

CANADA / JUDGMENT

Antignani v. Heaney

2022 BCSC 228

COURT

Supreme Court of British Columbia

DECIDED

14 February 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 228 Antignani v. Heaney

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Antignani v. Heaney,

2022 BCSC 228

Date: 20220214

Docket: M171157

Registry: Vancouver

Between:

Nicholas Antignani

Plaintiff

And

Marilyn Heaney and City of Vancouver

Defendants

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiff:

C.P.S. Dyson

J.K. McInnis

Counsel for the Defendants:

A. Rowshanzamir

Place and Date of Trial:

Vancouver, B.C.

November 15-19, 22-26, 29-30, and December 1-3, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 14, 2022

Table of Contents

Introduction. 3

The Accident. 3

Injuries and Initial Diagnoses. 4

Brain Injury. 6

Physical Injuries. 11

The Plaintiff's Current Condition. 13

Non-Pecuniary Damages. 15

The Plaintiff's Employment. 18

Past Loss of Earning Capacity. 22

Future Loss of Earning Capacity. 24

Cost of Future Care. 28

Loss of Housekeeping Capacity. 30

Special Damages. 32

Costs. 33

Summary. 35

Introduction

- [1] The plaintiff Nicholas Antignani seeks damages for injuries in a motor vehicle accident that occurred on March 9, 2016. Mr. Antignani had neck, back and shoulder injuries, but the most contentious issue is whether he suffered and continues to suffer from a brain injury and post-concussion syndrome. Liability for the accident is admitted.

- [2] Mr. Antignani is a 43-year old supermarket bakery manager. He was working in a similar position, with a different employer, at the time of the accident. He returned to work four and a half months after the accident, but quit shortly thereafter to become a 911 emergency service call-taker. That career change was unsuccessful and Mr. Antignani attributes his failure to cognitive limitations caused by the accident.
- [3] Since returning to the grocery industry, Mr. Antignani has lost no time from work for accident-related reasons. But he says physical and cognitive problems are making the work much more difficult than it was before the accident. He doesn't believe he is fully meeting his employer's expectations and is afraid that he won't be able to continue in his job much longer.

The Accident

- [4] The accident occurred at the intersection of Main Street and East 35th Avenue in Vancouver. Mr. Antignani was on his way to work as a passenger in a car driven by his husband, Terence Doucet. They were going south on Main Street when a City of Vancouver truck made a left turn from the northbound lane and collided with their vehicle.
- [5] Mr. Antignani testified that as they approached the intersection, he noticed the truck suddenly turning left in front of them. His next recollection is of sitting on the curb, feeling disoriented with his right arm and shoulder tingling and vibrating "like a tuning fork". He does not recall the impact or how he got out of the car.
- [6] Mr. Doucet testified the truck had been approaching in the centre lane, then was suddenly in front of them. He also did not recall feeling or hearing the collision and did not feel or see the car's airbags deploy, but recalled the car's interior being all white from the air bag dust.
- [7] Mr. Doucet recalled putting his hand on Mr. Antignani's leg after the collision and asking if he was okay, but Mr. Antignani was facing downward and did not respond. Mr. Doucet did not recall Mr. Antignani waking up or how either of them got out of the car. His first memory of being out of the car was of the police telling him to go sit by his husband.
- [8] Both Mr. Antignani and Mr. Doucet were taken by ambulance to Mount St. Joseph's Hospital. Mr. Antignani was discharged after being assessed by an emergency room physician. He testified that, after leaving hospital, he attended to filling prescriptions, retrieving his and Mr. Doucet's belongings from their wrecked car, and arranging for a rental vehicle. He believes he was "running on pure adrenaline." However, he said by that evening his entire body began to hurt and he developed an intense headache.

Injuries and Initial Diagnoses

- [9] On March 11--two days after the accident--Mr. Antignani saw Dr. Brian Yong, a family physician. Dr. Yong's notes indicate that Mr. Antignani complained of headaches, dizziness, nausea, right shoulder and arm pain, neck pain and mid and low-back pain. Dr. Yong did not diagnose a concussion at that time, but did so when he next saw Mr. Antignani on April 1, 2016. He referred Mr. Antignani to an information session at the G.F. Strong rehabilitation centre's concussion clinic.
- [10] Asked about the delayed concussion diagnosis, Dr. Yong testified that it was based on the persistence of symptoms. He said he does not like to make the diagnosis immediately because a patient may have headaches for other reasons in the immediate aftermath of an accident.
- [11] Dr. Yong referred Mr. Antignani for MRI scans on May 19, 2016. A scan of his head was normal, which Dr. Yong said does not rule out a concussion. He said he ordered the scan to rule out more serious brain injury, such as a bleed. A scan of the shoulder showed a small partial tear of the infraspinatus tendon, commonly referred to as the rotator cuff.
- [12] Mr. Antignani testified that the pain in his neck, back, and shoulder improved in the year following the accident, but then plateaued. He said he said the pain remains constant, with aggravations due to the physical aspects of his work.
- [13] Mr. Antignani testified that in the first year following the accident, he had daily headaches that usually lasted for several hours and on occasion for the entire day. He described these headaches as throbbing all over, with a feeling of pressure building up inside, leaving him unable to focus on anything else or listen to someone speaking to him. He said the headaches have become less frequent and shorter. For the last two years they have occurred three to four times a week and usually last less than an hour, but their intensity has not changed.
- [14] Mr. Antignani testified that he continues to experience cognitive limitations that did not exist before the accident. He said he has difficulty finding the right words and sustaining a conversation. Sometimes he will be in the process of answering a question but forget what the question was.
- [15] Other memory deficits alleged by Mr. Antignani include forgetting where objects such as his keys, wallet, or cell phone are, forgetting whether he has fed his cat or given her the medication she requires and forgetting to pay bills or to transfer money into the right account. He says he is no longer able to keep a mental list of tasks he has to perform and difficulties in multitasking are getting worse.
- [16] At work, he says he forgets to order products, resulting in his store being out of stock in items, and forgets to check the schedule to ensure that someone is going to be working in his department the following day.

- [17] He testified that the speed at which he can read and comprehend is reduced since the accident. This is partially due to visual symptoms including "floaters"--small object and shapes that float in his vision but are not actually present. He said he sees the outlines of words in a line below the line he is reading. In attempting to read for pleasure, he finds that intense concentration is required and he must often re-read portions he has forgotten.
- [18] He said he has become sensitive to light and noise. The fluorescent lights at work contrasted with the dark red floors exacerbate his visual symptoms and headaches. He is aware of all noises surrounding him and finds it difficult to know what to focus on.
- [19] In 2018, he says he attended a hockey game and found the sounds of the arena overwhelming. He had a similar experience in a movie theatre, where he found the sound too loud.

Brain Injury

- [20] During the trial, the terms "mild traumatic brain injury" ("MTBI") and "concussion" were often used interchangeably.
- [21] Dr. Christopher Babbage, a neurologist, examined Mr. Antignani in July 2021 and believes he suffered an MTBI in the accident. Dr. Babbage described the mechanism of the injury as a sudden acceleration/deceleration force to the head, causing microscopic brain damage that is not visible on CT or MRI scans. He states in his report:

In my opinion, Mr. Antignani's MTBI likely is contributing to his ongoing cognitive difficulties with poor concentration and forgetfulness. Mr. Antignani's traumatic brain injury likely contributes to his cognitive deficits and mood disturbance of depression and irritability which are common in individuals with MTBI. It is more than 5 years since the MVA and, in my opinion, it is unlikely that cognitive deficits or emotional dysregulation caused by the MTBI will be reversible.

- [22] Dr. Babbage also believes that Mr. Antignani has post-traumatic stress disorder (PTSD). He says the criteria for that diagnosis is met by the fact that Mr. Antignani experienced a life-threatening trauma and continues to have intrusive distressing memories and images of the event.
- [23] Dr. Christina Cheung is a neurologist practicing in Whistler, British Columbia, where she says she treats many patients with head injuries due to skiing and mountain bike accidents. She assessed Mr. Antignani in August, 2020. Dr. Cheung also says that it is more likely than not that Mr. Antignani suffered an MTBI and his ongoing symptoms are consistent with post-concussion syndrome.

[24] Dr. Paul Devlin, a psychiatrist who assessed Mr. Antignani in November, 2019, defined post-concussion syndrome as persisting difficulties arising from an MTBI that can persist for weeks, months or years. He said persistent symptoms associated with post concussion syndrome occur in about 15 per cent of individuals with a single concussive injury. Dr. Devlin says in his report:

The cardinal symptoms of postconcussion syndrome are the following: headache, dizziness, fatigue, irritability, sleep problems, concentration problems, memory problems, problems tolerating stress, emotion or alcohol, affect changes such as anxiety and depression, changes in personality and apathy. I believe that Mr. Antignani endorses practically all of these symptoms.

[25] Dr. Devlin also believes Mr. Antignani suffers from a major depression secondary to post-concussion syndrome and chronic pain. He does not agree that he meets the criteria for a diagnosis of PTSD. Dr. Devlin described his prognosis as "guarded at best."

[26] Dr. Rajiv Reebye, a physiatrist (specialist in physical and rehabilitation medicine) examined Mr. Antignani in December 2018 and April 2021. He also believes that Mr. Antignani sustained a concussion, with continuing post-concussive symptoms, making him more vulnerable to concussion from any future incident. However, he believes chronic pain and headaches are now a major contributor to the cognitive issues. Like Dr. Devlin, Dr. Reebye believes Mr. Antignani suffers from depression secondary to post-concussion syndrome and chronic pain and says any worsening of his mood is likely to worsen his chronic pain.

[27] Dr. Chand Taneja, a neuropsychologist, tested Mr. Antignani's level of functioning over two days in July 2017 and in a follow-up assessment in November 2019. She said her initial testing showed cognitive impairment in the areas most susceptible to neurological or psychological injury, including learning ability, reaction time, thinking and processing speed, sustained attention and fine motor co-ordination. Although she found mild improvement on her subsequent evaluation, she said her test results continued to show those impairments. She said "impairment" means performance in the 9th percentile or lower. At the same time, she found the Mr. Antignani performed well on tests measuring areas that are resilient to neurological injury, such as general intelligence.

[28] Two experts called by the defendants--Dr. Eugene Okorie, a psychiatrist, and Dr. John Falconer, a neurologist--do not believe that Mr. Antignani suffered a concussion. They say that diagnosis cannot be made in the absence of a loss of consciousness and rely on the fact that the ambulance and hospital records made on the day of the accident make no reference to Mr. Antignani having lost consciousness. They also rely on the fact that the ambulance paramedic assessed Mr. Antignani on the Glasgow Coma Scale ("GCS"), a measure of consciousness, and recorded a maximum or normal score of 15.

[29] Dr. Falconer further refers to Mr. Antignani's current ability to remember the circumstances of the accident. He says family doctors, such as Dr. Yong, are often too quick to diagnose concussions without fully exploring the circumstances at the time of an accident.

- [30] According to the report of the ambulance paramedic who attended to Mr. Antignani at the scene, his only complaint at that time was right arm pain radiating to the shoulder, along with numbness and tingling in the right arm. The paramedic, Alison Baumann, testified that Mr. Antignani appeared alert and oriented. Her report doesn't indicate whether she asked Mr. Antignani if he had lost consciousness, but she said it is a standard question and she would likely have noted it if he told her he had. On cross-examination, she said she did not ask about gaps in his memory.
- [31] The ambulance report indicates that paramedics were on their way to the scene at 7:34 a.m. They arrived at 7:45 and Ms. Baumann was at Mr. Antignani's side at 7:48. By 8:00 a.m. Mr. Antignani and Mr. Doucet were in the ambulance that was leaving for the hospital. There is no evidence of when the ambulance was called, or by whom, or the exact time of the accident, but Ms. Baumann was clearly assessing Mr. Antignani at least 15 or 20 minutes after the accident. There was therefore no formal assessment of his state of consciousness or his GCS score immediately after impact.
- [32] At the hospital, Mr. Antignani also reported right shoulder and arm pain. Dr. Christopher Schneck, who examined him, testified that he did a "quick" neurological assessment, which was normal, and that Mr. Antignani did not report any loss of consciousness. Dr. Schneck said he examined Mr. Antignani at around 9:12 a.m.--more than 90 minutes after impact--and that it "would have been a fairly short visit." Mr. Antignani recalled being in hospital for three to four hours, but the hospital record indicates he was discharged shortly after being examined by Dr. Schneck.
- [33] Dr. Devlin says a loss of consciousness is not necessary for a diagnosis of concussion or post-concussion syndrome and neither he nor Dr. Babbage place much weight on the GCS. Dr. Babbage described it as primarily a "triage tool" to determine if there is an urgent need for assessment by a neurosurgeon. He also said on cross-examination that a normal GCS a few minutes after an accident does not preclude a diagnosis of MTBI when there is a history of force to the head, loss of consciousness, and post traumatic amnesia. Dr. Reebye testified that a GCS score of 13 to 15 is in fact required for a diagnosis of MTBI. A lower score puts a brain injury into the moderate or severe category.
- [34] The fact there is no recorded documentation of a loss of consciousness must be weighed against the evidence of both Mr. Antignani and Mr. Doucet that Mr. Antignani did lose consciousness for some period of time. Mr. Doucet says Mr. Antignani was non-responsive immediately after the accident and Mr. Antignani has no recollection of the impact or of getting out of the car. That evidence of at least a brief loss of consciousness is not inconsistent with the fact that Mr. Antignani was fully conscious by the time the ambulance arrived.

- [35] Asked on cross-examination about a witness (meaning Mr. Doucet) having seen Mr. Antignani in a non-responsive state immediately after the accident, Dr. Okorie said he would expect such a witness statement to be included in the ambulance report. However, there is no evidence that Ms. Baumann, who created the report Dr. Okorie relied on, ever spoke to Mr. Doucet. She said her partner attended to Mr. Doucet while she attended to Mr. Antignani.
- [36] Similarly, when Dr. Falconer was asked about the gap in Mr. Antignani's memory, he replied that "there are seconds he doesn't remember." In fact, the period that Mr. Antignani doesn't recall begins a moment before impact and ends with him sitting on the curb. While there is no evidence of the precise length of that period, it could not have been as little as a few seconds.
- [37] The assessments made by the paramedic, Ms. Baumann, and the emergency physician, Dr. Schneck, were both brief, conducted in the minutes or hours following a serious accident, and primarily directed to the question of what if any immediate medical intervention was required. Mr. Antignani may or may not have been asked about a previous loss of consciousness, but the situation was not one in which a patient would necessarily give a perfectly complete and accurate medical history.
- [38] I found both Mr. Antignani and Mr. Doucet to be forthright and credible witnesses. After considering all the evidence, I accept their testimony on this point and I find on the balance of probabilities that Mr. Antignani was unconscious for some period of time immediately after the accident and before the arrival of the ambulance.
- [39] Because Dr. Okorie and Dr. Falconer base their opinions so heavily on an assumption that there was no loss of consciousness, those opinions cannot be accepted and I would in any event prefer the opinions of Drs. Babbage, Cheung and Devlin. I therefore find that Mr. Antignani did sustain a concussion in the accident and continues to suffer from post-concussion syndrome.
- [40] I further note that although Dr. Okorie and Dr. Falconer disagree with the diagnosis of MTBI, they do not dispute the existence of the cognitive symptoms that Mr. Antignani reports or the findings on Dr. Taneja's tests. Dr. Okorie attributes those "subjective cognitive concerns" to pain and emotional distress. He agreed on cross-examination that Mr. Antignani suffers from chronic pain, which can trigger depression and anxiety that in turn feeds back into the chronic pain. He agreed that this "negative feedback cycle" has occurred in this case.
- [41] Dr. Falconer says that Mr. Antignani has a post-whiplash headache disorder, producing migraine-like symptoms. That is a condition that can be caused for reasons other than a brain injury and Dr. Falconer agreed on cross-examination that such a condition can be chronic.

- [42] It is probably impossible to precisely determine the extent to which Mr. Antignani's cognitive problems are caused or contributed to by chronic pain and headaches, as opposed to being the direct result of brain injury. There is no dispute in the medical evidence about the reality of those symptoms, and their precise medical cause makes little difference for purposes of assessing their impact on Mr. Antignani's life and work.

Physical Injuries

- [43] Mr. Antignani testified that he now has neck pain and stiffness in varying degrees every day, with decreased range of motion, particularly in looking up. He said his right shoulder feels "like it is going to fall off" and the pain has worsened over the last year. The pain is exacerbated by his work, which requires some heavy lifting, and is more intense if he has a particularly heavy day at work. He said he feels a throbbing in his right arm and shoulder at night, similar to what he felt immediately following the accident. He is right-handed so he predominantly uses his right hand, arm, and shoulder.
- [44] Mr. Antignani said he continues to have low back pain, which begins as a slow burn in the morning and intensifies as the day proceeds. He said that pain is also exacerbated at work, not only by lifting, bending and twisting, but also by standing and walking on cement floors and moving between areas of different temperatures. He said he becomes hunched over and moves more slowly as the day progresses and must lie down to rest when he gets home.
- [45] Dr. Reebye says Mr. Antignani suffered soft tissue injuries to his neck, back and shoulder and has now developed myofascial pain syndrome. Given the continued presence of chronic pain almost six years after the accident, Dr. Reebye believes that chronic pain is likely to be permanent. He also says all of Mr. Antignani's injuries were caused by the accident and:

I am of the opinion that he is permanently disabled with ability to return to his pre-accident recreational activity level and that he is partially disabled with his chronic pain symptoms and cognitive symptoms affecting him at home and at work.

- [46] The defence medical experts, Dr. Falconer and Dr. Joshua Muhlstock, a physiatrist, point out that imaging subsequent to the accident revealed that Mr. Antignani has degenerative changes, or arthritis, in his cervical spine. There is no history of any pre-accident symptoms caused by that condition. Dr. Muhlstock says that condition was likely aggravated by the accident and is now contributing to ongoing symptoms. Dr. Falconer said the pre-existing condition made Mr. Antignani more susceptible to injury in the accident and to slower recovery. Although Mr. Antignani was at risk of symptoms at some point even in the absence of the accident, Dr. Falconer could not say he would necessarily have developed them.

- [47] Dr. Muhlstock said he was not certain the Mr. Antignani's shoulder tear was caused by the accident, but agreed there was no indication of any pre-accident injury to the right shoulder and such tears are often seen as a result of trauma. Although not disabling in most respects, Dr. Muhlstock said the shoulder injury will restrict Mr. Antignani in very heavy tasks and in repetitive or overhead activities.
- [48] On cross-examination, Dr. Muhlstock agreed that, based on the persistence of Mr. Antignani's neck and back pain, he could make a diagnosis of chronic pain. He also agreed that chronic pain lasting more than two years has a poor prognosis and that chronic pain can trigger psychiatric symptoms such as depression and anxiety, which can in turn further worsen the chronic pain.
- [49] I find that Mr. Antignani suffered neck, back and shoulder injuries in the accident, and I accept Dr. Reebye's opinion that the pain is likely to be permanent. Although the accident triggered a previously asymptomatic degenerative condition in his neck, there is no evidence as to whether or when that condition would have produced symptoms in the absence of the accident and no evidence that those symptoms would have become as serious or disabling as they now are. I also find that the chronic pain is contributing to or aggravating Mr. Antignani's cognitive limitations.

The Plaintiff's Current Condition

- [50] Mr. Antignani testified that he experiences pain on a daily basis and takes at least two extra strength pain killers a day. The medication only reduces the intensity of the pain without eliminating it. He still attends physiotherapy once a month, which is the maximum available to him without having to pay personally.
- [51] He testified that his general health before the accident was good. His only previous significant injury occurred when he fell down a waterfall at age 19 and he recovered from that within about two months. He had no pre-accident pain in or injuries to his neck, back (other than the waterfall incident) or shoulder and no pre-accident depression or chronic pain.
- [52] Before the accident, Mr. Antignani said his recreational activities included frequent bike rides, walking and gardening. He said he has tried to ride his bike once since the accident, but he found leaning over the handlebars to be uncomfortable. He still walks, but his walks are much shorter and gentler than before the accident and he does not walk every day. The flower and vegetable garden that he tended at the Vancouver home he shared with Mr. Doucet was left to die after the accident and Mr. Antignani said he was unable to mow the lawn.

- [53] Although he and Mr. Doucet previously shared household chores on a more or less equal basis, Mr. Antignani testified that he has now largely stopped cooking and washing dishes and rarely does anything that requires bending, such as vacuuming or dusting. He said Mr. Doucet now performs the vast majority of housework.
- [54] Socially, Mr. Antignani said his circle of friends has become smaller because he can't do many of the things he used to do with friends. Since the accident, he has been to no concerts, theatre, opera or ballet performances which he previously attended frequently.
- [55] Mr. Antignani said he and Mr. Doucet no longer sleep in the same bed because he needs to be undisturbed in order to sleep.
- [56] Mr. Antignani's alcohol consumption has increased dramatically since the accident. He says he has gone from being a social drinker to drinking a 1.5 litre bottle of wine every night because it helps him forget his injuries and work difficulties. In 2017, he noticed he was going to the liquor store every day.
- [57] Prior to accident, Mr. Antignani and Mr. Doucet were hoping to adopt or provide foster care for a child and were in the process of making the necessary applications and attending information sessions. Now, he says, he cannot properly take care of himself or their cat and does not know how he would care for a child.
- [58] Mr. Doucet's evidence about the about the changes in his husband and their life together was consistent with that of Mr. Antignani. He described Mr. Antignani before the accident as fun, outgoing, always up for an adventure and very expressive in his feelings. Now, he said, Mr. Antignani doesn't talk or laugh the way he used to and doesn't take part in fun activities. They no longer have their former engaging conversations about a variety of subjects, with conversations now limited to subjects like whether the cat has been fed or what needs to be done in the house. They no longer host the elaborate parties they used to have and rarely if ever have friends over for dinner or cards, although they used to do so at least twice a week.
- [59] Mr. Doucet described Mr. Antignani before the accident as very punctual and organized. He could go grocery shopping and remember all of the items needed without a written list. Now, without a written list, he may remember half of the needed items or will get the wrong ones. For example, Mr. Doucet said he only drinks non-dairy milk such as oat milk, which Mr. Antignani as known for years, but now Mr. Antignani will often come home with dairy milk rather than oat milk.
- [60] Before the accident, Mr. Doucet said Mr. Antignani would come home from work "with as much energy as when he left," but now lies down in a dark and quiet room.

Non-Pecuniary Damages

- [61] I find the evidence of Mr. Antignani and Mr. Doucet to be credible and compelling and find that Mr. Antignani's chronic pain, depression and cognitive difficulties have prevented him for doing most of what he previously enjoyed, as well as severely limiting his ability to perform necessary tasks. I agree with his counsel's characterization that Mr. Antignani is simply not the same person he was before the accident.
- [62] I accept the evidence of Dr. Reebye to the effect that complete recovery is unlikely and future treatments will have to focus on strategies for living with, rather than curing, chronic pain. Dr. Devlin's evidence is to the same effect. I also accept the evidence of Dr. Babbage that the cognitive difficulties and depression are likely to continue and compound each other. Dr. Babbage says antidepressant medication will not cure those problems, but will likely lower the risk of depression becoming more severe.
- [63] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. As usual in cases of this kind, I have been provided with a number of cases as possible guides to the appropriate range of non-pecuniary damages. Those cases have varying degrees of similarity to the facts of this case and, in the end, each case must turn on its own facts. Of the cases cited, I find *Steinlauf v. Deol*, 2021 BCSC 1118 [Steinlauf] and *Conarro v. Tallack*, 2020 BCSC 626 [Conarro] to be the most comparable.
- [64] In *Steinlauf*, the plaintiff's injuries included MTBI, post-concussion syndrome headaches, chronic back pain and depression. The plaintiff was 14 years younger than Mr. Antignani but, aside from the reference to age and specific occupation, much of what Justice Basran said in conclusion is equally applicable here:
- [138] The Accident significantly changed the course of Const. Steinlauf's life. He was on track to build a successful career within the RCMP and live a fulfilling and accomplished life. Before the Accident, he set lofty goals and worked hard to achieve them. Since the Accident, he is a shadow of his former self. This once confident, ambitious, and extroverted young man is now permanently, partially disabled, with limited mobility, shattered confidence, serious psychological problems, persistent and worsening pain, and an uncertain future. The Accident affected every aspect of his young life and unalterably and negatively changed its course.

Non-pecuniary damages were assessed at \$225,000.

- [65] In *Conarro*, the plaintiff was 49 at the time of the first of two accidents and 54 at trial. His injuries included shoulder injuries, chronic pain and headaches, vestibular injuries, one or more moderately severe psychiatric disorders, and some decrease in cognitive abilities related to his chronic pain psychiatric injuries. An MTBI was found to have resolved. Justice Marzari said at para. 169 the injuries had "affected key relationships and sources of joy and meaning in his life, including his ability to work at his job and his relationship with his wife."

- [66] The plaintiff in Conarroe had a previous history of back pain and PTSD. He was recovering or fully recovered from those injuries at the time of the first accident, but Justice Marzari found that they made some reduction in non-pecuniary damages appropriate. Non-pecuniary damages were awarded in the amount of \$180,000.
- [67] A plaintiff's pre-existing condition that creates a hypothetical risk regardless of the accident is potentially relevant because the purpose of damages award is to put plaintiffs in the position they would have been but for the accident, but not in a better position. Therefore, a reduction in damages is sometimes appropriate in order to take that contingency into account.
- [68] A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable: *Dornan v Silva*, 2021 BCCA 228 [Dornan] at para. 63. The Court in Dornan said at para. 75.
- [75] I conclude that to support a contingency deduction, the law does not require that the "measurable risk" involved be wholly inherent in the plaintiff's pre-existing condition, without the need for any external event to act upon it in order to give rise to a debilitating effect. The question is whether, given the pre-existing condition, there was a real and substantial possibility of future debilitating symptoms absent the accident. That real and substantial possibility may arise solely from the nature of the pre-existing condition itself, or require an external event acting upon that condition. In either case, the possibility must be real and substantial, not speculative.
- [Emphasis added.]
- [69] The Court made a similar statement in *Lo v. Vos*, 2021 BCCA 421 [Lo] at para. 74:
- [74] The existence of a specific contingency such as was found here must be proven by evidence that is capable of supporting the conclusion that the occurrence of the contingency is a real and substantial possibility, as opposed to a speculative possibility: *Graham [v. Rourke]* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.) at 15; *Hussack v Chilliwack School District No. 33*, 2011 BCCA 258.
- [70] Mr. Antignani had a degenerative condition in his cervical spine that may have made him more vulnerable to injury and was aggravated by the injury. However, there is no evidence that condition caused any pain or limitation before the accident. Although it might have caused pain in the future with or without the accident, there is no evidence on which to assess either the likelihood of that happening or the possible severity and persistence of any future pain. Any suggestion that it would have developed and progressed to debilitating symptoms is entirely speculative and I find no contingency deduction is appropriate.
- [71] The plaintiff seeks non-pecuniary damages of \$200,000. I find that to be an entirely reasonable submission in light of the evidence and the case law, and I award that amount.

The Plaintiff's Employment

- [72] At the time of the accident, Mr. Antignani was a bakery manager at Loblaws City Market in Richmond at an annual salary of approximately \$45,000, plus bonuses and employer contributions to his Registered Retirement Savings Plan. His income tax returns for 2014 and 2015, the two years immediately preceding the accident, show total income in each year of a little over \$49,000.
- [73] He had been in his position at Loblaws since 2014, but had worked in the grocery industry from 1999, including periods as dairy manager and bakery manager at Choices market.
- [74] Following the accident, Mr. Antignani was off work until July 21, 2016, when he began a graduated return to work. He said he had difficulty with both the physical and cognitive duties involved in his job and, in November 2016, left that job to begin work at ECOMM, which operates the 911 emergency call service. That was a career change he had begun pursuing before the accident.
- [75] Mr. Antignani's first job at ECOMM was as a "queue" operator, simply asking callers if they needed police, ambulance, or fire, and directing calls accordingly. After a few weeks in that position, he began training to become a call taker, which involves obtaining details and assessing priorities so the emergency services can be dispatched appropriately. Becoming a call taker required him to take an examination that required an 80 per cent score to pass. He failed that exam on his first attempt, but his score of 76 per cent was close enough that he was permitted one more try, which he passed.
- [76] Although he passed the necessary examination to become a call taker, Mr. Antignani said he found the work to be much more difficult in real-life situations. He said that, in talking to callers, he would forget critical details, had difficulty following conversations, could not record information fast enough and had a difficult time remembering and accurately recording addresses. He testified that he would get hung up on minor details which would prevent him from getting the most critical ones. He gave evidence about a specific call that involved a life-threatening situation, but it took him five minutes to get the call posted so the police would attend.
- [77] Mr. Antignani said his workstation had three monitors and was located in a large open room with fluorescent lights and no partitions separating more than 100 workstations. He said he regularly got headaches during his shifts and those headaches, combined with his sensitivity to noise and light, made it difficult for him to focus on calls he was receiving, particularly with many other conversations going on around him.
- [78] His ECOMM supervisor, Marc McAdam, testified that Mr. Antignani had problems with multi-taking and speed. On April 28, 2017, a trainer monitored his work over the course of six hours and identified multiple deficiencies in his work. That led to his termination from ECOMM.

- [79] However, Mr. McAdam also testified that Mr. Antignani's failure in the call-taker job was not uncommon. He said new employees typically begin in groups of eight. After passing the call taker exam and beginning work in that position, employees are subject to ongoing evaluations, culminating in a final technical assessment after about six months. Mr. McAdam said it is common for two recruits out of an initial group of eight to fail the call taker exam, with another two failing the final technical assessment. Jonathan Wong, a human resources co-ordinator at ECOMM, said that 60 to 80 call takers are hired each year and about 50 percent leave "within the first few years".
- [80] After his termination from ECOMM, Mr. Antignani received employment insurance benefits while unsuccessfully looking for less stressful and less consequential call centre work. Finally, in September 2017, he took a part time position as a bakery clerk at Costco, earning \$13 per hour. He testified that job required bending, sweeping, lifting, mopping, and wiping countertops, all of which he found to be hard on his back and shoulder.
- [81] In early 2018, he took a part time position as a grocery clerk stocking shelves at a Save On Foods store in Vancouver, earning about \$11 an hour. He worked both there and at Costco for about three months, until Save On Foods offered him full time hours.
- [82] Mr. Antignani was promoted to bakery manager in early 2019. In that position, he is responsible sales projections, determining how much product must be ordered, (including some orders that must be planned up to three weeks in advance) and unloading and warehousing products when they are shipped to the store. He is also responsible for training new employees and preparing employee work schedules.
- [83] Tiziana Maselli worked with Mr. Antignani in the bakery department for about year. She had previously managed the department and Mr. Antignani assumed that position when she stepped down to be head baker. She said she observed him to be forgetful and she often had to leave him notes reminding him of things he had forgotten to do. She also said he appeared to be in pain while unloading shipments and she would help him with that if she had time, although he never asked for such help.
- [84] In October 2020, Mr. Antignani moved to Grand Forks, B.C. to become bakery manager at the Save On Foods store there and Mr. Doucet joined him in Grand Forks a few months later. He continues to work as a bakery manager.
- [85] Although the bakery department at the Grand Forks store is almost as busy as in the Vancouver store he worked in, Mr. Antignani says he has a smaller, less-experienced staff. Compared to the Vancouver store, he says he needs to plan further ahead in his ordering of products to ensure there is no shortage or excess and the level of wasted product in his store is often well in excess of the company standard. He said he does not follow company procedures in ordering products and simply "does the basics." He limits his computer work to approximately ten minutes per day, although more is needed, because it aggravates his vision issues.

- [86] He said the physical aspects of his job, including unloading and moving products and standing and walking all day on cement floors aggravates his back, which he believes is becoming increasingly worse. He described the back pain as manageable at the beginning of a work day, but no longer manageable by the time he gets home. He feels he is "just hanging on" in a job he doesn't believe he will be able to do much longer.
- [87] Jasmine Shivji is an occupational therapist who conducted a functional capacity evaluation and prepared a report dated January 16, 2020. She found reduced lifting, pushing, carrying, and pulling capacity. She said Mr. Antignani is capable of working in limited, light, and select medium strength occupations on a full-time basis, providing that he has the flexibility to change postures and manage his symptoms as needed. However, she said he does not meet the physical requirements for occupations classified as heavy--a category that includes his present job. She believes he is currently working beyond his physical capacity and adds:

While this Functional Capacity Evaluation focused primarily on his physical capacity, it is important to note that Mr. Antignani continues to have post-concussive symptoms of headache, dizziness, and cognitive limitations, in addition to depression, anxiety and chronic pain. The combined effects of these conditions has had a serious impact on Mr. Antignani's ability to work and manage his life roles, and on his quality of life, and has subsequently impacted his employability.

- [88] Dr. Reebye also believes Mr. Antignani is better suited to more sedentary work and says physically demanding jobs such as his current one are likely to increase his chronic pain. Asked on cross-examination about the fact Mr. Antignani has not missed any work in his current job for reasons related to the accident, Dr. Reebye replied that the position is not well suited to him and that, if Mr. Antignani were his patient, he would recommend accommodations at work.

Past Loss of Earning Capacity

- [89] A loss of earning capacity, whether past or future involves a consideration of hypothetical events. *Rab v. Prescott*, 2021 BCCA 345 [Rab] at para. 28. The income Mr. Antignani would hypothetically have been able to earn in the absence of the accident must be assessed and compared with his actual earnings from the date of accident to the date of trial. Any difference must be shown to be the result of the accident rather than due to other, unrelated reasons.
- [90] He missed a little more than four months' work after the accident, after which he returned to Loblaws on a graduated return to work before leaving that job to join ECOMM late in 2016. At ECOMM he was paid an hourly wage that would have produced a somewhat higher annual income on a full-time basis. The ECOMM job also offered higher non-wage benefits, such as employer pension plan contributions.

- [91] Mr. Antignani's tax return for 2016 shows total employment income of about \$14,000 less than the previous year and there can be no doubt that is a loss directly attributable to the accident. The real issue between the parties relates to the subsequent years.
- [92] Mr. Antignani was terminated from the ECOMM position in April of 2017 and he attributes that to his inability to perform the job demands because of his injuries. He was then unemployed for several months before returning to the grocery industry in what was initially a non-management, lower wage capacity before being promoted. His income tax returns do not show a return to his pre-accident income level until 2020.
- [93] The defendants argue that his termination from ECOMM and any income loss arising from it was not due to the accident. They also say that, since returning to the grocery industry, he has lost no time from work for accident-related reasons. In effect, the defendants say that if Mr. Antignani had not made the choice to leave the grocery industry for ECOMM and had instead remained with Loblaws, he would have suffered no compensable income loss after 2016.
- [94] The difficulties that Mr. Antignani described with his work at ECOMM, such as problems with multitasking and quickly processing information, are confirmed in the employment records and are consistent with the medical evidence. I have already found, on the basis of the same medical evidence, that those cognitive problems were caused by the accident.
- [95] I therefore find that Mr. Antignani's termination from ECOMM was a direct result of the accident. Having said that, I must also recognize the real and substantial possibility that, even in the absence of the accident, Mr. Antignani may not have lasted at ECOMM. The evidence is that ECOMM has a high staff turnover, with about 50 per cent leaving in the first few years and some being terminated at about the stage Mr. Antignani was for failing their technical assessment.
- [96] The total amount of Mr. Antignani's "without accident" income to the date of trial has been calculated by an economist, Curtis Peever, on the basis of two hypothetical scenarios. One assumes Mr. Antignani continuing to work at ECOMM and the other is based on continuation of his Loblaws salary and benefits. In both cases, Mr. Peever has deducted two periods in 2019 and 2020 when Mr. Antignani was off work for reasons unrelated to the accident--appendix surgery in the first case and a broken foot in the second.
- [97] Having calculated Mr. Antignani's "without accident" income, Mr. Peever then compares it to his actual earnings and benefits from the date of accident to the date of trial. The result shows a total loss, net of income tax, of \$53,825 if Mr. Antignani had he remained at Loblaws and \$86,975 if he worked at ECOMM for most the relevant period.

- [98] I find Mr. Peever's methodology and conclusions to be reasonable and appropriate in the context of the evidence. Recognizing the contingency that Mr. Antignani might for other reasons have been unsuccessful or have not continued in the ECOMM job, I assess his past income loss at the approximate mid-point between the two amounts Mr. Peever has calculated and award \$70,000.
- [99] The defendants argue that the past income award should be subject to a deduction of approximately \$8,000 for Employment Insurance sickness benefits that Mr. Antignani received while off work in 2016. They rely on *Hastings v. Mathew*, 2020 BCSC 1418 [Hastings], *Dobbin v. Siewert*, 2013 BCSC 1153 [Dobbin] and *Kristan v. Lind*, 2017 BCSC 1205.
- [100] In *Hastings*, the deduction was made by consent and in *Dobbin*, it was conceded by the economics expert on cross-examination. In none of those cases did the Court apparently referred to *Wright v. Mastin*, 2009 BCSC 414 [Wright], where the Court said at para. 27 that "Employment Insurance benefits are not deductible from an award for past wage loss because they are a collateral benefit for which the plaintiff has paid."
- [101] Had *Wright* been cited in any of the later cases, the Court would have been bound to follow it on the principle stated in *Hansard Spruce Mills Ltd. (Re)*, [1954] 4 D.L.R. 590 (B.C.S.C.) or at least to consider whether it fell within any of the exceptions set out in that case. I therefore decline to make the deduction sought by the defendants.

Future Loss of Earning Capacity

- [102] In *Rab*, the court of appeal recently summarized and restated the approach the court must take in considering a claim for loss of future earning capacity. After reviewing the leading earlier cases-- including *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Steward v. Berezan*, 2007 BCCA 150, *Perren v. Lalari*, 2010 BCCA 140--the Court said at para. 47:
- [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring
- [103] That approach is essentially the same as must be used in determining whether a damage award should be reduced for contingencies.
- [104] In regard to the first step, the evidence establishes the following:

- Mr. Antignani is suffering from chronic pain and complete recovery, in the opinion of Dr. Reebye, is unlikely.
- He currently works in a job with a physical component that aggravates his pain on a daily basis, to the point he finds the pain unmanageable by the end of the day. His shoulder injury also limits his ability to perform some of the specific tasks involved in his job.
- In the opinion of Ms. Shivji, functional capacity evaluation shows that he does not meet the standard physical requirements for his current job and Dr. Reebye says he is no longer well suited to it.
- He suffers from cognitive problems, resulting from one or combination of causes including the direct effects of post concussion syndrome, chronic pain, headaches and depression. Those symptoms interfere with his ability to effectively perform the administrative and managerial components of his job.
- Subjectively, he believes he is "just hanging on" in his job and doesn't believe he can continue much longer.
- Although Ms. Shivji says he is capable of full-time work in a physically lighter, more sedentary occupation, his ability to perform some such jobs may be limited by his cognitive symptoms, as has already been demonstrated by his experience at ECOMM.
- There is no evidence of any specific alternative jobs or occupations available to him. His entire adult working life, other than his brief time at ECOMM, has been spent in grocery stores.

[105] I find that evidence clearly discloses a potential future event--inability to continue in his current occupation--that could lead to a loss of capacity.

[106] It must be recognized that, even with his current injuries and difficulties, Mr. Antignani was promoted to bakery manager and was considered suitable for transfer to that position in his current store. He has so far shown a determination to keep working through his pain and limitations and is proud of what he has been able to accomplish in the industry. Dr. Reebye describes the job as "a good distracter" for him.

[107] But notwithstanding those positive elements, I also find that the factors listed above and the severity of Mr. Antignani's ongoing symptoms also establish a real and substantial possibility that Mr. Antignani will become unable to continue in his current job as a bakery manager, either because of inability to tolerate the aggravating effect on his chronic pain and limitations or because of future employer dissatisfaction. If that happens, there is a real and substantial possibility that he will be unable to find alternative employment at his current income level that is compatible with his physical and cognitive limitations.

[108] The most difficult part of the exercise is assessing the likelihood of the future loss occurring and quantifying it. While I hesitate to assign an exact percentage to the likelihood of the future loss occurring, I find it to be relatively high. At a minimum, I find that even if he is able to continue in his current job for the foreseeable future, it is more

likely than not that he will be forced to retire earlier than he otherwise would. There is a smaller, but still significant likelihood of his becoming unable to continue in his current position at an earlier date. If that occurs, I find a high likelihood that any alternative employment available to him will be at a lower wage.

- [109] Quantification can be based on either an "income approach" or a "capital asset" approach. The later is appropriate where, as here, the plaintiff is not experiencing any income loss at the time of trial. The court may award an amount equal to one or more years of the plaintiff's recent past income: Rab, at paras. 64-72.
- [110] A different approach was used by the court of appeal in Lo after the Court found the trial judge's approach to be in error. The Court referred to actuarial evidence that placed the present value of the plaintiff's "without accident" capacity at \$1.8 million, then said at para. 119:
- [119] Giving weight to the judge's findings concerning the certainty of total disability only over the initial period of approximately four years, the ability of the appellant ultimately to work as a teacher or equivalent in the future, and the uncertainty surrounding her prognosis, while bearing in mind the evidence of the psychological experts that the judge accepted, I would put the relative likelihood of this future hypothetical at 45%, on the basis that it is slightly less likely to transpire than not. This yields a loss of capacity in the amount of \$810,000.
- [111] Counsel for Mr. Antignani, using the capital asset approach, submits that an award future loss of earning capacity in the range of \$150,000 to \$250,000 would be appropriate. The defendants submit that there should be no award under this head of damages. They rely heavily on the fact that Mr. Antignani, since returning to the grocery industry, has lost no time from work for reasons related to the accident. But, as I hope I have made clear, the absence of a present loss does not in itself exclude the possibility of a future one.
- [112] The defendants chose to make no alternative submission on how Mr. Antignani's loss of future earning capacity should be assessed if their first position is rejected, which it has been. Defendants are perfectly entitled to make that choice, but they run the risk of the Court being left in a position where the only assistance it has in this difficult assessment comes from the plaintiff.
- [113] The range suggested by counsel for Mr. Antignani is equivalent to between three and five years at Mr. Antignani's current income.
- [114] Another approach might involve use of actuarial evidence, similar to what the court of appeal did in Lo. One of the tables prepared by Mr. Peever to estimate Mr. Antignani's "without accident" future income calculates the present value of Mr. Antignani's income from his current job to age 70. It then adjusts that amount for actuarial survival rates and for labour market contingencies, such as unemployment or voluntary non-participation in the labour force. Those contingency factors are based on statistical averages for males in

British Columbia.

- [115] That table shows an adjusted present value of Mr. Antignani's current income to age 70 of either \$645,500 or \$890,900. The lower figure includes "choice" contingencies, such as voluntary non-participation in the labour force for some period of time or a choice to work only part-time. The higher figure applies to only "risk" contingencies, such as involuntary unemployment.
- [116] Mr. Antignani's pre-accident history is one of steady employment and strong attachment to the labour force, so I find the higher figure to be the more appropriate starting point. On that basis, the \$150,000 to \$250,000 range put forward by Mr. Antignani's counsel is equivalent to a relative likelihood of between 17% and 28%. I find that to be, if anything, a conservative estimate.
- [117] The same actuarial evidence can be considered in relation to my finding that there is at least a high likelihood of Mr. Antignani's injuries forcing him into earlier retirement. Retirement at age 60 would reduce Mr. Peever's "risk only" present value from \$890,900 to \$642,400, a difference of \$248,500.
- [118] Whichever of those methods is used to assess the value of Mr. Antignani's lost capital asset, I find his counsel's submission to be entirely reasonable and supported by the evidence. I therefore award \$250,000 for loss of future earning capacity.

Cost of Future Care

- [119] An award for the cost of future care is intended to compensate the plaintiff for treatments and care that are reasonably necessary to restore the plaintiff to their pre-accident condition, so far as it is possible. That must be based on medical evidence of what is reasonably necessary to promote physical and mental health. The assessment is not a precise accounting exercise and is subject to deduction for contingencies, based on the specific care needs of the plaintiff: *Pike v. Kasiri*, 2016 BCSC 555 at paras. 350 and 354-356.
- [120] It is not necessary that a physician testify to the medical necessity of each and every item of care that is claimed, but there must be some evidentiary link drawn between the 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. The test is whether there is a reasonable and substantial possibility of the items or services being necessary in the future. *Howell v. Machi*, 2017 BCSC 1806 at para. 395.
- [121] The report of Ms. Shivji includes recommendations for various physical aides, medications and ongoing therapies. Counsel for Mr. Antignani has identified a number of items from Ms. Shivji's report that have a total present value of \$165,000. In addition, counsel relies on Dr. Devlin's evidence that Mr. Antignani would benefit from attendance at a pain clinic at a cost of \$25,000 to \$35,000, and ketamine infusion treatments for depression at a cost of

\$7,200 to \$9,600. Counsel does not add those full amounts to what is recommended by Ms. Shivji, but submits that Mr. Antignani is entitled to a total award of \$180,000 for cost of future. The defendants simply say there is no need for any future care or treatment--a position that I find is not sustainable on the medical and other evidence.

[122] The \$165,000 figure arising from Ms. Shivji's recommendations includes one-time costs totalling between \$1,959 and \$2,822 for such things as a "mindfulness based stress reduction" course, an active rehabilitation program and home massage tools. I find the need for those items to be reasonable based on the medical evidence of Mr. Antignani's current condition. It also includes a present value of \$7,700 for non-prescription medications and for various physical and pain management aids that will need to be replaced from time to time.

[123] However, the vast majority of the costs based on Ms. Shivji's recommendations are for various therapies. These include ongoing psychological counseling and massage therapy, as well as a budget for other things that may be needed on an intermittent basis, such as physiotherapy, occupational therapy and/or kinesiology. The present value of those costs is based on them being required until Mr. Antignani turns 70.

[124] While I accept the need for those interventions and that assistance, I am not persuaded there is a high likelihood of them all being needed in combination or at the same level for the next 27 years.

[125] Dr. Reebye specifically supports the need for physiotherapy and massage therapy on a weekly basis, but says the need should be re-assessed after six months. He also agrees there is a need for psychological treatment, but does not put a time frame on it.

[126] Presumably, some or all of the therapies now seen to be necessary may reach the point where they have accomplished all they can. Or, the need for them could be eliminated or reduced depending on the success of the interventions recommended separately by Dr. Devlin.

[127] Taking these uncertainties and relative likelihoods into account, I find it appropriate to reduce the amount sought by the plaintiff by 50 per cent and I award \$90,000 for the cost of future care.

Loss of Housekeeping Capacity

[128] The plaintiff seeks a further award for loss of housekeeping capacity. The defendants argue that he is fully capable of performing normal household tasks, just as he has so far been able to perform more physically demanding tasks at work. That submission ignores Mr. Antignani's evidence, which I accept, to the effect that his attempts to persevere at work leave him without the strength or energy for housework. I accept the evidence of Dr. Reebye that Mr. Antignani is partially disabled both at work and at home.

- [129] An award for loss of housekeeping capacity may be assessed on either a pecuniary or non-pecuniary basis. In *Kim v. Lin*, 2018 BCCA 77, the Court said at paras. 33 and 34:
- [133] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [134] 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, courts 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, is tied to the actual loss of capacity which justifies the award in the first place.
- [130] Ms. Shivji has made recommendations on the cost of replacement housekeeping services that recognize the partial nature of Mr. Antignani's disability. For example, her future care recommendations include the cost of a lightweight vacuum cleaner to allow him to continue doing some of the housework. She also recognizes that, before the accident, Mr. Antignani was responsible for only 50 per cent of household chores.
- [131] Ms. Shivji recommends four hours per month of housekeeping assistance, which she estimated to cost \$28 per hour if obtained through an agency. She also estimates annual costs for seasonal cleaning to be \$448 to \$560 and annual costs for yard work to be \$520. The total value of those services, past and future, is about \$63,000.
- [132] While I find the services recommended by Ms. Shivji to be reasonable and consistent with the medical evidence of Mr. Antignani's disability, her quantification of them is based on the Vancouver home where Mr. Antignani and Mr. Doucet lived at the time of her report. There is no evidence on how the required level of services or their costs might differ at their current home in Grand Forks. Recognizing that uncertainty, but also recognizing that some assistance will likely be needed in any event, I award \$40,000 for past and future loss under this head of damages.

Special Damages

- [133] Mr. Antignani seeks \$18,630.65 in special damages. The plaintiff has the onus of proving expenses that were made necessary by the accident. But, as is almost always the case, the evidence on special damages was somewhat perfunctory. The relatively small amount of each expenditure makes detailed examination and cross-examination an inefficient use of valuable court time.
- [134] The claim includes \$4,690.27 for psychological counselling, physiotherapy and massage therapy and \$1,288.69 for prescription medications. I find these amounts to be clearly recoverable as special damages.
- [135] There is more controversy over \$6,535 for private MRI scans. Those scans were arranged through the office of plaintiff's counsel. The invoices for them have not been paid, but counsel says they are subject to a deferred billing arrangement and must be paid at the conclusion of this matter.
- [136] Normally, the costs of specific medical investigations arranged by counsel are not special damages but are potentially recoverable as disbursements to be included in a bill of costs. However, in this case, Dr. Yong testified that he requested the MRIs and used them as diagnostic tools to rule in or rule out possible conditions. He said there were long waiting lists for publicly funded scans and obtaining the scans at an early date from a private clinic allowed him to make earlier referrals to the appropriate specialists. The scans were therefore used for diagnosis and treatment, as opposed to purely litigation purposes, and I find the costs to be recoverable as special damages on that basis.
- [137] The special damages claim also includes \$2,579 for car rental, through a car sharing service, and \$944 in public transit fares and passes. Mr. Antignani testified that the car he was riding in on the date of the accident was a total wreck, but he and/or Mr. Doucet still owed money on it and had to continue making payments. They did not obtain a replacement vehicle for seven months.
- [138] The defendants argue there is no evidence that permits the Court to identify which car sharing costs relate to the accident and injuries. Some may have been trips to therapists, but others may have been trips to work or to buy groceries. Some trips involved Mr. Antignani taking Mr. Doucet somewhere for his, rather than Mr. Antignani's benefit.
- [139] That argument is, in my view, misconceived. When there is one vehicle for a household that has more than one member, it is used for a variety of family purposes. If a plaintiff and all members of his or her household are denied use of that vehicle as a result of a defendant's negligence, reasonable replacement costs are recoverable.
- [140] However, the period of time covered by the car sharing and public transit costs extends well beyond the seven months Mr. Antignani says that he and Mr. Doucet were without a car. I allow only the expenses incurred through September, 2016.

[141] I also allow items on the list of special damages relating to obtaining a medical form and a "miscellaneous" category that includes non-prescription pain medication. The purpose of other small items on the list was not adequately explained or identified in the evidence.

[142] I will leave it to counsel to do the arithmetic to determine the total amount of special damages, based on those findings.

Costs

[143] This matter was originally filed as a fast track action under R. 15-1 of the Supreme Court Civil Rules. That rule establishes what is intended to be an expedited procedure for cases where damages claimed are not expected to exceed \$100,000 or the trial is not expected to exceed three days in length.

[144] This trial was originally set for 7 days. Following an adjournment in April, 2020, made necessary by the closing of the court in the early stages of the COVID-19 pandemic, it was reset for 15 days.

[145] On the sixth day of trial, counsel argued the issue of whether this action should continue to be fast-track action. The defendants asked me to place a hard cap of \$100,000 on the plaintiff's claim. I did not accede to that request because I found that it was or should have long been obvious to both sides that this was not a proper fast-track action and in many respects the parties had not treated it as one. Even in a true fast track action, R. 15-1(3) allows the court to award damages in excess of \$100,000 if that is what the evidence requires.

[146] The defendants said they had been prejudiced because their discovery of the plaintiff was ended after two hours in reliance on R. 15-1(11). They never sought an agreement or order for the extension of time that the rule allows. By the time the matter was argued, I had heard the plaintiff's evidence in chief and on a very lengthy and detailed cross-examination and said in my oral reasons that saw little indication of actual prejudice.

[147] However, I held that although both parties should have recognized at an early stage that this was not a fast track action, plaintiff's counsel, having chosen fast track, was in a position to recognize that first. I therefore said that, following judgment, the onus would be on the plaintiff to apply for any departure from the limited costs allowed under R. 15-1(15).

[148] Counsel for the plaintiff may file and serve written submissions on costs within 30 days of the date of these reasons. Defence counsel will submit any response 14 days after that and the plaintiff will provide any reply within a further seven days. After reviewing those written submissions, I will advise counsel if I need to hear further from them in an oral hearing. If not, I will issue reasons on costs in due course.

Summary

[149] In summary, I award the following:

Non-Pecuniary Damages

\$200,000

Past Loss of Earning Capacity

\$ 70,000

Future Loss of Earning Capacity

\$250,000

Cost of Future Care

\$ 90,000

Loss of Housekeeping Capacity

\$ 40,000

Special Damages

To be totalled by counsel based on findings in paras. 133 to 142 above.

Costs

Subject to further submissions as directed in para. 148 above.

"N. Smith J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/02/2022BCSC0228.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/antignani-v-heaney-2022>

Prepared on 27 October 2026 · Esheria