola Abugharbriyeh (an Arabic-speaking Registered Clinical Counsellor) whose counselling sessions with the plaintiff were paid by ICBC.
- [71] Ms. Abugharbriyeh's call to and voicemail left with the plaintiff were innocently made. There was nothing done improperly (or in any manner unprofessional) by counsel, ICBC, or Ms. Abugharbriyeh that gave rise to the call and the voicemail.
- [72] The key relevant portion of the transcript reads:

THE COURT: Okay. So you received this phone call over lunch today; correct?

A Yeah, I received -- I received this voicemail requesting me to call her. So I called her and she said -- and she said that the employer for ICBC left her a message to talk to her, and also may call her. She wanted to talk to her. She told me that she did not know what was going on.

THE COURT: Sorry, and who's that? Dr. May, or was this Ola?

A So Ola told me that she didn't know what was going on and that she was contacted twice by phone by ICBC.

THE COURT: Okay. And what did you tell her?

A So I told her to say the truth, whatever happened with -- between the two of us, to tell -- to say it. And then I -- I hang up.

THE COURT: Okay.

- [73] I reassured the plaintiff that neither the Court nor counsel viewed him as having breached my warning given before the lunch break. As I told the plaintiff, it was a surprising event that he did not start and that he had handled the matter appropriately. As noted, I found the plaintiff to be earnest and generally forthcoming.
- [74] As noted, the plaintiff is 35 years old. He was born and raised in Syria.
- [75] The plaintiff stopped going to school in Grade 6 to work for his father who had a clothing store in Aleppo, Syria.
- [76] Over several years, the plaintiff learned the clothing trade. He would travel to various stores and show clothes as part of soliciting orders. Over time, his travel would also take him to Lebanon.
- [77] The plaintiff worked for his father for four or five years and then with some capital from his father established his own clothing business.
- [78] In 2011, with the war in Syria, the plaintiff moved to Lebanon.
- [79] In 2012, he married Amina, after a two-year engagement as part of an arranged marriage.
- [80] At the time of the marriage, Amina found the plaintiff to be happy, healthy, and cheerful. Their first son was born May 24, 2014 in Lebanon.
- [81] Shortly before his first son's birth, the plaintiff had travelled to Syria to obtain some important family documents. He was arrested and jailed. After about a month, he was released after a bribe of approximately \$35,000 was paid. In the early days of his incarceration, the plaintiff was tortured.
- [82] In December 2015, the plaintiff, Amina, and their son immigrated to Canada as refugees and settled in Richmond, British Columbia with a church sponsorship.
- [83] After arriving in Canada, the plaintiff and Amina started taking English lessons. The plaintiff was in good physical health and would help with household chores and in taking care of his son. The plaintiff's mood was good.
- [84] In Spring of 2016, the plaintiff, through a member of the congregation of the church that sponsored him, got a job with a local kitchen cabinet maker. He would help with sanding and other woodworking. Some heavy lifting was involved.
- [85] The plaintiff was paid \$14 per hour for a 7.5-hour, five-day work week. His total earnings from this first employer were approximately \$3,000.
- [86] As noted, the First MVA occurred on June 22, 2016.
- [87] As a result of his injuries from the First MVA, the plaintiff was not able to return to his first employer for some months. By that time, the plaintiff had been replaced. The plaintiff testified that his first employer told him that they would call him if an opening arose.

- [88] On December 2, 2016, the plaintiff was hired by a local pallet maker.
- [89] The plaintiff worked a 7.5-hour, five-day work week. He was paid \$14 per hour.
- [90] On January 19, 2017, the Second MVA occurred.
- [91] In the weeks following the Second MVA, the plaintiff attempted to return to work but found that he was unable to handle the physical labour involved in the making of the pallets. The plaintiff's last day of work was February 28, 2017.
- [92] The plaintiff has not had further employment as a result of his injuries and their progression.
- [93] The plaintiff has received social benefits that will need to be taken into account in the computation of the amount under some of the heads of damages.
- [94] In January 2018, the plaintiff bent to tie his shoelaces which caused significant back pain, which then became more severe over the next several days. The severe pain has subsided but he still experiences significant back pain with movement.
- [95] The plaintiff has followed recommendations for physiotherapy, massage treatment, occupational therapy, mental health counselling, and psychiatric treatment.
6. The First MVA - June 22, 2016
- [96] The First MVA occurred around 10 a.m., June 22, 2016. The plaintiff was riding his bike and wearing a bike helmet. He had been riding on the road but his lane had narrowed so he started to ride on the sidewalk. He estimated his speed to be 5 km/hr. The area was flat and dry. The weather was clear and sunny.
- [97] The defendant, Mr. Francis, was driving his car as he left the fenced area of his residential property in order to cross the sidewalk area and to then turn right onto the road (No. 4 Road in Richmond, BC).
- [98] Mr. Francis was proceeding slowly but failed to see the plaintiff riding on his bike.
- [99] The plaintiff's bike hit the left front side of Mr. Francis's car. The plaintiff was knocked to the ground with his helmet hitting the ground. He did not lose consciousness.
- [100] The plaintiff was taken by ambulance to the hospital. At the hospital X-rays were taken of the plaintiff's left wrist and elbow. The X-rays did not show any breaks or fractures. The plaintiff was given medications and left the hospital approximately five hours after his arrival. A friend picked him up from the hospital.
- [101] The plaintiff's first visit with Dr. Abou-Gareeb was on July 11, 2016. Dr. Abou-Gareeb became the plaintiff's family physician.
7. The Second MVA - January 19, 2017

- [102] In the Second MVA, the plaintiff was driving his car to work with a co-worker as a passenger. It was approximately 6:20 a.m. It was dark and raining. The area of the accident is flat.
- [103] The plaintiff had stopped his car at a red light. The defendant, Ms. Gibbon, in her car, failed to realize that the plaintiff's car was stopped.
- [104] Ms. Gibbon's car rear-ended the plaintiff's car at approximately 40 km/hr.
- [105] Ms. Gibbon estimated that the plaintiff's car was pushed forward approximately five feet.
- [106] A picture Ms. Gibbon's car shows significant front-end damage. It was repaired for approximately \$7,000.
- [107] The force of the collision caused the seat belt to bruise the plaintiff's lower abdomen area on both sides.
- [108] The plaintiff's car was driveable after the Second MVA. He did not go to the hospital immediately. After about an hour, the plaintiff experienced dizziness, headache, and back pain. He then went to the hospital.
- [109] At the hospital he vomited. He was kept overnight before he was discharged. A CT scan of his head, and X-rays of his lumbar spine and thoracic spine were taken. These were all normal.
- [110] On January 25, 2017, the plaintiff went again to the hospital as a result of feeling dizzy and vomiting. He was not kept overnight. He saw Dr. Abou-Gareeb the following day.

8. medical evidence

- [111] The defendants acknowledge that the plaintiff "sustained physical and psychological injury" as a result of the two accidents.
- [112] With respect to mental injury, the plaintiff has been diagnosed with chronic pain syndrome, Post-Traumatic Stress Disorder ("PTSD"), and Major Depressive Disorder ("MDD").
- [113] In addition to expert opinion evidence from Dr. Abou-Gareeb, I received opinion evidence from Dr. D. Powers (psychology and vocational rehabilitation), Dr. M. Gupta (neurology), Dr. H. Acharya (physical medicine and rehabilitation), and Dr. K. Heng (psychiatry).
- a) Dr. I. Abou-Gareeb (Family Physician)
- [114] Dr. Abou-Gareeb is a family physician and was qualified to provide opinion evidence with respect to family medicine and, in particular, the diagnosis, treatment, and prognosis of musculoskeletal injuries.
- [115] As noted, I have relied on Dr. Abou-Gareeb's descriptions of the plaintiff's symptoms and condition as they are more reliable than the plaintiff's memory of his symptoms and condition as of the time of any visit by the plaintiff with Dr. Abou-Gareeb.

[116] Of particular note, Dr. Abou-Gareeb's January 4, 2017 description of the plaintiff's clinical visit (15 days before the Second MVA) reads:

Samer reports that he gets pain in his head on the top and that his neck pain has worsened. The day before yesterday he felt his left hand numb while sleeping. He finished his sessions, ICBC sometimes visits his home. He feels pain when looking down for prolonged periods of 15 minutes while reading or writing. He was very frustrated and tearful, mood was slightly low because of fear that he might lose his job, he is pushing himself and trying to tolerate the pain in order to have a job and be off welfare. On examination, there is pain on neck extension and lateral rotation of the neck left greater than right otherwise no other concerns. Assessment is musculoskeletal pain neck pain and headache post MVA, anxiety/depression. Counseled on strategies for coping with current situation, prescribed Naproxen a non-steroidal anti-inflammatory (NSAID) and Baclofen, a muscle relaxant, advised to continue stretching, we will consider referring him for further physiotherapy.

[117] In her March 30, 2020 medico-legal report, Dr. Abou-Gareeb sets forth her prognosis of the plaintiff's injuries as follows:

Samer suffers from chronic symptoms (myofascial pains, headaches and major depression) that were caused by his 2 MVAs. His symptoms have persisted since the past 4 years and have interfered with his activities of daily living and his ability to work. It is unlikely that Samer be able to return to his pre accident level of functioning in the foreseeable future.

[118] I generally agree with Dr. Abou-Gareeb's prognosis but would add that the plaintiff's current "myofascial pains" now have a significant mental injury component. In this regard, I have given particular weight to Dr. K. Heng's psychiatric opinions and testimony.

b) Dr. D. Powers (Vocational Rehabilitation Professional)

[119] Dr. Powers has a doctoral degree in psychology and is a certified vocational rehabilitation professional. He was qualified to provide opinion evidence with respect to vocational rehabilitation and, in particular, vocational evaluation and vocational rehabilitation.

[120] Dr. Powers's report and testimony focussed on the plaintiff's future vocational abilities.

[121] The defendants had several criticisms of Dr. Powers's report. Chief among these criticisms was related para. 26 of Dr. Powers's report:

26. A baseline functional evaluation was ordered for this report and conducted November 09, 2019 by Mr. B. Dimou (certified EPIC lifting capacity evaluator). Based on the test results, in combination with clinical observations, Mr. Dimou opined that it can be concluded that Mr. Alragheb put forth a high level of physical effort during testing. That is, the testing results indicate that a high and consistent level of effort was provided, and therefore the assessment findings are likely an accurate measure of his functional capacity. Results of the assessment indicate that Mr. Alragheb frequently demonstrated postural accommodations and increased neck and low back pain during most of the physical demands testing,

including work intensive sitting, standing, pushing and pulling. Some elements were not tested due to Mr. Alragheb being limited at neck level with lower back pain and additional restrictions at stooping and kneeling.

[122] The defendants say that the baseline functional evaluation to which Dr. Powers refers represented Mr. Dimou's opinion based on Mr. Dimou's clinical observations and the results of the tests he administered. I agree. There is no admissible opinion evidence from Mr. Dimou. Dr. Powers should have administered the tests and formed his own opinion. Mr. Dimou's note was much more than, say, a doctor's assistant measuring a patient's height, waist, and weight

[123] I have given Dr. Powers's report and testimony little weight.

[124] In the case at bar, a vocational assessment was not necessary. Expert evidence is necessary where the trier of fact requires assistance to understand the evidence. Sopinka, Lederman, Bryant, *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis, 2018) describes the legal issue:

12.37 Judges recognized an exception to the opinion rule for expert witnesses to provide the trier of fact with the necessary technical or scientific basis upon which to properly assess the evidence presented. Conceived as a means of assisting jurors in the understanding of complex scientific or technical issues, expert evidence was permitted only in cases where the subject matter in question was beyond the capabilities of inexperienced persons who could not form a correct judgment without such assistance:

in other words when it so far partakes of the nature of a science, as to require a course of previous habit or study in order to the attainment of a knowledge of it.

12.38 Justice Dickson (as he then was) in *R. v. Abbey*, described the role of the expert in the following way:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary": [*R. v.*] *Turner* (1974), 60 Cr. App. R. 80 at p. 83, per Lawton L.J.

[Footnotes omitted.]

[125] I am satisfied that a jury would be able to assess the plaintiff's vocational future without the assistance of expert opinion evidence.

[126] The plaintiff has limited education and his English is very limited. His primary value in the workforce is that of a labourer. Before the First MVA, he had the qualities of being happy and cheerful. I am also satisfied that he wishes to provide for his family and would rather work than rely on social assistance. As noted, I found the plaintiff to be earnest and generally forthcoming. These are qualities that most employers value in an employee.

c) Dr. M. Gupta (Neurology)

[127] Dr. Gupta is a neurologist and was qualified to provide opinion evidence with respect to neurology including the assessment and treatment of spinal neurological complaints and conditions, headaches, and traumatic brain injuries.

[128] Dr. Gupta conducted an independent medical examination of the plaintiff on February 29, 2020.

[129] In her March 12, 2020, report Dr. Gupta opines that the plaintiff "likely suffered a concussion as a result of the [Second MVA]" but it has likely recovered without "ongoing concussion symptoms".

[130] With respect to the plaintiff's left arm, Dr. Gupta states:

Mr. Alragheb reports pain and occasional numbness in the left arm. Neurological exam of the left upper limb, MRI of the neck and nerve conduction studies do not reveal any significant neurological etiology. It is my opinion that his left arm symptoms are not likely neurological in nature.

[131] With respect to the plaintiff's low back pain, Dr. Gupta states that the "mechanical aspects of the lower back pain are not neurological in nature". She also states that "if he does have lumbar radiculopathy, it is mild based on his normal exam".

d) Dr. H. Acharya (Physical Medicine and Rehabilitation)

[132] Dr. Acharya specializes in physical medicine and rehabilitation and was qualified to provide opinion evidence regarding physical medicine and rehabilitation and, in particular, with respect to the assessment and treatment of soft tissue injuries, disc injuries, spinal degenerative issues, and chronic pain.

[133] Dr. Acharya opines:

From the point of view of a chronic pain syndrome, the prognosis is currently guarded but there is room for improvement. On my examination, I did not find any clear underlying orthopaedic or neurological injury from which a permanent disability should stem. He does have a chronic pain syndrome, in my opinion. The prognosis for chronic pain syndromes in terms of living a pain-free life is quite poor. However, the prognosis for improvement in his functional status is reasonable if the following recommendations in Question 9 are enacted and successful. From a mental health point of view, I would defer an opinion about disability to a psychiatrist.

[134] Dr. Acharya's recommendations to which he makes reference (Question 9) are:

He has seen a psychiatrist. However, I do not think that chronic pain has been addressed from a psychoeducational point of view or hurt versus harm counselling point of view. It would be reasonable to have him seen by an Arab-speaking psychologist for cognitive behavioural therapy. The number of sessions, etc., should be determined by a treating psychologist.

In my experience, duloxetine is a reasonable antidepressant which also has evidence in controlling muscle-related pain and therefore, it might be a good choice in this man's case.

He does have facet arthropathy and it is possible that some of his symptoms are in fact coming from the facet joints in the lumbar spine. It would be reasonable to consider facet joint injections including fluoroscopically-guided Cortisone injections, medial branch blocks, and/or radiofrequency ablation targeting the L4-L5 and L5-S1 facet joints in the lumbar spine. This may help to improve his pain symptoms.

If the above are done and if he understands hurt versus harm counselling, and assuming that the electrodiagnostic testing of his lower extremities did not show any clear evidence of motor axonal loss, it would be reasonable to try an active progressive rehabilitation program with a focus on return to work. It is my opinion that chiropractics, massage therapy, and passive physical therapy and other passive approaches are unlikely to be of any long-term benefit.

[135] In cross-examination, Dr. Acharya explained that PTSD or MDD may negatively impact chronic pain syndrome with the experience of pain enhanced. Similarly, it is common that a person with chronic pain syndrome may develop the symptoms of a mood disorder.

[136] Dr. Acharya further distinguished chronic pain syndrome from chronic pain. Chronic pain syndrome is chronic pain with significant deviation in function such as mood, work, relationships, sleep, and maladaptive pain behaviours.

[137] Dr. Acharya agreed that pain may be defined as "unpleasant sensory and emotional experiences associated with actual or potential tissue damage or described in terms of such damage". He also agreed that chronic pain defined as "pain that persists on or recurs for longer than three months" would generally be accepted as reasonable definition (some caveats for diseases such as cancer and that some medical professionals would say the pain must persist for at least six months).

[138] Dr. Acharya also noted that chronic pain tends to be more focal and chronic pain syndrome more general in terms of areas of pain.

[139] Dr. Acharya also testified that the plaintiff had facet arthropathy and that the plaintiff's lower back pain possibly related to the facet joints in the plaintiff's lumbar spine. Dr. Acharya was of the view that the plaintiff may have had a genetic predisposition to the degenerative changes. He viewed the changes on the imaging of the relevant joints were not caused by the Second MVA. He did view that the Second MVA was a possible cause of the plaintiff's lower back pain in that the degenerative changes of the plaintiff's spine became

symptomatic as a result of the Second MVA. As another possible cause, he stated that the pain could be part of the plaintiff's chronic pain syndrome.

e) Dr. K. Heng (Psychiatry)

[140] Dr. Heng specializes in psychiatry and was qualified to provide opinion evidence with respect to psychiatry including the diagnosis and treatment of psychiatric matters and, in particular, PTSD and MDD.

[141] Dr. K. Heng started treating the plaintiff for his mental health conditions in May 2018. As of the date of his March 25, 2020 medico-legal report, Dr. Heng had had 19 clinical sessions with the plaintiff. The sessions were undertaken through an interpreter.

[142] In his March 25, 2020 report, Dr. Heng states:

At my initial assessment with Mr. Alragheb in May 2018, I had diagnosed him with a Post Traumatic Stress Disorder (PTSD) as well as a Major Depressive Disorder (MDD). At the time of that assessment, I had noted that he experienced the following symptoms: flashbacks and memories associated with torture from his previous time in Syria, nightmares about being in the car accident, difficulties discussing the accidents, tearfulness and poor mood, increased anxiety / choking feeling when talking about this, initial and middle insomnia, poor concentration, poor energy, and anhedonia.

[143] Since the initial assessment, Dr. Heng's diagnosis of PTSD and MDD has not changed.

[144] In his medico-legal report with respect to the development of PTSD and MDD, Dr. Heng states:

The bio(logical)-psycho(logical)-social model has traditionally been used to understand the development of both PTSD and MDD. From a psychological perspective, suddenly experiencing a traumatic car V accident can significantly increase the risk of developing both conditions. From a biological perspective, increased pain as a result of a car accident can significantly increase one's risk of developing both conditions. Finally, from a social perspective, the reduction in mobility secondary to pain leading to the V subsequent, reduction in behavioural activation, and a reduction in social interaction, can also V, significantly increase one's risk of developing both conditions.

[145] Regarding further medical management of the plaintiff's mental condition, Dr. Heng in his report states:

From a pharmacological standpoint, continued medication management would be helpful. He has tried a few antidepressants (Ciprexil, Paxil, Prozac, Effexor). Anti-depressants are the mainstay of treatment from a pharmacological standpoint. As he has only had mild response thus far, it is likely that further time is required in trialing new anti-depressants in the future.

From a psychological standpoint, he would greatly benefit from treatment modalities such as Cognitive Behavioural Therapy (CBT) or Eye Movement Desensitizing and Reprocessing (EMDR). It would be especially helpful if he could do these treatments with an Arabic-speaking therapist. I am unable to find a publicly funded Arabic-speaking therapist, nor can I provide that service myself.

[146] Regarding the plaintiff's current condition and prognosis, Dr. Heng in his report states:

After two years of treatment, he continues to have significant difficulties with depression and concentration, He continues to have difficulties with pain and this further perpetuates his MDD and PTSD. At the current time, he has difficulties with being able to leave the home, interact with others, V and pursue recreational activities.

Until his depression and PTSD are under better control, it is more likely than not that he will continue to have difficulties with his future recreational activities. This being said, I am unsure what his pre-morbid level of activity and recreational life were like prior to the accident. Until he is able to gain adequate control of his pain and engage in Arabic-based psychotherapy for his PTSD, it is unclear as to how long his degree of limitation and/or restriction will last.

And further:

I will defer my opinion as to the prognosis of his physical concerns to his family physician and pain specialist. He is currently not receiving optimal care right now as he has not had a chance to try all of the various anti-depressant combinations, engage in Arabic-language psychotherapy, and receive adequate pain management. Complicating this is the fact that Mr. Alragheb has been quite inconsistent with taking his medications, something I attribute to his language barrier and not fully understanding the directions for taking his medications.

[147] Finally, in his report, Dr. Heng emphasizes the importance of treatment:

Having continued MDD and PTSD, if left untreated, could ultimately lead to suicide in the long term. Chronic risks of untreated MDD and PTSD linked to further development of other anxiety disorders and even dementia, although the probability is difficult to quantify. With optimal treatment, his risk for relapse is low for both PTSD and MDD, and the risk for other conditions stemming from his PTSD and MDD are significantly reduced.

[148] In his testimony, Dr. Heng described the process of trying different medications (and combinations of medications) in order to address a patient's particular conditions. What works for one patient may not work for another. There is a degree of trying different medications in the hope of finding the medication (or combination) with a greater beneficial effect.

[149] Dr. Heng also described particular difficulties arising with respect to the plaintiff adhering to his medications. In cross-examination, Dr. Heng testified:

Q So, again, the point being that if he's adhering to his medications, he seems to do better --

A Correct.

Q -- and when he's not adhering to his medications, he seems to do more poorly.

A Correct.

Q Right?

A I feel like the medication, what we call non-compliance, though, partially is a language issue. I'll give you an example. So he will have these side effects and he won't know what to do with these side effects, but he needs someone to be able to call the office. I can talk to him and say, okay, well, in the case of this side effect, just keep going the course, or maybe you can do something else to alleviate the side effect. Unfortunately, because he doesn't have that person there and we don't have any Arabic-speaking staff members, I just kind of wait until he's here again in four to six weeks, at which point then he's kind of stopped the medication kind of on his own because --

Q But then you provide him direction and say --

A Yeah.

Q -- "Listen, you need to keep taking it".

A Correct.

Q Right? Yes?

A Yes.

Q And so when he's -- pardon me, and the Paxil has helped and he's seen some overall improvement even though he hasn't properly been taking it.

A Correct.

[150] With respect to the relationship between mood and pain, Dr. Heng in cross-examination testified:

Q So if he gets optimal treatment --

A Yes.

Q -- he's more likely to see improvement, right?

A I hope -- I would hope so, yes.

Q Now, you mention that pain control is part of the treatment plan or the treatment model.

A Correct.

Q And that's because there's a well-known relationship between mood and pain, right?

A Yes.

Q Pain can affect a patient's mood?

A Yes.

Q And a patient's mood, particularly depression, can affect a patient's pain experience, right?

A Yes.

Q If one is depressed, one tends to feel the pain more acutely or highly.

A Yes.

Q And we've heard people talk about it as kind of a vicious circle or something, like one affects the other and they snowball.

A Correct.

Q So if we can improve a patient's mood --

A Okay.

Q -- we can improve his pain --

A Pain.

Q -- experience, right?

A Yes.

Q And if we can improve his pain experience independent of his mood --

A Mm-hmm.

Q -- then that could improve his mood.

A Yes.

Q And also, of course, function -- a person's ability to function --

A Yeah.

Q -- at work, at home, wherever --

A Mm-hmm.

Q -- that also has an effect on one's mood.

A Yes.

Q So if you can improve a person's pain or pain experience and you can educate them as to hurt versus harm -- are you familiar with that term?

A No.

Q If you can educate them that just because something hurts, you're not harming yourself, and therefore you can actually do it. If you can do all that, you can improve somebody's function, right?

A Correct.

Q And that may then, again --

A Make things better.

Q -- make everything else better, right?

A Yes.

Q And so you can end up with kind of a positive snowball or a virtuous circle, if I can use that term.

A Yes. I --

[151] As of the date of trial, the plaintiff had started psychotherapy with an Arabic-speaking counsellor, and EMDR as recommended by Dr. Heng.

9. Findings on the plaintiff's medical conditions

[152] Prior to the First MVA, I find that the plaintiff was an active spouse and father. I recognize that he may have had sub-clinical PTSD. However, it was not affecting normal function or behaviour, or day-to-day mental health. He was able to get a job, which gave him pride of providing for his family.

[153] As a result of the First MVA, the plaintiff suffered the following physical injuries:

- a) a concussion (which resolved within several weeks);
- b) headaches;
- c) light sensitivity;
- d) neck pain;
- e) left elbow tenderness (which resolved within several weeks);
- f) upper back tenderness (left scapular region); and
- g) some numbness on his left side and two of his left hand fingers.

[154] With respect to his mental health after the First MVA, the plaintiff became, at times, as described by Dr. Abou-Gareeb, frustrated and tearful with depressive characteristics and anxiety. I find that the plaintiff's depressive characteristics and anxiety were caused by the First MVA.

[155] After approximately six months, on December 21, 2016, the plaintiff started at a labour-intensive job at a pallet factory.

[156] As noted, prior to the Second MVA, as Dr. Abou-Gareeb described as part of the plaintiff's January 4, 2017 visit:

He was very frustrated and tearful, mood was slightly low because of fear he might lose his job, he is pushing himself and trying to tolerate the pain in order to have a job and be off welfare. Assessment is musculoskeletal pain, neck pain and headache post MVA, anxiety/depression

[157] On September 1, 2016, Dr. Abou-Gareeb had also previously assessed "anxiety/depression" and proposed a "trial of Cymbalta for pain and depression".

[158] I find that the plaintiff, before the Second MVA, was struggling but persevering at the job with the pallet company. I cannot say whether the physical demands at the pallet company were beyond the plaintiff's physical capabilities over a longer period. I accept the plaintiff's testimony that he was 75% to 80% recovered from the First MVA before the Second MVA. That said, I find that the plaintiff's injuries from the First MVA contributed in combination with his injuries from the Second MVA to result in his current condition. In particular, I find that his mental injury was compounded by the Second MVA.

[159] As a result of the Second MVA, the plaintiff suffered or developed the following injuries:

- a) aggravation of headaches;
- b) aggravation of neck and shoulder pain;
- c) lower back pain;
- d) chronic pain syndrome;
- e) PTSD (symptomatic);
- f) MDD.

[160] With respect to the lower back pain, it was mild after the Second MVA but became much worse as a result of the plaintiff bending to tie his shoelaces in January 2018.

[161] I find that the Second MVA caused the plaintiff's lower back to become symptomatic and that the further aggravation of pain in the plaintiff's lower back was causally related to the Second MVA. The Second MVA involved considerable force which Dr. Acharya stated could have been a possible cause of the plaintiff's lower back injury.

[162] In his written submissions, plaintiff's counsel stated:

The point I wish to make is not with respect to Mr. Alragheb's psychiatric injuries (which are clearly diagnosed), but rather, with respect to the physical injuries. It does not matter what is causing Mr. Alragheb's physical injuries (whether musculoligamentous or chronic pain or neurological). It is impairment of function that needs to be addressed, regardless of the label.

[163] I find that the plaintiff's current injuries are indivisible. The plaintiff's chronic pain syndrome, PTSD (symptomatic), and MDD have resulted from the culmination of the First MVA and Second MVA. The plaintiff's lower back pain is interwoven with his chronic pain syndrome. I find that the plaintiff's injuries consist now of primarily mental injury (chronic pain syndrome, PTSD, and MDD). The plaintiff's physical injuries have, for the most part resolved, although he still experiences pain as a result of his mental injury. That said, the treatment of the plaintiff's mental injury will present challenges, will take time, and he may not recover fully. In this manner, I find that the plaintiff's impairment of function may be addressed.

[164] For completeness, I will add that, with respect to his mental injury, the plaintiff was vulnerable to symptomatic mental injury (within the "thin skull" description as found in the jurisprudence) prior to the First MVA as a result of his incarceration and torture. I also find that without the two accidents, he would have continued to have been generally happy and cheerful (in other words, his injuries do not fall within the "crumbling skull" description as found in the jurisprudence).

[165] I also find that the plaintiff wishes to get better. He has consistently strived to follow the recommendations of various medical professionals. He desires to be a productive member of society. The foregoing attributes support a more favourable prognosis for improvement in his condition than would otherwise be the case.

10. Assessment of award

a) Non-Pecuniary Damages

[166] In *Karim v. Li*, 2015 BCSC 498, Justice Abrioux (then sitting in this Court) summarized the applicable law:

[120] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide as each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[121] The framework for the assessment of non-pecuniary damages was outlined by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34:

[46] The inexhaustive list of common factors cited in *Boyd [v. Harris]*, 2004 BCCA 146] 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 BCCA 54.

[122] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences and ability to articulate that: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[167] As noted, the damages and loss caused by the First MVA for the time before the Second MVA can be determined on known evidence. Ms. Gibbon, the defendant in the Second MVA, cannot be liable for such damages and loss because her fault did not contribute to these damages and loss: *Negligence Act*, s. 1(3).

[168] As a result of the First MVA, the plaintiff's pain, suffering, loss of enjoyment of life, and loss of amenities is comparable to the months of recovery related to many whiplash type of accidents. Awards for whiplash type accidents where recovery ranges from one to two years fall generally within \$40,000 to \$60,000.

[169] I will assess the plaintiff's damages at \$20,000 (before reduction) for his non-pecuniary damages arising after the First MVA and before the Second MVA. I have not prorated the plaintiff's non-pecuniary loss for this seven-month period because in the early months of recovery there is relatively greater pain, suffering, and loss of enjoyment of life.

[170] The plaintiff was 50% at fault for the First MVA. Accordingly, his award is \$10,000.

[171] Neither party assessed separately the plaintiff's non-pecuniary damages and loss arising after the First MVA and before the Second MVA.

[172] The plaintiff submitted that the total non-pecuniary damages should be \$140,000 with 20% of the amount (\$28,000) allocated to the First MVA. The plaintiff then reduced this amount by \$14,000 in order to recognize that he is 50% at fault for the First MVA. The plaintiff did not reduce the balance. The total award for non-pecuniary damages the plaintiff sought was \$126,000 (\$140,000 - \$14,000).

[173] In support of the \$140,000 award (before reduction), the plaintiff relies on the following cases:

- a) Shoghi v. Lin, 2019 BCSC 1818 [\$160,000];
- b) McMullin v. Trelenberg, 2020 BCSC 49 [\$150,000];
- c) Gill v. Lai, 2018 BCSC 101 [\$140,000], appeal allowed on other grounds, 2019 BCCA 103;
- d) Bellaisac v. Mara, 2015 BCSC 1247 [\$140,000]
- e) Kim v. Sodhi, 2019 BCSC 1823 [\$120,000];

[174] The defendants submit that the plaintiff's non-pecuniary damages before reduction are in the range of \$95,000 to \$125,000. The defendants then reduce this range by 33 1/3% recognizing their view of an equal division of fault among the plaintiff and each defendant. The result is \$63,000 to \$82,500.

[175] In support of the \$95,000 to \$125,000 range, the defendants rely on the following authorities:

- a) Iampietro v. Leung, 2019 BCSC 1750 [\$125,000];
- b) Da Silva v. Pollard, 2019 BCSC 2249 [\$110,000];
- c) Tathgur v. Dobson, 2018 BCSC 1384 [\$95,000]

[176] As noted in Trites, comparable cases only offer a rough guide. I found that Bellaisac to be similar in several aspects. The plaintiff in Bellaisac was a younger man who had recently come to Canada, had poor English skills, and had been engaged in physical labour.

[177] On the other hand, the plaintiff's physical injuries in Bellaisac were more severe with a poor prognosis. In the case at bar, the plaintiff's injuries largely represent mental injury, which, with further consistent treatment, have a reasonably favourable prognosis.

[178] Before reduction, I will award \$120,000 for non-pecuniary damages for the time after the Second MVA. These damages are then reduced by 25% (or \$30,000) to \$90,000.

[179] The total non-pecuniary award is \$100,000 [\$10,000 (First MVA to Second MVA) + \$90,000 (post Second MVA)].

b) Pre-trial (Past) Loss of Earning Capacity

[180] With respect to past loss of earning capacity, Justice K. Smith, writing for our Court of Appeal in Rowe v. Bobell Express Ltd., 2005 BCCA 141, stated:

[30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

[31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in Personal Injury Damages in Canada, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,

... The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of the value of work" is the substance of the claim -- loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the actual earnings the plaintiff would have received; sometimes by a replacement cost evaluation of tasks which the plaintiff will now be unable to perform; sometimes by an assessment of reduced company profits; and sometimes by the amount of secondary income lost, such as shared family income.

[K. Smith J.A.'s underscoring; other emphasis in original.]

[181] The plaintiff says that his pre-trial (past) loss of earning capacity is \$37,998.

[182] In general terms, the plaintiff calculates his past income loss using a 37.5-hour work week at \$14 per hour.

[183] The plaintiff also reduces the amounts otherwise calculated by the social assistance he received.

[184] The plaintiff divides the calculation into two periods:

- a) from the date of the First MVA to the date he started work at the pallet company (December 21, 2016).
- b) from the end of February 2017 to the date of trial.

[185] With respect to the first period, the plaintiff reduces the amount otherwise calculated by 50% to reflect the fact that he was 50% at fault for the First MVA. He then reduces that amount by the social assistance he received. The net result for the first period is \$614.

[186] With respect to the second period, the plaintiff again uses a 37.5-hour work week at \$14 per hour. He again reduces the amount by the social assistance he received during this period. He makes no further adjustments because he views that he shares no portion of the fault after the Second MVA.

[187] The net result of the plaintiff's calculations for the second period is \$37,384.

[188] The combined total for the two periods is \$37,998 (\$614 + \$37,384).

[189] The defendants say that the plaintiff's low back injury was not related to either of the two accidents. The defendants further say that, as a consequence, a 25% reduction is warranted. The defendants say the net result should then be reduced by 33 1/3% to reflect a 1/3 apportionment of fault to the plaintiff relative to the two defendants. With social assistance then deducted, the defendants say that there are no damages to be paid under this heading.

[190] As noted, I have found that the plaintiff's lower back injury was causally related to the Second MVA and the lower back pain is interwoven with his chronic pain syndrome. It is part of an indivisible injury.

[191] I will adopt the plaintiff's calculations with one adjustment. The \$37,384 the plaintiff calculates for the second period should be reduced by 25%, thereby recognizing that the plaintiff's apportionment of fault after the Second MVA to the plaintiff is 25%.

[192] The net result is that the plaintiff's past loss of earning capacity is \$28,652 ($\$614 + (\$37,384 \times .75)$).

c) Future Loss of Earning Capacity

[193] In *Perren v. Lalari*, 2010 BCCA 140, our Court of Appeal set forth at para. 32 the rule that there must be a "real and substantial possibility of a future event leading to an income loss" before such a loss may be assessed. The loss may be quantified using the earnings approach or the capital asset approach. The earnings approach is the more suitable approach in the case at bar.

[194] In *Rosvold v. Dunlop*, 2001 BCCA 1, our Court of Appeal stated:

[9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

[195] The plaintiff takes an earnings approach to assess his loss of future earning capacity. He says that he is unlikely to return to work in any capacity.

[196] The plaintiff says that he would have continued to work as a labourer earning \$15.20 per hour at 37.5 hours per week and paid for 52 weeks each year (\$29,640 per annum) for the next 30 years. Using a discount multiplier of 24.0158, the result is \$713,944 (I calculated \$711,828). He then reduces this amount by 15% to recognize that he may not have worked full-time on a sustained basis. The result is \$606,683 (I calculated \$606,852) which the plaintiff then rounds to \$600,000.

[197] The defendants also take an earnings approach to assess the plaintiff's future loss of earning capacity. They also use the same discount multiplier. The defendants use a 40-hour work week and a \$14.60 hourly rate (\$30,368 per annum). The defendants starting point before adjustment for contingencies and the plaintiff's share of fault is \$728,832.

[198] The defendants submit the negative contingencies such as premature mortality, labour market conditions and those specific to the plaintiff must be considered.

[199] The defendants, in their written submissions, address matters as follows:

284. The Defendants submit that the Court must apply contingencies as best it can, in the absence of expert evidence. The positive contingencies in this case are minimal, and the negative contingencies significant. The Defendants submit that Mr. Alragheb's pre-existing physical state did not carry such significant risks as the Plaintiff's in Dunbar [v. Mendez, 2016 BCCA 211] but the negative contingencies associated with his background (limited education and skill set, etc.) carry greater risks than the similar contingencies applicable to the Plaintiff in Dunbar. The net result is that the contingency applied to Mr. Alragheb's case should be on par with that applied by the Court of Appeal in Dunbar: somewhere between 25% and 50%. The Defendants suggest 30%, which is below the middle of that range, and a conservative discount.
285. This then reduces the notional \$728,832 loss to \$510,182 (rounded).
286. That amount should then be reduced further, to take account of the chance of significant improvement in Mr. Alragheb's function, such that he will be able to return to work at least part time. That will not happen immediately.
287. However, if we assume he can earn even a modest amount -- say, equivalent to \$12,000 per year -- to take into account a delayed but eventual return to at least part-time work of 20 hours per week, the "gross" loss using the CLEBC multiplier table becomes $\$18,368 \times 24 = \$440,832$.
288. Applying a further 30% reduction for negative contingencies yields a loss of \$308,582 (rounded).
289. Finally, as with Mr. Alragheb's claim for past loss of earnings after January 2018, this loss is both indivisible, and affected by his low back injury. Account must be taken of these factors.
290. If the Court finds that the low back injury is causally related to the car accidents, then the above figure of \$308,582 should be reduced by 1/3, to reflect apportionment among the parties. This yields a net future loss, after all contingencies and apportionment, of \$203,664 (rounded).
291. Again, if the Court assigns a different portion to Mr. Alragheb's own negligence, the figures change. Using again 25% as an example, if the low back injury is causally related to the car accidents the figure becomes \$231,436 (rounded).
292. If the Court finds that the low back injury is not causally related to the car accidents, then the negative contingency amount should be somewhat greater (to account for the risk that the injury would continue to impact his employment either on an ongoing basis or periodically), and the Defendants suggest adding a further 2% to 5%, and reducing the loss accordingly.

293. At the end of the day, the award is to be determined by assessment, not calculation. All of the foregoing is meant to assist the Court by providing an analytical framework, with examples. Taking everything into account, the Defendants submit that a reasonable range for an award of loss of future earning capacity is \$225,000 to \$325,000.

[Counsel's emphasis.]

[200] In assessing the negative contingencies, I have considered that the plaintiff has a strong desire to work. He wishes to provide for his family and to be off social assistance. Despite experiencing pain, he took the job with the pallet company which, in my view, is clear evidence of his desire. Accordingly, I will assign 25% to negative contingencies.

[201] Even with reasonably successful treatment, it will be some time before the plaintiff may return to work. Weighing all in, I will use an annual figure of \$10,000 rather than the \$12,000 figure the defence submits. Using the defendants' more favourable figures (which assumed a 40-hour work week), the result is \$489,154 $((\$30,368 - \$10,000) \times 24.0158)$.

[202] As noted, I have found that the plaintiff's lower back pain is related to the Second MVA and is an indivisible injury. It is part of the plaintiff's chronic pain syndrome.

[203] After assigning 25% for negative contingencies, the result is \$366,866 $(\$489,154 \times .75)$.

[204] After apportioning 25% fault to the plaintiff, the result is \$275,149 $(\$366,866 \times .75)$ which I will round to \$275,000.

[205] In sum, the award for the future loss of earning capacity is \$275,000.

d) Costs of Future Care

[206] Our Court of Appeal in *Johal v. Meyede*, 2014 BCCA 509 stated that in considering costs of future care, the trial judge should ensure (at para. 44):

- a) an "evidentiary link between the caregiver's assessment of pain or disability and the recommended care";
- b) "regard for the real and substantial possibility that the expense will be incurred" and that "an allowance for the contingency that the cost may not be incurred"; and
- c) "the specific amount awarded for each item claimed" is identified.

[207] The parties agree that the cost of future care is \$8,124 comprising of \$5,000 for interpretation services and \$3,124 for vocational rehabilitation services. The parties agree that the three *Johal* criteria are met. The foregoing agreement was made without prejudice to any argument on apportionment with respect to other heads of damages. The foregoing was also subject to any deductions under s. 83 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318.

e) Special Damages

[208] The parties agree that the plaintiff should be awarded \$309 as special damages arising from the First MVA and incurred before the Second MVA. The \$309 is after a 50% reduction for liability (fault).

[209] The plaintiff says that he has a further \$11,427 in special damages incurred after the Second MVA. He proposes no reduction. The defendants say that the amount should be reduced by 33 1/3% to \$7,610.

[210] In accordance with a 25% apportionment of fault, I will reduce, accordingly, the special damages incurred after the Second MVA. The result is \$8,570 ($\$11,427 \times .75$)

[211] The total amount for special damages is \$8,879 ($\$309 + \$8,570$).

11. conclusion

[212] The Court awards the plaintiff the following damages:

f) Non-pecuniary damages:

\$100,000

g) Pre-trial (past) loss of earning capacity:

\$28,652

h) Future loss of earning capacity:

\$275,000

i) Cost of future care:

\$8,124

j) Special damages:

\$8,879

Total

\$420,655

[213] The award is subject to any applicable s. 83 Motor Vehicle Act deductions and applicable deductions for disability benefits the plaintiff may have received between the date of trial and the date of trial proceeds are received.

12. costs

[214] If the parties wish to speak to costs, I ask that within 90 days they arrange through Supreme Court Scheduling a 55-minute 9 a.m. hearing before me.

"Funt J."

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