
CANADA / JUDGMENT

Bucholtz v. Zhang

2020 BCSC 571

COURT

Supreme Court of British Columbia

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2020 BCSC 571 Bucholtz v. Zhang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bucholtz v. Zhang,

2020 BCSC 571

Date: 20200415

Docket: M174840

Registry: Vancouver

Between:

Russell Lee Bucholtz

Plaintiff

And

Qui Zhang

Defendant

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

February 24-28, 2020

March 2, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 15, 2020

Table of Contents

INTRODUCTION.. 3

FACTUAL BACKGROUND.. 3

The plaintiff's pre-Accident condition.. 3

The Accident and the plaintiff's post-Accident condition.. 5

Expert evidence. 8

The plaintiff's experts. 8

Dr. Cecil Hershler (physiatrist) 9

Ralph Kowalik (functional capacity assessment) 10

The defendant's expert Dr. Robin Rickards (orthopaedic surgeon) 11

ISSUES.. 11

Issue I: Nature, extent, and duration of the plaintiff's injuries. 12

Legal framework. 12

Findings on nature, extent, and duration of injuries. 13

Issue II: Assessment of non-pecuniary damages. 15

Legal framework. 15

Assessment of the plaintiff's non-pecuniary damages. 16

Issue III: Assessment of damages for loss of future earning capacity. 18

Legal Framework. 18

Assessment of future earning capacity. 19

Issue IV: Future care costs. 21

Legal Framework. 21

Assessment of damages for future care costs. 22

CONCLUSION.. 24

INTRODUCTION

- [1] This action arises from a motor vehicle accident that occurred on June 16, 2015, when the defendant rear-ended the plaintiff's vehicle as he was waiting to turn onto the Lougheed Highway (the "Accident"). Liability is admitted. The plaintiff says he suffered soft tissue injuries to his upper back, neck and shoulders in the Accident.
- [2] The plaintiff is presently 49 years old. He works full time as the lead receiver at a mattress warehouse operated by Serta Simmons Bedding ("Serta"). The plaintiff did not miss work at Serta as a result of the Accident and has continued in his full-time employment up to the time of trial. The plaintiff nevertheless asserts he suffered a loss of future earning capacity as a result of the injuries he sustained in the Accident.
- [3] The defendant acknowledges that the plaintiff suffered soft tissue injuries in the Accident, but says the injuries do not prevent him from working and will not impact on his future earning capacity. The defendant contends that the plaintiff's injuries will fully resolve with a moderate exercise program, which the defendant is willing to fund.
- [4] The heads of damages in issue in this case are non-pecuniary loss, future loss of earning capacity, and future care costs. The plaintiff does not advance a claim for past wage loss. The parties have agreed on the quantum of special damages.

FACTUAL BACKGROUND

The plaintiff's pre-Accident condition

- [5] The plaintiff grew up in Surrey, British Columbia. He describes having a close relationship with his parents and his younger brother Robert. As a youth, he was active in sports, including baseball, soccer, and football. He participated in family activities such as camping.
- [6] The plaintiff got his first job delivering newspapers at the age of 12. He has worked ever since, often at multiple jobs at the same time. In his late teens and early 20s, the plaintiff worked as a landscaper and then at Richmond Plastics, while simultaneously working graveyard shifts at a saw mill. The plaintiff says that he worked a 56-hour week for approximately five to six years. All of his jobs required physical labour.

- [7] The plaintiff married his former spouse Jennifer in 1996. He stopped working temporarily when his oldest son Logan was born. Logan is now 23 years old. The plaintiff stayed home to act as Logan's primary caregiver for approximately one year. The plaintiff and Jennifer had two more sons together: Caleb, who is now 21 years old, and Linden, who is 16.
- [8] The plaintiff says he led a very active life as his sons grew up. He participated in many sporting activities with them including soccer, baseball, football, and basketball. The family lived in a townhouse in North Vancouver that was directly beside a green space and other sports facilities. The plaintiff says sports were a big part of his connection with his children.
- [9] The plaintiff and his former spouse separated in 2009 and are now divorced. Following the separation, the plaintiff moved to Surrey. He continued to see his sons at least every other weekend, and also during their sporting events.
- [10] The plaintiff started working full-time for Serta in 1998. He became the lead receiver after a couple of months and he continues to hold this position. His job responsibilities include moving product to the production areas, loading and unloading trailers, clean up, and dealing with inventory. His job requires him to drive a forklift and he has a licence as a forklift operator. The plaintiff enjoys his job, although he says it is hard on his body.
- [11] The plaintiff met Danielle Bak in 2009 and they began to date in 2010. They now live together. Prior to the Accident, the plaintiff and Ms. Bak enjoyed going for walks by the water two to three times per week after work. They had a weekly routine of going to Wing Wednesdays with friends. The plaintiff is a fan of heavy metal music and he and Ms. Bak would attend live concerts. The plaintiff preferred to stand near the front of the stage, and occasionally "moshing".
- [12] The plaintiff says that his health prior to the Accident was generally good and he was not restricted in his physical activities. He sustained a workplace injury over a decade ago when he fell on a lumber pile and injured his lower back. The plaintiff was off work for approximately six weeks and underwent chiropractic treatments. This injury had not completely resolved prior to the Accident, as the plaintiff continued to experience lower back pain. The plaintiff says this pain was manageable through exercise and visits to the chiropractor two to three times per year. It did not interfere with his ability to work or to participate in sporting activities with his children.
- [13] The plaintiff was in a prior motor vehicle accident a couple of years before the Accident. He did not sustain any injuries and did not seek medical treatment.

The Accident and the plaintiff's post-Accident condition

- [14] The Accident occurred on June 16, 2015, as the plaintiff was driving home from work. He stopped his vehicle as he approached the Lougheed Highway in order to see if traffic was clear. The plaintiff's vehicle was struck from behind by the defendant. At the time of impact, the plaintiff's body was turned to the left as he was watching for a break in traffic.

- [15] The plaintiff did not experience pain at the time of the Accident but he became sore the next day in his shoulders, back, and neck. The plaintiff did not take time off work and did not immediately consult his family doctor. The plaintiff first saw his family doctor after the Accident in October 2015. In the meantime, he saw his chiropractor more frequently. The plaintiff says he delayed in consulting his family physician because he believed his Accident-related pain would resolve with chiropractic treatment.
- [16] Following the Accident, the plaintiff first saw his chiropractor, Dr. Linda Gordon, on June 25, 2015. Dr. Gordon testified that since the Accident, she has treated the plaintiff for pain and discomfort in his right shoulder, mid and upper back, and neck. These are new issues for the plaintiff. Following the Accident, Dr. Gordon treated the plaintiff through spinal manipulation therapy, and "Graston Technique", an instrument-assisted therapy for soft tissue injuries. Since the Accident, Dr. Gordon has seen the plaintiff once or twice per month.
- [17] The plaintiff has tried other, non-chiropractic, treatments to relieve his pain including acupuncture, massage, and trigger point injections. Some of these treatments, particularly the massage and trigger point injections, have given him temporary relief but none have resolved his injuries.
- [18] Since the Accident, the plaintiff has managed his pain on a daily basis by using ice packs, a TENS machine, and "magic bags", which are hot and cold compresses that can be used to relieve muscle pain. Before the Accident, the plaintiff would use a magic bag about once a month for his pre-existing low back pain. After the Accident, the plaintiff uses the magic bag and ice pack daily, both before and after work. He also uses Ibuprofen and "Icy Hot", a medicated pain relief cream, to manage his pain symptoms.
- [19] The plaintiff says when he comes home from work he is exhausted and sore. He cannot engage in physical and social activities with Ms. Bak, including walking, at previous levels. He is also unable to engage in sports activities with his sons to the extent he once did. He cannot attend sporting events or heavy metal concerts without experiencing discomfort.
- [20] The plaintiff describes feeling sore in his mid back, right shoulder, and, to a lesser extent, his neck from "sun up to sun down". He says his upper back and shoulder pain is constantly present. He uses an ice pack and magic bag on these areas on a daily basis. The plaintiff says he started to self-medicate after the Accident by increasing his beer consumption, although he has tried to cut back in recent months. He has put on weight since the Accident. His injuries have also had a negative impact on his intimate relationship with Ms. Bak.
- [21] The plaintiff continues to be responsible for most of the housework due to the fact that Ms. Bak has chronic condition. Caleb moved in with the plaintiff and Ms. Bak from March 2018 to March 2019, and again in January 2020. Caleb assists with some of the heavier chores.

- [22] Although the plaintiff has not taken time off work since the Accident, he believes that he is slower at work due to his Accident-related injuries. He relies more on his co-workers to assist him with tasks that require heavy lifting. Due to the nature of his employment, he says it is not possible for him to do a less physical job at Serta. Instead, the plaintiff says he works through his pain and then tries to recover after work.
- [23] Darren Robinson, the plaintiff's direct supervisor at Serta, was called by the plaintiff. Mr. Robinson describes the plaintiff as a hard worker who cares about his job. He says the plaintiff has to be encouraged to use vacation time and sick days because otherwise the plaintiff will not take the time off that he is entitled to. Mr. Robinson has observed the plaintiff exhibit pain behaviour, such as grimacing or readjusting his grip, in the course of carrying out his job duties. Mr. Robinson says there are not any less physical jobs at Serta that the plaintiff would be able to perform. The plaintiff has not asked Mr. Robinson for any accommodation. Mr. Robinson says that the plaintiff tends to be "quiet and stoic".
- [24] The plaintiff's complaints of ongoing upper back, neck, and shoulder pain following the Accident are corroborated by the evidence of his collateral witnesses, namely Ms. Bak, Caleb, the plaintiff's parents and brother, and family friend Jennifer Scott. All of these witnesses testified to observing the plaintiff intensify his use of magic bags and ice packs after the Accident, and to his inability to participate in physical activities at previous levels. The plaintiff is a patient at the dental office where Ms. Scott is a receptionist. She says that the plaintiff even brings an ice pack with him to appointments due to the discomfort of sitting in a dentist's chair.
- [25] Caleb and Ms. Bak see the plaintiff every day. They describe him as being in a lot of pain, and frequently alternating between the magic bag and ice packs in an effort to relieve the pain. They say the pain affects the plaintiff's mood, as he is discouraged and depressed by his lack of recovery.
- [26] The plaintiff has developed other health issues since the Accident. In 2016, he was diagnosed with a left inguinal groin hernia and underwent surgery. The plaintiff was off work for eight weeks following the surgery. The hernia has recently started to bother the plaintiff again and he is awaiting an appointment for reassessment. In 2018, the plaintiff had two surgeries for bilateral carpal tunnel syndrome, one surgery for each hand, and was again off work for about eight weeks. The plaintiff's right hand has not fully recovered and he continues to experience numbness and pain.
- [27] The plaintiff says that the hernia and carpal tunnel surgeries temporarily impacted his ability to engage in physical activities and to work, but the impacts were not permanent. The plaintiff's right hand pain causes him some discomfort at work but he manages the pain with hand weights and hand yoga. The plaintiff has also experienced discomfort at work due to the lingering problem with his hernia. As noted, he is awaiting reassessment.

- [28] The plaintiff hopes to stay in his current job until retirement. Prior to the Accident, the plaintiff had hoped to retire at the age of 65. Now he does not know if it is realistic to think he can work that long with his injuries. The plaintiff says he feels depressed and anxious over his current condition. He is not sure whether he will be able to continue to work given his pain level. He worries about the future.

Expert evidence

The plaintiff's experts

- [29] The plaintiff tendered expert reports from Dr. Cecil Hershler, a physiatrist, and Ralph Kowalik, who was qualified as an expert in the areas of functional capacity evaluation, vocational rehabilitation, and cost of future care.

Dr. Cecil Hershler (physiatrist)

- [30] Dr. Hershler examined the plaintiff on November 6, 2019, and reviewed his medical records. He found the plaintiff to have numerous tender points, particularly along the right side of the neck and across the top of the right shoulder and, to a lesser extent, on the left side between the shoulder blades. Dr. Hershler identified these tender points through the plaintiff's reaction to palpation of muscle structures in these areas. Dr. Hershler diagnoses the plaintiff with myofascial pain. Given the timing of onset of the plaintiff's pain symptoms, it is Dr. Hershler's view that the myofascial pain was caused by the Accident.
- [31] In terms of prognosis, Dr. Hershler opines that it is unlikely that the plaintiff's symptoms will resolve in the foreseeable future. He believes the plaintiff will have to live with some degree of chronic pain in his neck and upper body indefinitely. Dr. Hershler believes that the persistent nature of the plaintiff's pain will likely affect his ability to work to retirement age in his present condition, as his ability to work through the pain will diminish with age.
- [32] Dr. Hershler offers treatment recommendations that are intended to assist the plaintiff with pain management. He suggests that the plaintiff continue with monthly chiropractic and massage therapy for an indefinite period. Given that the plaintiff's job is already physically strenuous and involves heavy lifting, Dr. Hershler believes that it would not be helpful, and could be harmful, for the plaintiff to engage in a program of active rehabilitation. In Dr. Hershler's view, the plaintiff's pain would be better managed through light stretching exercises at home.
- [33] Dr. Hershler disagreed with the proposition put to him in cross-examination that the plaintiff would, in any event, have been unable to work to retirement age due to his pre-existing chronic low back pain and the complications associated with his hernia and carpal tunnel surgeries. Dr. Hershler says that while he would defer to a surgeon, he expects that the hernia and carpal tunnel are issues that can be resolved with further surgery. Dr. Hershler posits that the plaintiff's carpal tunnel may in fact have worsened as a result of the Accident. As for the plaintiff's pre-existing chronic low back pain, Dr. Hershler says that the

pain was manageable before the Accident and he expects that, but for the Accident, the plaintiff could have continued to manage it without any impairment of his ability to work to retirement.

- [34] In cross-examination, Dr. Hershler agreed that the plaintiff will likely be able to extend his working life if he follows all of the recommended treatments. However, he will never be totally free of pain.

Ralph Kowalik (functional capacity assessment)

- [35] Mr. Kowalik assessed the plaintiff on September 18, 2019. He conducted a full-day evaluation over approximately eight hours, and administered a series of standardized tests. The purpose of the assessment was to complete a functional capacity evaluation of the plaintiff, determine the effects of any functional impairment on the plaintiff's current or future vocational prospects, and recommend and estimate the cost of a treatment plan.
- [36] Mr. Kowalik concludes that the plaintiff has a number of functional limitations, including limited tolerance for repetitive stooping or kneeling, limited tolerance for reaching at or above shoulder height, and limits in his ability to lift and carry weight. Mr. Kowalik opines that the plaintiff is less competitively employable than another job candidate who is pain free and without such functional limitations. In his view, the plaintiff will be limited, in the future, to less physical jobs.
- [37] Mr. Kowalik offers a number of future care recommendations for the plaintiff under the headings "home equipment/assistive devices" and "treatment". These include recommendations that the plaintiff participate in a program of active rehabilitation, consult a nutritionist, and have monthly massage therapy sessions for a duration to be determined by his physicians. In Mr. Kowalik's view, a program that combines active and passive rehabilitation therapies should result in functional improvement for the plaintiff.
- [38] In cross-examination, Mr. Kowalik agreed that he did not purport to offer any opinion on whether the plaintiff's functional limitations were caused by the Accident.

The defendant's expert Dr. Robin Rickards (orthopaedic surgeon)

- [39] The defendant tendered an expert report from Dr. Robin Rickards, an orthopaedic surgeon. Dr. Rickards assessed the plaintiff on November 12, 2019. The assessment included a physical examination of the plaintiff and a review of his medical records. Dr. Rickards diagnoses the plaintiff with "possible cervical facet joint syndrome", and "possible soft tissue strain cervical and midback areas". Given the timing of the onset of the plaintiff's symptoms, Dr. Rickards believes that the symptoms were caused by the Accident.
- [40] Dr. Rickards opines that the "cornerstone of treatment" for chronic inflammatory or soft tissue injuries is anti-inflammatory medication, manipulative treatments such as chiropractic, massage, and physical therapy, and muscle strengthening through a structured

exercise regime. Dr. Rickards opines that the plaintiff's symptoms are likely to dramatically improve within six months and will completely resolve within a period of 12-18 months if he follows such a treatment plan. If the pain persists, Dr. Rickards suggests that spinal intervention treatments, namely medial branch blocks and radiofrequency ablation, should resolve the symptoms.

- [41] In cross-examination, Dr. Rickards agreed with the proposition that the longer someone endures chronic pain, the more likely it is that the pain will persist on a permanent basis. Dr. Rickards agreed it is possible that the plaintiff is one of those patients whose chronic pain will be permanent.

ISSUES

- [42] The following issues arise for resolution in this action:

I. What is the nature, extent, and duration of the injuries suffered by the plaintiff as a result of the Accident?

II. What is the appropriate award of non-pecuniary damages?

III. What is the appropriate award of damages, if any, for loss of future earning capacity?

IV. What is the appropriate award of damages for the plaintiff's future care costs?

- [43] As noted at the outset of this judgment, the plaintiff does not advance a claim for past wage loss. The parties have agreed to an award of special damages in the amount of \$3,603.

Issue I: Nature, extent, and duration of the plaintiff's injuries

Legal framework

- [44] The onus is on the plaintiff to prove on a balance of probabilities that the defendant caused or contributed to the injuries for which he seeks compensation. The general test for causation is the "but for" test, which requires a plaintiff to show that the injury for which they seek compensation would not have occurred but for the defendant's tortious act: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-14 [*Athey*].
- [45] Torfeasors must take their victims as they find them in the sense that the defendant is liable for the plaintiff's injuries even if those injuries are more severe than might be expected in the average person: *Athey* at para. 34. At the same time, the defendant is not required to put the plaintiff in a better position than she would have occupied absent the wrongdoing. The defendant is liable for the injuries caused, but need not compensate for the effects of a pre-existing condition if there is a "measureable risk" that the plaintiff would have suffered those effects in any event: *Athey* at para. 35.

- [46] A weakness inherent in the position of the plaintiff that might realistically contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in assessing damages. Furthermore, such a contingency does not have to be proven to a certainty; it is given weight according to its relative likelihood: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 48.
- [47] In the present case, the plaintiff must establish on a balance of probabilities that the injuries for which he claims compensation were caused by the Accident. The process of damage assessment must consider any pre-existing injuries that would have led the plaintiff to suffer all or a portion of the injuries even without the Accident. It must also consider if there are events occurring after the Accident which have contributed to his injuries but which are unrelated to the Accident.

Findings on nature, extent, and duration of injuries

- [48] The parties agree that the plaintiff suffered injuries in the Accident. The defendant admits that the plaintiff suffered soft tissue injuries to his neck, upper/mid back, and shoulders, although his left shoulder pain has largely resolved. The defendant does not challenge the plaintiff's credibility. The defendant's submission to the court assumes that the plaintiff has accurately and truthfully described the pain symptoms he has experienced since the Accident. The plaintiff's evidence is, in any event, corroborated by his collateral witnesses.
- [49] The dispute between the parties as to the extent and duration of the plaintiff's injuries centres on the disagreement between Dr. Hershler and Dr. Rickards regarding the plaintiff's prognosis. Dr. Hershler says the plaintiff's pain symptoms are unlikely to fully resolve in the future, and the best possible outcome that can be hoped for is that the plaintiff's chronic pain can be managed through Dr. Hershler's recommended treatment plan. Dr. Rickards says the plaintiff's symptoms are likely to fully resolve within 12-18 months provided that the plaintiff follows Dr. Rickards' proposed treatment plan.
- [50] I prefer the evidence of Dr. Hershler over that of Dr. Rickards given Dr. Hershler's superior expertise in the treatment and management of chronic pain. Dr. Hershler is an expert in physical medicine and rehabilitation. He has extensive experience teaching and researching in the area of rehabilitative medicine, and 30 years of experience treating patients experiencing chronic pain in his private practice. Dr. Rickards, by contrast, is an orthopaedic surgeon, whose practice was limited to orthopaedic surgery until 2011. Dr. Rickards' training in the area of chronic pain consists of a three-month course in pain management, which he completed in 2014. His clinical experience is limited to performing spinal interventions at the Langley Pain Clinic over a two-year period.

- [51] Dr. Rickards acknowledged in cross-examination that the plaintiff's pain symptoms could persist indefinitely, notwithstanding Dr. Rickards' optimistic prognosis. Given Dr. Hershler's greater expertise in the treatment of chronic pain, I prefer his evidence in assessing the likelihood that the plaintiff will in fact experience chronic pain beyond the recovery time predicted by Dr. Rickards.
- [52] The defendant also relies on Mr. Kowalik's opinion that the plaintiff's functional capacity should improve with a program of active rehabilitation. To the extent that Mr. Kowalik's opinions differ from Dr. Hershler, I also prefer the evidence of Dr. Hershler for the simple reason that Mr. Kowalik is not a physician. Mr. Kowalik expressly declined to offer opinion evidence on issues requiring medical expertise, such as causation. In his future care recommendations, Mr. Kowalik defers to the opinions of the plaintiff's treating physicians as to the length of time the various treatments should last.
- [53] The defendant additionally argues that any damage award to the plaintiff should be discounted to reflect the real and substantial possibility that he would have suffered the same level of impairment due to health conditions unrelated to the Accident. The defendant points, in particular, to the plaintiff's pre-existing injury to his lower back, and his continuing complications arising from hernia and carpal tunnel surgery.
- [54] In my view, the evidence does not support a reduction in damages to account for the plaintiff's unrelated health conditions. Based on the evidence before me, I find that the plaintiff was able to manage his lower back pain prior to the Accident without serious impacts on his work and personal life, and that he would have continued to do so but for the Accident.
- [55] The damage assessment process must, of course, account for the plaintiff's original position. In other words, it must account for the fact that the plaintiff had pre-existing chronic lower back pain that caused him some level of discomfort before the Accident, and would continue to cause him discomfort after the Accident. However, I find the evidence does not support the inference that the plaintiff's pre-existing back pain would have impacted his quality of life or future earning capacity in the same manner even absent the Accident.
- [56] As for the complications that have followed the plaintiff's surgeries for the hernia and carpal tunnel, there is no evidence at all before me to suggest that these are permanent health issues for the plaintiff. Dr. Hershler was the only expert to have been questioned on the future impacts of the plaintiff's post-surgery complications. While properly pointing out that it was beyond his expertise to offer a definitive opinion, Dr. Hershler suggested that these issues could be resolved through surgery. The defendant led no evidence to the contrary. The defendant's submission that the post-surgery complications would have prevented the plaintiff from working to retirement in any event is pure speculation that is ungrounded in the evidence.

[57] Accordingly, I find that the Accident caused soft tissue injuries to the plaintiff's mid to upper back, shoulders, and neck. While the pain in the plaintiff's left shoulder has largely resolved, he continues to experience pain in his mid to upper back, right shoulder, and neck. I accept Dr. Hershler's opinion that the plaintiff's pain symptoms are likely to be chronic given the length of time that has elapsed since the Accident without resolution of the pain symptoms. I conclude that there is no basis in the evidence to reduce the plaintiff's damages to account for health conditions that are unrelated to the Accident.

Issue II: Assessment of non-pecuniary damages

Legal framework

[58] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39.

[59] As set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, common factors influencing an award of non-pecuniary damages include:

- a) age of the plaintiff;
- b) nature of the injury;
- c) severity and duration of pain;
- d) disability;
- e) emotional suffering;
- f) loss or impairment of life;
- g) impairment of family, marital, and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff).

[60] An award of non-pecuniary damages must be fair and reasonable to each party. Fairness is measured in part against awards made in comparable cases. However, other cases only serve as a rough guide as each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

Assessment of the plaintiff's non-pecuniary damages

- [61] The plaintiff's soft tissue injuries have caused him pain on a daily basis. While the injuries have not caused the plaintiff to be off work, this can be attributed to the plaintiff's stoicism and resolve to "tough it out". The plaintiff works through the pain, but this is with cost to his personal and social life. I accept the plaintiff's evidence, as confirmed by his collateral witnesses, that he cannot participate in the activities he once did due to his Accident-related pain. His ability to participate in sporting activities with his sons has been impaired and he cannot go for walks or on social outings with Ms. Bak as he once did. The plaintiff has gained weight since the Accident as a result of the reduction in his activities. His relationship with Ms. Bak has been negatively impacted. The plaintiff worries about his future and his ability to work until retirement.
- [62] The plaintiff suggests that the appropriate range of non-pecuniary damages is \$85,000 to \$115,000. The plaintiff relies on the following cases: *Tang v. Duong*, 2020 BCSC 85 (\$80,000); *Harry v. Powar*, 2018 BCSC 845 (\$85,000); *Lewis v. Wang*, 2020 BCSC 16 (\$90,000); *Pasemko v. Kosolofski*, 2020 BCSC 246 (\$90,000); *Gardner v. Yoo*, 2019 BCSC 2230 (\$100,000); *Carrillo v. Deschutter*, 2018 BCSC 2134 [Carrillo] (\$115,000).
- [63] The defendant says that the appropriate range is \$40,000 to \$60,000, citing the following cases: *Mothe v. Silva*, 2015 BCSC 140 (\$40,000); *Nockleby v. Fiddick*, 2012 BCSC 1463 (\$40,000); *Parker v. Martin*, 2017 BCSC 446 (\$45,000); *Farbatuk v. Lagrimas*, 2014 BCSC 1879 (\$60,000); *Klim v. Purdy*, 2014 BCSC 578 (\$65,000).
- [64] I generally find the cases provided by the plaintiff to be of greater assistance in establishing a range, particularly given the relatively dated nature of the cases cited by the defendant. However, I do not accept that the cases relied upon by the plaintiff establish an upper range of \$115,000 in the circumstances of the present case. In *Carrillo*, the plaintiff's injuries included not only soft tissue injuries, but also persistent headaches and a frozen shoulder which restricted his range of motion. The plaintiff in *Carrillo* also had pre-existing mental health issues that negatively impacted his ability to manage the chronic pain.
- [65] The remaining cases cited by the plaintiff suggest a range of \$80,000 to \$100,000 for non-pecuniary damages in circumstances analogous to the present case. Having regard to all of the circumstances of the plaintiff's case, including the nature of his injuries and their impacts on his personal and employment life, I consider that an award of \$85,000 is fair and reasonable compensation for the plaintiff's non-pecuniary loss.

Issue III: Assessment of damages for loss of future earning capacity

Legal Framework

[66] A claim for future loss of earning capacity requires the court to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after its occurrence, accounting for negative and positive contingencies:

Gregory v. Insurance Corp. of British Columbia, 2011 BCCA 144 at para. 33.

[67] The principles governing the assessment of damages for loss of future earning capacity were summarized by Low J.A. in Reilly v. Lynn, 2003 BCCA 49 at para. 101:

The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, supra, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, supra, at 79.

[68] There are two possible approaches to loss of future earning capacity: the "earnings approach" and the "capital asset approach". Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: *Perren v. Lalari*, 2010 BCCA 140 at para. 12.

[69] In the present case, the plaintiff says his loss should be valued using the capital asset approach. This approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at 356; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 10.

Assessment of future earning capacity

- [70] The plaintiff argues that the evidence establishes a real and substantial possibility that he will suffer a loss of income in the future. Dr. Hershler opines that the plaintiff's ability to work through pain will decline with age, and that he is unlikely to be able to work to retirement age. Mr. Kowalik opines that the plaintiff has functional limitations that will limit future job opportunities and place him at a competitive disadvantage as compared to his able-bodied peers.
- [71] The plaintiff seeks an award of damages for future loss of earning capacity between \$130,000 and \$175,000. This represents a loss of 20-30% of the plaintiff's income that he would otherwise earn between now and the age of 65 at his annual salary of approximately \$50,000.
- [72] The defendant says there is insufficient evidence to establish a real and substantial possibility that the plaintiff will suffer a loss of income as a result of the Accident. Citing *Kim v. Morier*, 2014 BCCA 63 at para. 8, the defendant says that the plaintiff's own perception that he may be impaired in his future earning capacity is not enough to ground an award of damages for future income loss. The defendant emphasizes that the plaintiff has not taken any time off work to date for reasons related to the injuries he sustained in the Accident.
- [73] Alternatively, the defendant argues that if the plaintiff has established a real and substantial possibility of a future income loss, any award of damages should be modest to account for the plaintiff's unrelated health problems that may also impact his future earning capacity. The defendant says an award in the amount of \$25,000, which equates to six months of the plaintiff's current salary, is appropriate.
- [74] I find that the evidence does establish a real and substantial possibility that the plaintiff's ability to earn an income in the future will be impaired by injuries he suffered in the Accident. This is not simply a matter of the plaintiff's self-perception, as the defendant argues. I accept Dr. Hershler's evidence that the plaintiff may be unable to work to the usual retirement age due to the likely deterioration in his ability to manage pain symptoms over time. I further accept the evidence of Mr. Kowalik that the plaintiff has functional limitations affecting his ability to perform a job that requires physical labour. The evidence supports the inference that such limitations are causally related to the injuries the plaintiff suffered in the Accident.
- [75] While every case must of course be decided on its facts, there is no rule that a plaintiff who has not suffered a past loss of income will also not suffer a future loss of income. In the present case, the plaintiff has been able to continue his full-time duties by pushing through his pain and relying on the assistance of co-workers. However, I accept the opinion of Dr. Hershler that the plaintiff's ability to work through his pain may diminish with age. Furthermore, the alternative employment opportunities available to the plaintiff may be limited due to his functional impairments.

- [76] I conclude that the plaintiff's soft tissue injuries to his back, neck, and shoulder have rendered him less capable overall of earning income from all types of employment, less marketable as an employee, and less valuable to himself as a person capable of earning an income in a competitive labour market. There is a substantial possibility that the plaintiff will be unable to continue to work to retirement age in his current employment.
- [77] Although I accept that the plaintiff is entitled to an award of damages for loss of future earning capacity, I do not agree with his proposed approach to assessing this loss. The evidence suggests that the plaintiff will continue in his full-time employment at Serta for the foreseeable future. The evidence does not justify an award of 20-30% of the present value of the income the plaintiff expects to earn over the next 16 years in his current employment.
- [78] The plaintiff relies heavily on Dr. Hershler's opinion that he will likely have a shorter working life than he would have had but for the Accident. However, there are significant uncertainties associated with Dr. Hershler's prognosis that must be accounted for in the damage assessment process. Accepting that the evidence establishes a real and substantial possibility that the plaintiff may, as a result of the Accident, retire earlier than he otherwise would have, it cannot be said with any precision whether this risk, should it materialize, constitutes a loss of a few months of income or five years of income or something in-between. Dr. Hershler also opines that the plaintiff may be able to extend his working life by adopting the proposed treatment plan. There is therefore a realistic possibility that the plaintiff will work to retirement age, notwithstanding Dr. Hershler's guarded prognosis.
- [79] Taking into account all of the positive and negative contingencies, and bearing in mind that damages for loss of future earning capacity are to be assessed rather than calculated, I am of the view that an award of \$80,000 constitutes fair and reasonable compensation for the plaintiff's loss of future earning capacity. This equates to approximately 18 months of full-time salary for plaintiff. In my view, such an award appropriately balances the uncertainties associated with the plaintiff's future employment impacts as a result of the Accident-related injuries, including the possibility that he may suffer no impact at all.

Issue IV: Future care costs

Legal Framework

- [80] The purpose of an award for future care costs is to restore the plaintiff to his pre-Accident condition, to the extent that is possible with a monetary award: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. The award is based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 210-211 [Hardychuk].

[81] The test for determining the appropriate award under the cost of future care heading is objective and based on medical evidence. An award of future care costs requires: (1) a medical justification for the claim, and (2) that the claims are reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 35.

[82] Future care costs must be justified both because they are medically necessary and they are likely to be incurred by the plaintiff. The award of damages for cost of future care predicts what will happen in the future, and thus is not a precise accounting exercise: *Hardychuk* at paras. 212-214.

Assessment of damages for future care costs

[83] The plaintiff seeks \$51,798.74 in damages for the following future care expenses, broken down as follows:

Monthly chiropractic treatment until age 82

\$14,080.98

Ice pack - \$19.99 replacement every five years

\$100.00

Nutritionist

\$360.00

TENS unit - one time replacement

\$179.95

Annual gym membership to age 82

\$12,537.94

Monthly massage treatment until age 82

\$23,428.20

Medication costs until age 82

\$1,111.67

[84] The plaintiff says these expenses are supported by the recommendations of Dr. Hershler and Mr. Kowalik.

- [85] The defendant submits that an award of \$5,415.38 is appropriate, consisting of 24 active rehabilitation sessions (\$2,400); a one-year gym pass (\$534.25); two years of passive rehabilitation therapy, whether massage or chiropractic treatments (\$2,400) and one year of medication costs (\$56.94). Relying on the opinion of Dr. Rickards, the defendant contends that the plaintiff's symptoms are likely to significantly improve within six to 24 months, and therefore he will not incur future care costs beyond that time.
- [86] I conclude that the evidence does not support an award for the future costs of an active rehabilitation program or for an annual gym membership to permit the plaintiff to continue a program of active rehabilitation on a self-monitored basis. While Dr. Rickards recommended such a program, Dr. Hershler's view is that such a program would be counterproductive given the physical nature of the plaintiff's job. Dr. Hershler recommends, instead, that the plaintiff engage in stretching activities at home, combined with passive therapies such as chiropractic and massage therapy. Having argued to me, successfully, that I should prefer the opinions of Dr. Hershler over Dr. Rickards with respect to injuries and prognosis, it cannot be open to the plaintiff to selectively advance future care recommendations that are supported by Dr. Rickards but not by Dr. Hershler.
- [87] I also conclude that the evidence does not support an award to cover the expense of a nutritionist. While the plaintiff may benefit from such a service, it cannot be said that the plaintiff's eating habits are causally related to the Accident.
- [88] I accept, as does the defendant, that the evidence supports an award to cover chiropractic and massage therapy, and also annual medication costs of \$56.94. The issue is the appropriate length of time that such costs should be covered. The plaintiff proposes an award to cover these costs until the age of 82, without deduction to account for contingencies that may impact the need for these services over such a lengthy period of time.
- [89] In my view, having regard to all of the contingencies, a fair and reasonable award of damages to the plaintiff for future care costs is \$20,000. This amount roughly equates to the present value of 10-12 years of monthly chiropractic and massage therapy, medication costs until the age of 82, plus the cost of a TENS unit replacement and 10 years of ice pack replacements. I consider that such an award fairly reflects the contingencies that must be accounted for in the assessment of damages for the plaintiff's future losses.

CONCLUSION

- [90] In summary, I award the following compensation to the plaintiff:

Non-pecuniary damages

\$85,000

Loss of future earning capacity

\$80,000

Future care costs

\$20,000

Special damages

\$3,603

Total

\$188,603

[91] Unless there are circumstances of which I am unaware, the plaintiff is entitled to his costs of the action at Scale B. If either party wishes to make further submissions on costs, then each party may provide a further short written submission on costs, not to exceed three pages, through Supreme Court Scheduling.

"Horsman J."

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