

CANADA / JUDGMENT

Alvarado v. KCP Heavy Industries Co. Ltd.

2022 BCSC 1668

COURT

Supreme Court of British Columbia

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2022 BCSC 1668 Alvarado v. KCP Heavy Industries Co. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Alvarado v. KCP Heavy Industries Co. Ltd.,

2022 BCSC 1668

Date: 20220923

Docket: S180906

Registry: Vancouver

Between:

Gerson Alvarado, Robert Clegg, Henry Brizuela, Steven Sandhu, and Mariana Valencia-Palacio
Personal Representative of the Estate of Sebastian Gomez Obando, deceased, on her own behalf
and for the benefit of Juan Gomez Valencia and Alicia Gomez Valencia

Plaintiffs

And

KCP Heavy Industries Co. Ltd.

Defendant

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Plaintiffs:

J.L. Thornback

M. Segal

No other appearances:

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 8-11, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 23, 2022

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Introduction

- [1] In this action, one of the plaintiffs, Robert Clegg, seeks damages against the defendant, KCP Heavy Industries Co. Ltd. ("KCP"), arising from an industrial accident which occurred on March 11, 2016 at a construction site in Chilliwack, British Columbia (the "Accident").
- [2] The Accident occurred when a metal outrigger on the concrete pump truck operated by Mr. Clegg failed, causing an outstretched boom laden with concrete to fall. One of Mr. Clegg's co-workers, Mr. Obando, was killed instantly and another, Mr. Alvarado, was crushed resulting in paralysis from the chest down.
- [3] Mr. Clegg seeks damages from KCP for the psychological trauma he claims caused by witnessing the Accident.
- [4] As noted, Mr. Clegg is one of a number of plaintiffs in this action, which was commenced on January 24, 2018, and later amended. Other plaintiffs include Mr. Obando's estate and family and Mr. Alvarado.
- [5] KCP, the only remaining defendant at this time, did not file a defence and, subsequently, default judgment was pronounced against it on June 22, 2018 with damages to be assessed. Pursuant to a Case Plan Order made October 21, 2020, Mr. Clegg's damages claim was heard in August 2022, separately from those of the other plaintiffs.
- [6] Mr. Clegg seeks damages arising from the psychological trauma he sustained as a result of the Accident. He claims for income loss, loss of housekeeping capacity, non-pecuniary damages, a past in-trust claim, and cost of future care, totalling approximately \$4.7 million.
- [7] Given that KCP failed to file a defence to Mr. Clegg's claim, and default judgment was taken against it, the only issues to be decided in this case concern the quantum damages sustained by Mr. Clegg as a result of the Accident.

Evidence Adduced at Trial

- [8] Mr. Clegg, his spouse Jennifer Granville, his mother Bonnie McLean, and his father James Clegg, testified at trial and provided evidence concerning Mr. Clegg's pre- and post-Accident condition. Mr. Clegg also tendered affidavit evidence from three lay witnesses, including from his previous co-worker, Dieter Saide, from his previous employer, Mikaela Ciebien, and from a representative of WorkSafeBC, Laura Hoffard. Finally, Mr. Clegg provided expert opinion evidence from a psychiatrist, Dr. Kellie LeDrew, from an economist, Darren Benning, and from a rehabilitation consultant, Elaine Sandor.
- [9] Some of the relevant evidence adduced at trial is summarized below.

Evidence of Robert Clegg

- [10] At the time of the Accident, Mr. Clegg was 42 years old and lived in British Columbia along with his long-term partner, Jennifer Granville, and their two children--Caleb, who is now 17, and Chloe, who is now 11.
- [11] Before the Accident, Mr. Clegg worked long hours but, in his time off, often camped with his family. He was close with both of his children and had a good relationship with his father, James Clegg. Since the Accident, Mr. Clegg's relationship with his father and son Caleb has deteriorated. Mr. Clegg contends that this results from his inability to return to work as a concrete pump operator.
- [12] Prior to working as a concrete pump operator, Mr. Clegg worked in a variety of transportation-related jobs. In 2005, at the age of 25, he first obtained work as a concrete pump operator in Newfoundland and for the balance of his career, he has mostly worked in British Columbia. Before the Accident, Mr. Clegg worked at PSI Concrete Pumping ("PSI"), where he had good relationships with his co-workers and enjoyed his job. He testified that he was proud to have worked on a number of high-profile construction projects in the Vancouver Lower Mainland.
- [13] Mr. Clegg started working with PSI in early 2015 and worked with this company until the Accident, with the exception of a brief hiatus during which he worked as an operations Manager for a ready-mix company on a BC Hydro project. During his time with PSI, Mr. Clegg worked his way up to operating the largest pump trucks and worked long hours, as much as 80 hours a week.
- [14] Mr. Clegg testified that prior to the Accident, he was earning in excess of \$100,000 per year. I will address the specifics of his pre-Accident earnings later in my reasons. Mr. Clegg testified that he had hoped to bring Caleb into the concrete pumping industry and that he planned to move on to other roles in industry--such as working in sales with his father.
- [15] On the day of the Accident, Mr. Clegg had been pumping concrete for approximately 45 minutes. The boom of his concrete pump truck was extended and workers were placing concrete on what would be the floor of a parking garage. Mr. Clegg heard a crack, which it

was later determined was the sound of one of the pump truck's outriggers breaking. Within milliseconds, Mr. Clegg saw Mr. Alvarado hit in the chest by the falling boom and bend backwards, sustaining gruesome compound fractures. The boom hit Mr. Obando, who was instantly killed. Mr. Clegg was sprayed with his blood.

- [16] After the Accident, Mr. Clegg passed out. He woke up in an ambulance and was taken to a local hospital. He remembers calling his father and others, crying. He was picked up from hospital by his younger brother.
- [17] Mr. Clegg was placed under the care of a psychiatrist. He was prescribed medication, including antipsychotics, and received treatments, including light therapy. He participated in group sessions for trauma survivors. He testified that he became hyper-vigilant on safety matters.
- [18] Mr. Clegg tried to return to work with PSI and another concrete pumping business after the Accident, but was unable to continue as a result of on-going trauma symptoms. He also attempted to work as an operations manager at a concrete ready-mix plant in Whitehorse and unsuccessfully attempted retraining to work as a boilermaker. He testified that being on construction sites and experiencing various triggers, such as the smell of diesel, revives his trauma from the Accident.
- [19] In June 2021, Mr. Clegg moved to Gander, Newfoundland with his family. He has unsuccessfully attempted to return to work, including working at local fast food restaurants, as a dockworker, as a taxi driver, and in trucking. He is currently unemployed.
- [20] For a period of time, child services officials in Newfoundland removed Mr. Clegg from the home he shared with Ms. Granville and Chloe. He has since completed anger management and parenting courses and has returned to the family home.
- [21] To date, Mr. Clegg continues to be impacted by the Accident. He experiences hallucinations, including seeing Mr. Obando, and he regularly experiences flashbacks of the Accident itself. He testified that his sleep continues to be disturbed by nightmares of the Accident and that he now only sleeps two hours each night. He testified that he is miserable, irritable, and described his life as a living hell. He testified that he either attempted or contemplated suicide approximately nine times and, as a result, has been committed to mental institutions on several occasions.
- [22] Mr. Clegg's relationship with his family has been negatively impacted by his post-Accident symptoms. After the Accident, his relationship with Caleb fell apart. He believes that Caleb is living on the street in British Columbia and has become addicted to methamphetamine. Mr. Clegg attributes Caleb's circumstances to his inability to mentor him.

- [23] He expressed significant sadness at no longer being the provider for Ms. Granville and Chloe, testifying that he at times feels like jumping off a building. He is embarrassed that Ms. Granville now spends time caring for him and, in some respects, managing his life. He also testified that he no longer has anything in common with his father and that they do not speak. Mr. Clegg testified that his relationship with Chloe is one of his only sources of comfort. He takes her to activities, including various sporting events and cadets.
- [24] Mr. Clegg testified that he continues to be very risk averse. He says he rarely leaves the house, no longer camps with his family, and has very few leisure activities, if any. He says that he is unable to focus on routine tasks such as mowing the lawn or doing housework.

Evidence of Jennifer Granville

- [25] Ms. Granville testified that before the Accident Mr. Clegg was a nice, funny, and loving man who was a good father and husband. Although his mood has improved since the Accident, he remains angry and moody. She testified that they no longer share the quiet and fulfilling social life they once had, including hosting BBQs and fires in their backyard with close friends. She testified that the family does not go camping as much as they used to and that Mr. Clegg is unable to participate in activities in busy places as he quickly becomes anxious in larger crowds. She testified that he is routinely unable to perform simple tasks such as laundry and dishes.
- [26] Ms. Granville testified that Mr. Clegg continues to experience nightmares approximately two or three times per week and hallucinations. She testified that he sees a psychologist on a weekly basis week.

Evidence of Bonnie McLean and James Clegg

- [27] Mr. Clegg's mother, Bonnie McLean, testified that before the Accident, Mr. Clegg appeared to be a happy, content, hands-on father. She testified that since the Accident, Mr. Clegg has become unpredictably emotional, laughing one moment and crying the next.
- [28] Mr. Clegg's father, James Clegg, provided similar evidence concerning Mr. Clegg's pre-Accident demeanour. He testified that since the Accident, his son has not been the same and that he seems short-tempered, hates the world, and feels sorry for himself. He testified that in late 2020 or early 2021, he tried to bring Mr. Clegg in on a construction project he was working on in New Brunswick, but ended up having to send him home as he was not the same person he was before.

Medical Evidence of Dr. LeDrew

- [29] Dr. LeDrew was qualified as an expert in psychiatry and her report on the impact of the Accident on Mr. Clegg's psychological health was admitted at trial.

- [30] Dr. LeDrew diagnosed Mr. Clegg with post-traumatic stress disorder ("PTSD"), which in her opinion, was caused by or is related to the Accident. Dr. LeDrew noted that Mr. Clegg had been treated for major depressive disorder ("MDD") and his reports of ongoing depressive symptoms. In Dr. LeDrew's opinion, Mr. Clegg no longer meets the criterion for MDD but is impacted by on-going symptoms of depression.
- [31] Dr. LeDrew's opinion is that Mr. Clegg continues to experience persistent symptoms of PTSD, depression, and other psychiatric difficulties--which are chronic in nature. In her opinion, Mr. Clegg will likely never return to his pre-Accident level of functioning, which will impair his ability to work and negatively impact his quality of life.
- [32] With respect to ongoing care requirements, Dr. LeDrew's opinion is, in summary, that Mr. Clegg will require medications and psychotherapeutic treatment, including psychotherapy, for the remainder of his life.

Analysis

Causation

- [33] A plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury, so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17, 1996 CanLII 183; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [34] The primary test for causation asks: but-for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [35] I have no difficulty concluding that as a result of the Accident, Mr. Clegg sustained significant psychological injuries, including PTSD, and continues to be impacted by on-going symptoms of depression.

Non-Pecuniary Damages

- [36] 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. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [37] The factors to be considered in an assessment of non-pecuniary damages are those set out at para. 46 of *Stapley v. Hejslet*, 2006 BCCA 34, and they include:
- the age of the plaintiff;

- the nature of the injury;
- severity and duration of pain;
- disability;
- emotional suffering; and
- loss or impairment of life.

[38] Mr. Clegg was relatively young at the time he sustained psychological injuries as a result of the Accident and continues to experience significant and ongoing symptoms related to PTSD and depression. Of greatest significance are those including disturbed sleep, flashbacks, hallucinations, changes to mood, a reduced ability to perform routine tasks, and an inability to continue to work in a trade which Mr. Clegg enjoyed and was good at. I note as well that Mr. Clegg has attempted or contemplated suicide on a number of occasions. Although there is no suggestion that he remains suicidal at this time, Dr. LeDrew believes there is a risk that his psychiatric condition may relapse.

[39] Mr. Clegg relies on cases including *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155 at para. 540, *aff'd* 2018 BCCA 410, and *Kempton v. Struke Estate*, 2020 BCSC 2094, to establish what I describe as the base for an award of non-pecuniary damages in this case.

[40] In *Hans*, the plaintiff was awarded \$265,000 (which Mr. Clegg submits is equivalent to \$305,000 in 2022 dollars) for non-pecuniary damages. The plaintiff in that case suffered primarily psychological injuries (PTSD) that resulted in highly debilitating emotional, mental, and social symptoms. The plaintiff suffered from chest pain, decreased memory, anxiety, sleep disturbances, personality change, reduced parenting activity, and social isolation. Failed returns to work exacerbated the plaintiff's psychological symptoms and he had a poor recovery prognosis from a diagnoses of PTSD and MDD: *Hans* at paras. 479-502.

[41] In *Kempton*, the court found that an award for non-pecuniary damages of \$225,000 was appropriate (\$240,000 in 2022 dollars). The plaintiff in that case suffered similar impacts as Mr. Clegg, including difficulty sleeping, nightmares, flashbacks, considerable employment limitations, difficulty socializing with other people, reliance on their spouse to do household tasks, personality changes, and negative impacts on relationships. The plaintiff took pride in his pre-injury work, and could not return to it, struggling with even simple tasks: *Kempton* at paras. 107-122.

[42] Mr. Clegg submits that his psychological injuries are more severe than those sustained by the plaintiffs in *Hans* and *Kempton*. For example, he submits that he suffers from more frequent hallucinations and flashbacks and blames himself for the life-altering injury to Mr. Alvarado and the death of Mr. Obando. He also mourns the loss of his ability to work in the concrete pumping industry, a career which he loved and had been successful in, and the resulting inability to bring his Caleb into this business. As well, he submits that in assessing non-pecuniary damages, the value of household services now provided by Ms. Granville

should be considered.

- [43] Mr. Clegg submits that his injuries can be characterized as devastating, justifying an award at the rough upper limit for non-pecuniary damages, which is approximately \$415,000 at this time.
- [44] I am not convinced that the impacts of the injuries sustained and related symptoms experienced by Mr. Clegg, although significant, should be described as devastating, justifying an award for non-pecuniary damages at the high end of the scale. Further, I am not satisfied that the impacts are as severe as the impacts experienced by the plaintiff in Hans. For example, I note the finding in Hans that, as a result of the accident, the plaintiff's spouse effectively had to babysit him, including providing reminders to tend to basic hygienic needs. In addition, the plaintiff in Hans no longer had any interest in his children and had to be coaxed to attend at their activities: Hans at paras. 493-494.
- [45] In my view, a number of the injuries and symptoms in Mr. Clegg's case are similar to those of the plaintiff in Kempton. I note in particular that in Kempton, the plaintiff could only sleep two hours per night. Both Mr. Clegg and the plaintiff in Kempton experienced recurring nightmares accompanied by on-going hallucinations. Arguably, evidence that during nightmares, the plaintiff in Kempton clawed at the walls of his bedroom and clawed his legs with his toenails suggests that his sleep disturbance symptoms were more severe than Mr. Clegg's.
- [46] Considering the factors enumerated in Stapley in the light of the evidence in this case, and in consideration of the similarity of the impact of Mr. Clegg's injuries and symptoms to those to the plaintiff in Kempton, I have concluded that the appropriate award for Mr. Clegg's non-pecuniary damages is \$260,000.

In-Trust Claim

- [47] Mr. Clegg seeks an award of \$6,000 as compensation for the value of services provided by Ms. Granville after the Accident. This proposed award is calculated based on Ms. Granville providing approximately 300 hours of assistance over a 60-day period, at an hourly rate of \$20 per hour--being the median wage rate for home support workers in the Lower Mainland region.
- [48] As was set out at para. 529 of Hans "[s]pouses or other family members who provide care or other services to an injured plaintiff are entitled to compensation for those services rendered over and above those what would be expected from the family relationship".

- [49] The evidence establishes to my satisfaction that in the initial months following the Accident Ms. Granville provided extraordinary services, including assisting in the management of Mr. Clegg's psychological symptoms, taking him to appointments, and staying with him or otherwise constantly monitoring him remotely to ensure that he was taken care of. Given the evidence that Mr. Clegg attempted suicide several times after the Accident, I have no difficulty concluding that Ms. Granville's monitoring was required.
- [50] Although there is no clear evidence establishing that Ms. Granville provided 300 hours of services to Mr. Clegg, given the nature and extent of his psychological injuries and symptoms, I find this to be a reasonable estimate. Further, I accept that the amount sought per hour for these services, \$20, is fair and reasonable. I award \$6,000 in respect of Mr. Clegg's in-trust claim.

Loss of Housekeeping Capacity

- [51] A loss of housekeeping capacity award is intended to compensate for work which a plaintiff is no longer able to perform for the household: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63.
- [52] Mr. Clegg seeks an award of \$250,000 for loss of housekeeping capacity. This amount is based on Mr. Benning's calculation of the value of labour which he assumed Mr. Clegg has been unable to perform since the Accident and will be unable to perform going forward.
- [53] The principles governing an award for loss of housekeeping capacity are those set out in *Kim v. Lin*, 2018 BCCA 77, which are as follows:
- [31] [] loss of housekeeping capacity [is] just that, a loss of capacity, or the loss of an asset that should be compensated as a pecuniary loss regardless of whether the replacement services which are used to value the loss and determine the quantum of the award are actually purchased []
- []
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work - i.e., where the plaintiff has suffered a true loss of capacity - that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage" []

- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, the court may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, be tied to the actual loss of capacity which justifies the award in the first place.
- [54] A helpful review of the analysis to be applied in determining whether to grant an award for loss of housekeeping capacity was set out by Justice Gomery in *Ali v. Stacey*, 2020 BCSC 465 at para. 67:
- a) The first question to be answered in determining whether to award damages for loss of housekeeping capacity is whether the loss should be considered pecuniary or non-pecuniary, which involves a discretionary assessment of the nature of the loss: referring to *Kim* para. 33.
 - b) If a plaintiff is paying for services, or if family members are providing equivalent services gratuitously, a pecuniary award is usually more appropriate: referring to *Riley v. Ritsco*, 2018 BCCA 366 at para. 101.
 - c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; referring to *Kim* para. 31.
 - d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as part of the general award of non-pecuniary damages; referring to *Riley* para. 102.
- [55] In my understanding of Mr. Clegg's submissions, he is unable to perform usual and necessary household work such as yard work and maintenance around the house, which he normally performed. As well, Mr. Clegg submits that since the Accident, he is, in theory, responsible for other tasks which were previously taken care of exclusively by Ms. Granville, including laundry, dishes, cooking, and taking care of Chloe; however, more often than not, Mr. Clegg does not complete them.
- [56] What is being advanced by Mr. Clegg is an award for loss of housekeeping capacity as a pecuniary loss. Unfortunately, there was very little evidence at trial with respect to loss of capacity on the part of Mr. Clegg to perform the usual and necessary household work that he used to do.
- [57] At trial, Mr. Clegg testified that prior the Accident, he always performed the outside work and performed minor duties inside the home, such as dishes, but Ms. Granville has always done the cooking. Ms. Granville's testimony in this respect is consistent with that of Mr. Clegg.

- [58] With respect to his current capacity, Mr. Clegg testified that he gets distracted while cutting the lawn, for example, stopping after cutting one line in the grass. He did not testify that he is unable to perform this or other outside work. He testified that now that he is not working, he takes Chloe to various sporting activities and cadets--which I presume was a duty previously performed by Ms. Granville. Ms. Granville testified that Mr. Clegg now performs household duties like laundry or dishes if he has a good day, but on bad days, which are more frequent, he lays in bed or on the couch. She estimates that he helps with household tasks perhaps one or two times per week and does yard work when it needs to be done.
- [59] In my view, the evidence adduced at trial does not establish that Mr. Clegg's psychological injuries would make a reasonable person in his circumstances unable to perform usual and necessary household work. The evidence does not establish that Mr. Clegg is unable to perform outside work and indicates that he is now performing more duties inside the home now than he did prior to the Accident, albeit not always consistently. As a result, I do not consider that a separate award for loss of housekeeping capacity as compensation for a pecuniary loss is justified in the circumstances of this case.
- [60] To the extent that Mr. Clegg has suffered a loss of amenities related to household tasks, I consider that this is covered by the award made for non-pecuniary damages.

Loss of Income Earning Capacity

- [61] In assessing the loss of income earning capacity, the first question to be answered is whether Mr. Clegg's income earning capacity has been impaired as a result of the injuries and symptoms arising from the Accident. If the answer to this question is yes, the next questions are what amount should be awarded for past loss of income earning capacity to the date of trial and what is the amount to be awarded for loss of future income earning capacity?: *Meckic v. Chan*, 2022 BCSC 182 at para. 142.
- [62] I have no difficulty determining based on the testimony at trial and the expert evidence of Dr. LeDrew, that Mr. Clegg has and will continue to suffer from significant and long-lasting psychological injuries, including PTSD and symptoms of depression, which have and will continue to prevent him from working in the concrete industry and has reduced his ability to work in any occupation.
- [63] In this case, I consider that the earnings approach should be applied in assessing Mr. Clegg's damages for past and future loss of income earning capacity as his loss is more easily measurable. Other than brief periods of employment, he has effectively not returned to work since the Accident: *Meckic* at para. 146.

Past Loss of Income Earning Capacity

- [64] Mr. Clegg seeks an award for past loss of income earning capacity of \$770,000 plus pre-judgement interest. This assumes that if the Accident had not occurred, Mr. Clegg's annual income as a pump operator would have increased from \$100,000 at the time of the Accident to \$150,000 by 2020. The \$770,000 sought does not include any deduction for contingencies but does include a deduction for Mr. Clegg's modest employment earnings during this period.
- [65] Mr. Clegg relies upon the opinion evidence of Mr. Benning with respect to calculation of past income loss based on various scenarios. These scenarios include Mr. Clegg working as a pump operator until trial and obtaining employment in sales with the company his father worked with, Sika Canada, in 2017. Mr. Benning was qualified to provide such opinion evidence at trial.
- [66] Mr. Benning's income loss calculation includes contingency deductions of approximately \$65,000, including the risk of unemployment, resulting in estimated past income loss of approximately \$706,000. However, Mr. Clegg submits that these deductions should not be made or should be offset by the real and substantial possibility that Mr. Clegg would have trained Caleb to take over as a pump truck operator and that he would have moved on to a higher earning position some time after 2020.
- [67] The evidence establishes that in the calendar year prior to year of the Accident, Mr. Clegg earned \$101,969. Further, the evidence establishes that by the time of the Accident, he was established in his trade as a concrete pump operator. I consider it reasonable to conclude that, absent the Accident, Mr. Clegg would have continued with this work until trial. I will address the question of whether there was a real and substantial possibility that, absent the Accident, he would have sought other more remunerative employment before trial later in these reasons.
- [68] I find that Mr. Benning's calculation of Mr. Clegg's without-Accident earning capacity, premised upon an increase in annual earnings from \$100,000 in 2016 to \$150,000 in 2020, resulting in an estimate of past income loss of \$770,000, is supported on the available evidence. Although I have found that Mr. Clegg was well established as a pump truck operator by 2016, I note that he had experienced periods of unemployment in previous years. As a result, I find that Mr. Benning's labour market contingency deduction for potential unemployment between 2016 and 2022 to be reasonable.
- [69] I do not find that there was a real and substantial possibility that by approximately the summer of 2020, as Mr. Clegg submits, Caleb would have been working at PSI and would have been in a position to take over Mr. Clegg's role as a pump truck operator with PSI. Caleb would have been 16 years old by the summer of 2020. The evidence indicates that it took Mr. Clegg approximately ten years to work up to the level of operating the largest concrete pump trucks. I find it exceedingly unlikely, and there is no evidence supporting such a proposition, that Caleb would have been able to obtain this level and take over Mr.

Clegg's role by this time.

- [70] I note that Caleb was not called as a witness at trial and there is no evidence from him with respect to his plans for employment. Although Mr. Clegg testified with respect to his plans to have Caleb join him in the concrete pumping industry, the suggestion that, absent the Accident, Caleb would have done so before trial allowing Mr. Clegg to obtain other higher paying employment falls within the realm of speculation.
- [71] As a result, I assess Mr. Clegg's damages for loss of past income earning capacity to be the amount calculated by Mr. Benning, \$706,069, plus pre-judgment interest.

Future Loss of Income Earning Capacity

- [72] Mr. Clegg seeks an award for future loss of income earning capacity of \$2.6 million, after deduction of his residual income earning capacity.
- [73] This submission is premised upon Mr. Clegg working until he is 70 years old and involves two potential employment scenarios, which, but for the Accident, could have taken effect by the date of trial. The first scenario is that there is a 25% chance that Mr. Clegg would have continued to work as a concrete pump operator and earned \$150,000 per year for the remainder of his career. The second is that there is a 75% chance that he would have changed jobs and earned \$200,000 per year by, for example, working in the same industry in concrete finishing (as a laser screed) or taking on a new higher paying sales job, such as working with the company his father works for now.
- [74] Mr. Clegg submits that a potential award for future loss of earning capacity of approximately \$2.97 million--before deduction of residual earning capacity--is appropriate. He derives this amount using the estimates prepared by Mr. Benning under different earnings scenarios, assuming a retirement age of 70 and applying the above percentages.
- [75] I agree with Mr. Clegg that it can be reasonably assumed that, absent the Accident, he would have worked until he was 70. He testified that he did not have specific plans as to when he intended to retire and liked his work. In addition, there is independent evidence from his previous employer and an ex-colleague that some concrete pump operators work into their late 60s.
- [76] Further, I agree that the evidence establishes real and substantial possibility, which I assess at 25%, that Mr. Clegg would have continued to work as a pump operator until he was 70, and a 75% chance that he would have obtained other higher paying employment in the concrete pumping industry or in sales. I am satisfied on the evidence adduced at trial that his potential annual income under these scenarios is \$150,000 and \$200,000 respectively. This results in a calculation of \$2.97 million for loss of future income earning capacity.

- [77] Mr. Clegg acknowledges that a deduction is to be made for his residual earning capacity. He submits that it has been six years since the Accident and he has been unable to work in any capacity that has allowed him to earn close to the average income earned by males in British Columbia, without trades certificates, diplomas, or degrees. Mr. Benning has provided a calculation of Mr. Clegg's potential residual income earning potential based upon such average earnings, the present value of which totals approximately \$907,000.
- [78] The evidence indicates that Mr. Clegg's highest income since the Accident was in 2017 when he unsuccessfully attempted to return to work as a concrete pump operator and earned \$39,606. Since 2017, Mr. Clegg has earned between \$0 and \$7,378 per year. Mr. Clegg concedes that it is possible that he will continue to earn some amounts at whatever positions he finds, but it is unlikely that he will ever return to steady employment.
- [79] Mr. Clegg submits that the evidence of Dr. LeDrew that he will not return to his pre-Accident level of functioning and that without access to treatment that his condition will degrade, supports his position that a deduction for residual earnings should be at the low end of the scale.
- [80] Mr. Clegg submits that if the court concludes that there is a 75% chance that he will earn the average earnings set out in Mr. Benning's calculations (for average B.C. males with similar credentials), there should be a deduction of approximately \$227,000 from the assessment of loss of residual income earning capacity. Mr. Clegg submits that if this Court concludes that there is a 50% chance that Mr. Clegg will earn such average earnings, the deduction would be \$454,000. Subtracting these amounts from the estimated \$2.97 million for loss of future income earning capacity would result in an award of \$2.74 million at the high end and \$2.516 million at the low end.
- [81] Determining the relative likelihood of Mr. Clegg returning to various levels of employment is, as this Court has described in numerous decisions, an exercise in gazing into the crystal ball. I am cognizant of Mr. Clegg's employment history and earnings over the last six years--which has not been significant. Nonetheless, there is no evidence establishing with any certainty that Mr. Clegg is unable to return to any form of employment going forward. He is still a relatively young man and, with proper psychiatric or psychological treatment, his condition may not degrade further.
- [82] I consider it reasonable to assess Mr. Clegg's residual earning capacity based on a 50% chance that at some point he will be able to earn the average earnings set out in the calculations completed by Mr. Benning for males in British Columbia without formal training or education. This would result in a deduction for residual earnings capacity of \$454,000. I am not satisfied that Mr. Clegg is currently able to earn such average earnings and therefore find it appropriate to apply a contingency deduction of 20% to this amount to reflect the possibility that he will not immediately return to full time work--which results in a deduction of \$340,000 for Mr. Clegg's residual earnings capacity.

[83] In conclusion, I assess Mr. Clegg's damages for loss of future income earning capacity to be \$2,630,000.

Past and Future Care Costs

Past Care Costs

- [84] An injured person is entitled to recover the reasonable out-of-pocket expenses that they incurred as a result of a defendants' negligence. The overarching legal principle informing this head of damage, consistent with the recovery under tort law generally, is that a plaintiff is entitled to compensation to be restored to the position he or she would have been in had the accident not occurred. Money can be used to provide care to sustain or improve the mental or physical health of the injured person it may properly form part of a claim, so long as the expenditures are fair and reasonable: see for example, *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 28-29.
- [85] Mr. Clegg sustained a workplace injury as a result of the Accident and therefore was compensated by WorkSafeBC, including for costs of care arising from and after the Accident. Under s. 10(6) the Workers Compensation Act, R.S.B.C. 1996, c. 492 [Act], WorkSafeBC may advance a claim, and they do in this case, in respect of the amount of healthcare costs they paid for Mr. Clegg. Section 10(10) provides that an award for healthcare costs must be included in an award for damages.
- [86] Laura Hoffard, legal assistant to the Director of Legal Claims, Law and Policy Division with WorkSafeBC has sworn an affidavit regarding such payments. As of August 3, 2022, WorkSafeBC has paid \$73,714.14 in health care costs for Mr. Clegg. \$6,754.28 of that amount represents health care costs billed to WorkSafeBC by the BC Medical Services Plan. The expenses include therapy with a psychologist, sessions with a counselor, medications, and social work services.
- [87] In addition, WorkSafeBC has paid \$29,143.83 towards Mr. Clegg's vocational rehabilitation, which included consultations with a vocational rehabilitation consultant, tuition, equipment and tools. Mr. Clegg testified that WorkSafeBC had paid for him to enroll in, and for the cost of equipment for, Boilermakers training, which he was not able to pursue, and provided a vocational rehabilitation consultant who assisted him with sticking to an exercise program.
- [88] Under s. 1 of the Act, "healthcare" includes things which WorkSafeBC is empowered to provide to injured workers. Under s. 16 of the Act, WorkSafeBC is empowered to provide vocational rehabilitation to an injured worker.
- [89] I find that the amount paid by WorkSafeBC towards Mr. Clegg's healthcare costs, including vocational rehabilitation, arise from the Accident and that such costs are recoverable as healthcare costs.[1]

[90] Mr. Clegg testified that he has spent approximately \$2,000 on medications in the past six years. There is no evidence to contradict this testimony and I find that Mr. Clegg is entitled to an award for this amount.

[91] In total, I award Mr. Clegg damages for the cost of past care expenses in the amount of \$104,857.97, plus pre-judgment interest.

Cost of Future Care

[92] Mr. Clegg seeks damages for the cost of future care in the amount of \$542,197.71.

[93] An assessment of damages for cost of future care is not a precise accounting exercise. Damages for cost of future care "are a matter of prediction": Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9 at para. 21.

[94] In 2018, in Warick v. Diwell, 2018 BCCA 53 at paras. 11, 24-29, our Court of Appeal upheld a significant award of future care costs and noted the governing legal principles as follows:

[11] []

- such claims are proven where the plaintiff establishes a real and substantial risk of future pecuniary loss;
- such claims must be medically justified and reasonable;
- damages are to be assessed, not mathematically calculated, and should allow for contingencies for the possibility that the future may differ from the evidence at trial []; and
- an award for services not previously used should be made only where the services are likely to be incurred on a going-forward basis.

[]

[95] It is not necessary for a medical expert to testify in support of each item of support that is claimed but there must be some evidentiary link between a physician's assessment of pain, disability and recommended treatment and the care recommended by a qualified health care professional: Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at para. 39.

[96] Recommendations and assessment of costs by a qualified healthcare professional (including rehabilitation consultants and occupational therapists) can be the basis for cost of future care awards, so long as there is an evidentiary link between the medical assessment and the care recommended: Gignac at para. 31.

- [97] The ordinarily applicable principle that a plaintiff is not entitled to an award for costs that may be publicly funded does not apply in this case because of the operation of s. 10(10) of the Act, which explicitly provides that an action brought must include a claim for health care provided under the Act. Ms. Hoffard has provided affidavit evidence that WorkSafeBC pays for expenses ordinarily covered by the Provincial Medical Services plan.
- [98] I will deal with each of the cost of future care items claimed by Mr. Clegg individually.

Psychotherapy

- [99] Dr. LeDrew has provided an opinion that Mr. Clegg will likely need ongoing psychotherapy for the remainder of his life. She recommends that he continue to access trauma focused therapies provided by his current treatment provider, Ms. Denise Butt.
- [100] Mr. Clegg testified that he benefits from regular counselling appointments, as well as access to counseling on an as needed basis in moments of psychological crisis. He has a standing appointment for therapy with Ms. Butt every Monday at 12:30 p.m. He testified that the first few days after an appointment with Ms. Butt, he often feels better. He testified that while attending trial in Vancouver, Ms. Butt took his unscheduled phone calls, including in the night. He testified that he plans to continue therapy with Ms. Butt.
- [101] Ms. Sandor was accepted as an expert in rehabilitation consultant and her report outlining Mr. Clegg's future health care needs and costs was accepted as evidence at trial. Ms. Sandor recommended that Mr. Clegg obtain one to two hours per week of counselling for the rest of his life. This recommendation is intended to represent his average need, with the assumption that at times his needs will fluctuate.
- [102] Ms. Sandor used Ms. Butt's actual rate for the calculation of the cost of psychological counselling. I find that Mr. Clegg will incur costs to obtain psychological counselling of \$15,840 annually for the rest of his life. I award him the present value of this amount, being \$392,730.71.

Pharmacotherapy

- [103] Dr. LeDrew has provided an opinion that Mr. Clegg will likely require pharmacotherapy for the remainder of his life. She considers that his medication regime is likely to be characterized by "polypharmacy", or the requirement for many various types of medications taken together, which is more costly than standard treatments recommended as first line treatments in accepted treatment guidelines.
- [104] Mr. Clegg testified that he would take medications that were prescribed to him. The cost for Mr. Clegg's medication has not been assessed by Ms. Sandor, as the medications, dosages, and frequencies were uncertain. However, she recommends that a contingency should be provided for Mr. Clegg's extraordinary medication needs.

[105] Mr. Clegg testified that he has spent approximately \$2,000 on medications over the past six years. However, he has not consistently taken medications during this period. Based on Dr. LeDrew's opinion that Mr. Clegg's future medication regimen is likely to be more costly than standard medications, Mr. Clegg submits that his annual medication costs will likely be in the range of \$500 per year. I award the present value this future medication cost, being \$12,396.80.

Psychiatric Assessment

[106] It is Dr. LeDrew's opinion that Mr. Clegg's pharmacotherapeutic treatment needs re-evaluation and regular supervision by a family doctor and/or psychiatrist to stabilize his symptoms and improve his functional recovery. In response to this opinion, Ms. Sandor recommends an initial consultation with a psychiatrist at a cost of \$250, with two follow-ups per year, from now until life expectancy, at an annual cost of \$180.70. I award the present value the cost of psychiatric assessment and follow-up, being \$4,480.20.

Occupational Therapy Assessment and Case Management

[107] Dr. LeDrew recommended case management services to assist Mr. Clegg with medication management and coping skills. In accordance with this recommendation, Ms. Sandor recommends an initial in person occupational therapy assessment at a cost of \$1,000 and 12 to 15 hours of case management per year for five years provided virtually to enable coordinated access to recommended services.

[108] The annual cost of the follow up case management services ranges from \$1,687.50 to \$1,755.00. The present value of these services ranges from \$8,026.61 to \$8,347.68.

[109] Mr. Clegg testified that if there was someone who could help him coordinate his treatment that he would "100%" use that service. He seeks an award for the future cost of occupational therapy and assessment and case management of \$9,000. I award this amount.

Rehabilitation Assistant or Kinesiologist Services

[110] Mr. Clegg testified that he does not exercise because it is often difficult for him to get out of bed. Further, he testified that there was a "WCB person" who worked with him to get him moving and that when he was exercising regularly he experienced less hallucinations. He testified that if he had someone to help him accomplish exercising he would use that service.

- [111] Ms. Sandor recommended the following schedule of sessions with a kinesiologist: two years of four to ten hours per week of kinesiologist support (including travel time), followed by two years of two to five hours of support per week, followed by a final year of 24 sessions of two to five hours. This would result in present value costs for this stream of services of between \$74,555 to \$90,531. Mr. Clegg seeks an award in the approximate middle of this range: \$80,000.
- [112] Although I do not challenge Ms. Sandor's recommendation, or Mr. Clegg's evidence, that exercise will likely be of benefit, I am unable to understand the basis for Ms. Sandor's recommendation that Mr. Clegg undergo sessions with a kinesiologist at her suggested frequency. I consider that an award for the present value of the cost of one to two kinesiology session per week for a period of five years is appropriate. I award \$20,000 for these costs.

Substance Abuse Treatment

- [113] Mr. Clegg seeks an award for the cost of obtaining treatment for problematic substance use in the amount of \$11,000 based on a 25% chance that he may require such treatment in the future.
- [114] Mr. Clegg testified that at one point he did self-medicate with marijuana because it calmed him down but after Dr. LeDrew told him that his marijuana use was not helping him, he stopped using it.
- [115] Given Mr. Clegg's testimony that he no longer uses marijuana, and the lack of evidence that he is at risk of excessive use of this or other intoxicating substances I decline to award any amount for substance abuse treatment.

Counselling for Ms. Granville

- [116] A court may include counselling for family members in a future cost of care award where it is medically justified.
- [117] Mr. Clegg refers to the following cases in which family or couples counselling was included in a cost of future care award:
- i. Palani v. Lin, 2021 BCSC 59 at para. 143, awarding costs of couples counselling under future care costs;
 - ii. Madge v. Meyer, 1999 ABQB 1017 at para. 218, awarding costs of counselling to help family members handle the plaintiff's substantial change in personality; and
 - iii. McCluskey v. Desilets, 2013 BCSC 2150 at paras. 24-25, awarding costs of family counseling "based on the effect of PTSD on family".

- [118] Ms. Granville testified that she does not know what to do to help Mr. Clegg, and that this makes her feel bad. She wishes she could do something to help him, and she is interested in learning more about how she might help him.
- [119] Ms. Sandor recommended that Ms. Granville have access to counselling for one hour per week for one year. In Ms. Sandor's opinion, this will help Ms. Granville optimally support Mr. Clegg in his recovery and Mr. Clegg will continue to require the support of his family to manage his day-to-day trauma related challenges. The cost of this recommendation is \$15,840.00.
- [120] Dr. LeDrew opines that Mr. Clegg's symptoms will likely fluctuate in their degree of intensity and frequency and he is at risk for worsening of all his psychiatric conditions which may include future episodes of MDD and suicide risk. Consistent with this risk, Ms. Sandor recommends additional counselling for Ms. Granville to be used at times of crisis when Mr. Clegg's psychiatric problems escalate. She recommends 12 to 18 hours per crisis event, accounting for a total of five future crisis events. The cost of this recommendation is \$16,500.00.
- [121] The present value of the future cost of counselling for Ms. Granville is \$32,340. I award this amount.

Summary of Cost of Future Care Award

- [122] In summary, I award Mr. Clegg \$470,948 for the cost of future care.

Conclusion

- [123] In conclusion, I award Mr. Clegg damages arising from the Accident as follows, rounded to the nearest dollar:

Non-Pecuniary Damages:

\$ 260,000

In-Trust claim:

\$ 6,000

Past Loss of Income Earning Capacity:

\$ 706,069*

Future Loss of Income earning Capacity:

\$2,630,000

Past Care Costs:

\$ 104,858*

Cost of Future Care:

\$ 470,948

TOTAL:

\$4,177,875

*Plus pre-judgment interest

Costs

[124] Mr. Clegg is entitled to costs of these proceedings at Scale B.

"Mayer J."

[1] I note that the new version of the Act came into force on April 6, 2020, the Workers Compensation Act, R.S.B.C. 2019, c. 1. Because the result with respect to recovery of healthcare costs is the same under both versions, it is not necessary to decide which act applies to get to the same result.

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