
CANADA / JUDGMENT

Bynoe v. Chuah

2020 BCSC 2242

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Supreme Court of British Columbia

DECIDED

23 December 2020

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2020 BCSC 2242 Bynoe v. Chuah

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bynoe v. Chuah,

2020 BCSC 2242

Date: 20201223

Docket: M180783

Registry: Vancouver

Between:

Fando Bynoe

Plaintiff

And

Ian Chuah

Defendant

Before: The Honourable Madam Justice Francis

Oral Reasons for Judgment

Counsel for the Plaintiff:

D.J. Gomel

T.C. Schapiro

Counsel for the Defendant:

(appearing by teleconference):

G.M. Dougans

D. Horvath

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 7 - 11 and

14 - 16, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 23, 2020

- [1] THE COURT: I am going to give my reasons for judgment orally today. If a transcript is ordered of the reasons, I may edit them for grammar, clarity and the addition of case references, but the substance will not change.
- [2] Mr. Fando Bynoe sustained injuries in a motor vehicle accident that occurred on December 9, 2016 (the "Accident"). He was driving with his stepdaughter from his home in Burnaby to Richmond Centre to go Christmas shopping. Weather conditions were poor and the road was slushy. As Mr. Bynoe's vehicle approached the intersection of Boundary Road and Marine Way, the defendant, who was travelling in the lane beside Mr. Bynoe's vehicle, lost control of his vehicle and collided twice with Mr. Bynoe's vehicle.
- [3] Liability was admitted by the defendant and the matter proceeded to trial on the issue of damages only.
- [4] Mr. Bynoe seeks compensation for non-pecuniary damages, past income loss, loss of future income-earning capacity, cost of future care, and special damages. The parties have agreed to amounts payable to Mr. Bynoe for past income loss and special damages, so the only issues in contention in this trial were:
- a) non-pecuniary damages;
 - b) loss of future income-earning capacity; and
 - c) cost of future care.
- [5] There is no dispute in this case about causation. The defendant accepts that Mr. Bynoe's current injuries were caused by the Accident. The only matter on which the parties disagree is Mr. Bynoe's prognosis for recovery. This impacts their positions on non-pecuniary damages, loss of future income-earning capacity, and cost of future care. As a result, it is important for the court to carefully assess the evidence, particularly that of the medical

experts, about the prospects for Mr. Bynoe's further recovery and how the prognoses will impact his future quality of life, employment prospects, and care requirements.

Life Before the Accident

- [6] At the time of trial, Mr. Bynoe was 45 years old. He was born and raised on the island of St. Vincent in the Caribbean. In 2003, he came to Vancouver for a holiday and he fell in love with the city. He ultimately established permanent residency in Canada. Mr. Bynoe has very little formal education. He left school at age 15.
- [7] Mr. Bynoe's work history is fairly straightforward. As a teenager and a young man, he worked on his father's banana plantation doing manual labour. When he left St. Vincent, in his early 20's, it was to work in the cruise industry where he played bass guitar in a band, and did some housekeeping work on cruise ships.
- [8] In Canada, he has worked consistently as an auto detailer since 2005, first for Marine Chrysler and then for Brown Bros. Ford. Mr. Bynoe's job at Brown Bros. Ford, which he held from 2012 to the time of the accident, was a union position. At the time of the accident, he was earning \$18.58 an hour. Mr. Bynoe spoke with great pride about his work and the attention to detail involved in making an old car look new.
- [9] Vickie Ciebien, his supervisor at Brown Bros. Ford, spoke very highly of Mr. Bynoe. She testified that he did meticulous work and was a punctual and reliable employee. She also described him as a happy-go-lucky person who was well liked by his co-workers.
- [10] Shortly after arriving in Canada, Mr. Bynoe found his way into the Lower Mainland's live Caribbean music scene. He joined a band called Maffie and Crew, with whom he played bass guitar. The band practised weekly and played shows at Caribbean festivals and other venues. He made friends through his music, including his bandmate and close friend, Ivan Elva. Mr. Elva testified that Mr. Bynoe was an animated musical performer who liked to move around the stage and engage with the audience.
- [11] Mr. Elva also described Mr. Bynoe as an energetic and funny guy prior to the accident.
- [12] Mr. Bynoe met Sibyl Joseph in 2010 at a music festival. They started dating and at the time of the Accident they were living together, along with Ms. Joseph's daughter, and were engaged to be married. By all accounts, they had a good relationship in which both contributed financially to the home. Mr. Bynoe did the bulk of the housework.
- [13] Ms. Joseph testified that Mr. Bynoe was fit before the Accident. She described Mr. Bynoe as humorous, good-natured, and lighthearted. She denied that he was particularly emotional before the Accident and, in fact, said that she sometimes wished he would show more emotion when they were arguing.
- [14] Mr. Bynoe's health was unremarkable before the Accident.

After the Accident

- [15] Shortly after the Accident, Mr. Bynoe began to experience pain in his neck, back, and left hip. He saw his family physician, who recommended he take time off from work, which he did. He began attending physiotherapy. In January 2017, he reported to his family doctor that he was anxious and he was put on antidepressants.
- [16] In late January 2017, Mr. Bynoe attempted to return to work on a graduated basis. He worked three days a week, four hours a day. Auto detailing is very physical work and it became evident in early 2017 that even with the use of a back brace, Mr. Bynoe was in extreme pain at the end of a half-day shift. Ultimately, his return to work was not successful and by May 2017, his doctor suggested that he stop working altogether. He has not worked since May 2017.
- [17] Since the Accident and more markedly since his return to work failed, Mr. Bynoe has experienced depression and anxiety. Also, while some of his areas of pain improved after the Accident, his pain in his lower back has not improved.
- [18] Mr. Bynoe was mostly disabled from playing bass guitar for a year after the Accident. The only time he played that year was at his wedding to Ms. Joseph in August. He played four songs with his band at the wedding and, he was required to sit while he performed because he was unable to carry his bass guitar around the stage.
- [19] Over the next few years, Mr. Bynoe participated in a number of rehabilitation regimes, including three programs of active rehabilitation, physiotherapy, therapeutic injections, and counselling. In the course of active rehabilitation, he injured his right shoulder. His right shoulder pain continues, although it has improved. While he takes the position that his shoulder injury was caused by the Accident, because it was caused as a result of treatment for his accident-related injuries, his counsel conceded that Mr. Bynoe's shoulder pain is a secondary issue to his chronic lower back pain and his psychiatric disorders.
- [20] Mr. Bynoe's lower back pain continues to impede his day-to-day life. He has pain every day and long car rides or prolonged periods of standing are extremely painful for him. At times his pain is so great that he is unable to walk.
- [21] Mr. Bynoe's mental health has continued to deteriorate since the accident. Unfortunately, this impacted his marriage and in July 2020, his wife and stepdaughter moved out of the house. Mr. Bynoe is now separated from Ms. Joseph. Ms. Joseph testified that it was the change in Mr. Bynoe's personality since the Accident that ultimately caused her to leave the relationship.

[22] When he gave evidence at the trial, Mr. Bynoe was weepy and intensely emotional. The various experts who assessed him also remarked in their reports that Mr. Bynoe presents as depressed, hopeless feeling, and easily emotionally triggered. This is a stark contrast from the way he was described pre-Accident by Ms. Joseph, Mr. Elva, and Ms. Ciebien, all of whom described Mr. Bynoe before the accident as a fun-loving, happy-go-lucky, and not particularly emotional person.

Expert Evidence

[23] Three medical expert reports were tendered into evidence; two from the plaintiff and one from the defendant. All three doctors were cross-examined at trial.

Dr. Wiseman

[24] Dr. Wiseman is a psychiatrist with considerable experience in treating patients with chronic pain. He was the only psychiatrist to opine on Mr. Bynoe's mental health and the complex interrelationship between his mental health and his chronic pain.

[25] Dr. Wiseman opined as follows:

- a) Before the Accident, Mr. Bynoe had a vulnerability towards feeling anxiety but did not have any kind of psychiatric disorder.
- b) After the Accident, Mr. Bynoe developed major depressive disorder with anxious distress.
- c) As at the time of Dr. Wiseman's examination in October 2019, Mr. Bynoe continued to suffer from moderate to severe major depressive disorder with anxious distress.
- d) Mr. Bynoe's condition is complex with pain, anxiety, and depression all playing mutually reinforcing roles in his experience of overall distress, and in his level of functional impairment and social and occupational disability.
- e) At this point, three years after the accident, Mr. Bynoe's prognosis is poor.
- f) Mr. Bynoe's depression at this point is enough to render him independently disabled from working in a gainful fashion. The combination of depression plus chronic pain enhances his degree of disability even further.
- g) Dr. Wiseman offered a number of treatment recommendations, but even with these recommendations, he opined that there was less than a 50% chance that Mr. Bynoe would be able to return to the workforce, even in a part-time capacity.

Dr. Anton

- [26] Dr. Anton is a psychiatrist. He opined that there were a number of possible causes for Mr. Bynoe's back pain. However, he, like Dr. Wiseman, was alive to the interplay between physical and mental issues in cases of chronic pain. He noted in his report that depression is the most common psychiatric complication of chronic pain, and that depression and anxiety can amplify pain perception and reduce the effectiveness of pain treatments.

Dr. Gharsaa

- [27] Dr. Gharsaa is an orthopedic surgeon who prepared a report that concluded that, from an orthopedic perspective, he could find no objective evidence of injury or impairment to Mr. Bynoe. He opined that Mr. Bynoe was deconditioned and recommended that he do active rehabilitation.
- [28] Dr. Gharsaa freely agreed on cross-examination that he is not an expert in chronic pain. He also admitted that he does not treat depression and did not consider Mr. Bynoe's mental health in his report. His report, being limited solely to the question of whether Mr. Bynoe has an injury from the accident that is orthopedic in nature, is of such a narrow focus that it does not assist the court in understanding Mr. Bynoe's condition at all.
- [29] Dr. Wiseman and Dr. Anton, both doctors with considerable experience in chronic pain, explained that chronic pain is a complex condition involving an interplay between the site of pain, the central nervous system, and the brain. The fact that Dr. Gharsaa could find no objective evidence of Mr. Bynoe's injury on physical examination is not surprising, given the nature of his current injuries. His report does not detract from or even provide opinion evidence relevant to Dr. Wiseman and Dr. Anton's opinions about Mr. Bynoe's chronic pain and, as a result, I give it very little weight.
- [30] Four non-medical experts also testified: Sergiy Pivnenko, an economist; Dominic Shew, an occupational therapist who performed a functional capacity evaluation on Mr. Bynoe; Derek Nordin, a vocational expert called by the plaintiff; and Dr. Colleen Quee Newell, a vocational expert called by the defendant.

Dominic Shew

- [31] Mr. Shew conducted a functional capacity evaluation on Mr. Bynoe that took approximately six hours and ten minutes to complete. Mr. Shew opined that Mr. Bynoe's physical impairments were such that he did not have the ability to return to his previous position as an auto detailer on a part-time or on a full-time basis. With respect to the other career positions suggested by the defendant's expert Dr. Quee Newell, such as shelf stocker, security guard, or delivery driver, Mr. Shew opined that Mr. Bynoe was not competitively employable in any of these positions.

Derek Nordin

[32] Derek Nordin, a vocational consultant, opined that absent the Accident, Mr. Bynoe would have continued working as an auto detailer. He also opined that Mr. Bynoe is not presently competitively employable in any capacity due to his chronic pain, depression, and anxiety. In terms of future prospects, he opined that it was an open question whether Mr. Bynoe would return to work at some point. He did not make any specific vocational recommendations. In testimony, he explained that in order for vocational rehabilitation recommendations to be valid, the person has to be at the point in recovery where there is some hope for them to get back into the workforce. Mr. Bynoe was not at this point when Mr. Nordin assessed him. Mr. Nordin testified that he would defer to the medical experts on Mr. Bynoe's prognosis.

Dr. Colleen Quee Newell

[33] Dr. Colleen Quee Newell was qualified as an expert in vocational rehabilitation. She prepared a report about Mr. Bynoe's vocational prospects. Unfortunately, when she prepared her first report, the only medical opinion she had was that of Dr. Gharsaa. She relied on that opinion in considering Mr. Bynoe's functional abilities and his career options. Given the extremely narrow scope of Dr. Gharsaa's report, I agree with the plaintiff's counsel that this resulted in Dr. Quee Newell's first report resting on a very weak foundation.

[34] Dr. Quee Newell opined that Mr. Bynoe is capable of limited light and some medium-strength occupations that do not require repetitive or sustained low-level tasks and offer regular opportunities for postural breaks. Examples of jobs she suggested include parts delivery driver, courier driver, security guard, video surveillance monitor, greenhouse nursery worker, or retail shelf stocker.

[35] While Dr. Quee Newell admitted that Mr. Bynoe was severely depressed and anxious at the time of her assessment of him, she did not consider any of his psychiatric impediments when she made her vocational recommendations. In her rebuttal report, Dr. Quee Newell focused on Dr. Wiseman and Dr. Anton's recommendations about Mr. Bynoe's career prospects, specifically Dr. Anton's opinion that Mr. Bynoe may at some point in the future be able to tolerate less physically demanding work than his job as an auto detailer, and Dr. Wiseman's recommendation that vocational rehabilitation would be advisable once Mr. Bynoe's mood has stabilized. She disagreed with Dr. Wiseman that Mr. Bynoe should wait to do any vocational rehabilitation until his mood has stabilized, and she was of the view that his treatment for depression and his vocational rehabilitation should happen at the same time.

[36] She did, however, concede on cross-examination that she would defer to the medical professionals about Mr. Bynoe's diagnosis and prognosis.

- [37] While I do not doubt Dr. Quee Newell's expertise, I find her report does not sufficiently account for the multiple challenges Mr. Bynoe would face on an attempted return to the workforce, not the least of which is his major depressive disorder. It is unfortunate that this expert did not have psychiatric evidence when she prepared her first report, as it appears she became fixed in her view of Mr. Bynoe's vocational prospects at the time she wrote it. When she later received Dr. Wiseman and Dr. Anton's reports, she did not significantly alter her opinion, notwithstanding a psychiatrist's opinion that it was more likely than not that Mr. Bynoe would never return to work.
- [38] I agree with the plaintiff that Dr. Quee Newell's report is so detached from the medical evidence in this case that it is of very little weight. As between the vocational experts, I prefer the opinion of Mr. Nordin, whose opinion is grounded in the evidence from the doctors as to Mr. Bynoe's likely prognosis.

Damages

Non-pecuniary damages

- [39] The plaintiff seeks an award of \$180,000 to \$200,000 for non-pecuniary damages. The defendant submits that non-pecuniary damages should be assessed in the range of \$90,000 to \$110,000.
- [40] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. In assessing non-pecuniary damages, the court may look to awards made in analogous cases. However, each case must turn on its facts. No two personal injury claims are identical and awarding damages always involves an exercise of judgment: *Kapelus v. Hu*, 2013 BCCA 86 at para. 16.
- [41] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal enumerated the factors to be considered in assessing non-pecuniary damages and they include the plaintiff's age, the nature of the injury, the severity and duration of pain, disability, emotional suffering, impairment of family, marital, and social relationships, impairment of physical abilities, loss of lifestyle, and the plaintiff's stoicism.
- [42] The plaintiff put the following cases before the court in support of his position on non-pecuniary damages: *Polous v. Cinnamon Lopez*, 2016 BCSC 81 (\$180,000), *Bhatti v. Jones*, 2020 BCSC 1935 (\$190,000), *Niescierowicz v. Brookes*, 2020 BCSC 1590 (\$190,000), and *Shongu v. Jing*, 2016 BCSC 901 (\$200,000).
- [43] The defendant put the following cases before the court in support of its position on non-pecuniary damages: *Walls v. Ocampo*, 2020 BCSC 499 (\$80,000), *Nadeau v. Toulmin*, 2020 BCSC 866 (\$110,000), *Achan v. Jin*, 2020 BCSC 1430 (90,000), and *Dabu v. Schwab*, 2016 BCSC 613 (\$95,000).

- [44] I have considered the cases cited by both counsel. The cases cited by the plaintiff were more analogous to the circumstances of this case than the cases cited by the defendant. For example, the plaintiff in Walls, was only mildly impaired in her ability to do her job and the primary loss to the plaintiff was the loss of lifestyle associated with working out in her husband's gym, which was something that she had taken great pleasure in.
- [45] In Nadeau, the plaintiff had some impairment to her sleep and mood, but unlike Mr. Bynoe, her psychiatric injuries were not so severe that she was disabled from working.
- [46] In Achan, Madam Justice Fleming noted that the plaintiff in that case had some psychological injury that was not as severe as the plaintiff in Nadeau. I have already found that Mr. Bynoe's psychiatric injuries are more serious than those faced by the plaintiff in Nadeau.
- [47] In Dabu, the plaintiff's own expert opined that she could increase her activities at home and at work, and the plaintiff continued to work full-time at a job that gave her considerable satisfaction and enjoyment.
- [48] The cases put forward by the plaintiff, on the other hand, involve plaintiffs whose enjoyment of life had been deeply impacted in every facet by virtue of their physical and psychiatric injuries. For example, the plaintiff in Bhatti lost his ability to work and his depression negatively affected his marriage, his ability to participate in social activities, and all aspects of his enjoyment of life. These cases are much more analogous to Mr. Bynoe's circumstances.
- [49] In assessing non-pecuniary damages, I must look at the various injuries suffered by the plaintiff through the lens of the Stapley factors.
- [50] In this case, I find that the factors relevant to assessing non-pecuniary damages include the impact Mr. Bynoe's chronic pain and depression have had on his marriage, his social life, his ability to return to work, and his sense of self-worth. Prior to the accident, Mr. Bynoe had a full-time job he enjoyed, an active social life, and a happy marriage.
- [51] Now his marriage is over, he has had a significant negative personality change, he is deeply depressed, he is anxious, and he cannot work. His friend Ivan Elva testified that Mr. Bynoe had gone from being a happy and funny person to being sad, weepy, and low in self-esteem. While Mr. Bynoe is still physically capable of playing bass guitar sitting down, he will never be able to dance on stage or participate in musical performances the way he did before.
- [52] Mr. Bynoe's loss of ability to work is particularly relevant to non-pecuniary damages in this case, since his job as an auto detailer was clearly a source of identity and self-confidence for him. He was justifiably proud of the work he did and the life that he had built in Canada. As a result of his accident-related injuries, Mr. Bynoe has lost this sense of himself.
- [53] In the circumstances, I find that an award of \$190,000 for non-pecuniary damages is appropriate.

Loss of income earning capacity

- [54] The parties have agreed that past income loss should be assessed at \$135,300. With respect to future loss of income-earning capacity, the plaintiff seeks an award in the range of \$680,000 to \$840,000 and has provided an earnings-based calculation to substantiate that claim. The defendant argues that loss of future income-earning capacity should be assessed using the capital asset approach and has submitted that an award of \$100,000 to \$125,000 would be appropriate.
- [55] In *Falati v. Smith*, 2010 BCSC 465, this Court set out certain principles which inform the assessment of loss of earning capacity. They include:
- a) The amount of damages may involve a consideration of hypothetical events;
 - b) The standard of proof is not the standard of the balance of probabilities. The plaintiff need only establish a real and substantial possibility of loss;
 - c) The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong; and
 - d) The court must undertake an assessment of damages for loss of earning capacity rather than taking a purely mathematical approach to the issue.
- [56] A plaintiff must always establish that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden, then they must prove the quantification of loss of future income-earning capacity on an earnings approach or a capital asset approach; both are correct: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The capital asset approach is often more appropriate in cases where the pecuniary loss is not easily measured. Either way, this Court must endeavour to quantify the financial harm accruing to the plaintiff from his injuries over the course of his working career, taking into account relevant and realistic negative and positive contingencies: *Pett v. Pett*, 2009 BCCA 232 at para. 19.
- [57] In this case, the medical evidence is clear that Mr. Bynoe has a less than even chance of ever working again. As such, the plaintiff has established that there is a real and substantial possibility of a future event leading to an income loss.
- [58] In terms of quantification of loss, the defendant urges me to take a capital asset approach. The capital asset approach requires the court to consider the four factors set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, in the context of the particular facts of this case.
- [59] The four factors are:
- a) whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
 - b) whether the plaintiff is less marketable or attractive as an employee to potential employers;

- c) whether the plaintiff has lost the ability to take advantage of job opportunities which might otherwise have been open; and
 - d) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive market.
- [60] Were I required to assess Mr. Bynoe's future income loss on the basis of the capital asset approach, I would assess an amount far higher than the \$100,000 to \$120,000 suggested by the defendant. That is because, contrary to the defendant's submission, the answer to each of the four Brown questions in this case is an unambiguous "yes". Mr. Bynoe has been rendered less capable overall from earning income, he is less marketable or attractive as an employee, he has lost the ability to take advantage of job opportunities, and he is less valuable to himself as a person capable of earning income in a competitive market.
- [61] However, I have determined that I should not apply the capital asset approach in this case, because I am of the view that there is sufficient certainty about Mr. Bynoe's earnings but for the accident and his prognosis for working again that the earnings approach can be used to discern an income loss amount that is more accurately tied to Mr. Bynoe's probable loss than the capital asset approach allows.
- [62] This is not a case where Mr. Bynoe's future income, but for the accident, was uncertain. On the contrary, all experts who opined on the matter agreed that, had it not been for the accident, Mr. Bynoe would most likely have continued to work as an auto detailer for the rest of his career.
- [63] Mr. Pivnenko, the economist, calculated the value of Mr. Bynoe's future earnings. He considered negative contingencies that may impact Mr. Bynoe's future income. The negative contingencies include unemployment, exit from paid work before desired age of retirement, and a change of the pattern of work to fewer hours. The fact that Mr. Bynoe's job was unionized made some of these contingencies less pronounced and Mr. Pivnenko estimated them at less than 20% and closer to 10%.
- [64] Mr. Pivnenko also considered the non-wage benefits enjoyed by Mr. Bynoe. Mr. Bynoe had a pension, employer-funded healthcare, and life insurance. Based on paystubs, Mr. Pivnenko was able to discern that Mr. Bynoe's employer funded approximately 8.2% of Mr. Bynoe's gross earnings to his pension plan. He estimated that the non-wage benefits would add about 12% to the value of wage compensation for Mr. Bynoe.
- [65] Ultimately, Mr. Pivnenko determined that the negative contingencies and the non-wage benefits were close enough to cancel one another out, and he neither added nor detracted from his estimate of future income in order to account for either of these factors.
- [66] I am satisfied that Mr. Pivnenko's calculations provide a picture that is as accurate as possible to estimate Mr. Bynoe's future income would be but for the accident.

- [67] I find that Mr. Bynoe, given his very limited savings and his enjoyment of his job, would likely have worked to age 70 but for the accident. Using Mr. Pivnenko's calculation, the amount of \$849,820 is a reasonably accurate number for estimating Mr. Bynoe's lifetime earnings but for the accident.
- [68] The next step in the analysis is to deduct an amount for positive contingencies to reflect the fact that the weight of medical expertise suggests that there is some chance that Mr. Bynoe may recover enough to work again.
- [69] The following are the factors that I have considered in assessing the positive contingencies:
- a) Dr. Wiseman did not put a probability on Mr. Bynoe's ability to work again, he simply said the chances of it happening were less than 50%.
 - b) Dr. Wiseman was of the view that if Mr. Bynoe did work again, it would have to be part-time.
 - c) It is also relevant that Mr. Bynoe had a good union wage in his prior employment. The vocational experts were in agreement that any employment Mr. Bynoe can do in the future will be entry level and may not be as generous in its compensation as his prior position.
- [70] Recognizing that a precise mathematical calculation is not possible, I would deduct 20% from \$849,820 to account for the positive contingency of Mr. Bynoe being able to work again. This reflects the less than even chance that Mr. Bynoe will work again, and also reflects the fact that if Mr. Bynoe does work again, it will be part-time and at a lower hourly rate than what he made in his prior career.
- [71] As a result, I assess Mr. Bynoe's loss of future income-earning capacity at \$680,000.

Special Damages

- [72] Special damages have been agreed in the sum of \$3,815.79.

Cost of future care

- [73] The purpose of an award for future care is to compensate a plaintiff for costs which may reasonably be expected to be incurred to preserve and promote the plaintiff's mental and physical health: *Gigmac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30.
- [74] The test for assessing future care costs is well settled; it is whether the costs are reasonable and whether the items are medically necessary: *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 62.
- [75] The quantification of damages for cost of future care is an assessment, it is not a precise accounting exercise. Adjustments may be made for the contingency that the future may differ from what the evidence at trial indicates. *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Prempeh v. Boisvert*, 2012 BCSC 304 at para. 108.

[76] The plaintiff seeks an award to pay the cost of a number of items. These are:

- kinesiology, 30 treatments at \$80 each for a total of \$2,400;
- physiotherapy, 20 treatments at \$40 each after Part 7 reimbursement, for a total of \$800;
- psychological counselling, 30 treatments at \$225, which is \$6,750;
- transcranial magnetic stimulation, one time at \$3,500;
- occupational therapy, initial assessment and a reassessment at a cost of \$4,000;
- medication, \$213.70 annually for 40 years with a two-percent discount rate applied comes to \$6,040.42;
- a gym membership annually for five years at a two-percent discount rate for a total of \$3,393.72;
- one-time vocational counselling for a cost of \$1,890.

[77] The total amount claimed by the plaintiff is \$28,774.14.

[78] Some but not all of these amounts were agreed to by the defendant. For example, the defendant does not consent to the cost of kinesiology or further physiotherapy. Unfortunately, the defendant did not make specific submissions about why these treatments were not medically recommended or were not necessary.

[79] Each therapy claim is tied to an expert recommendation in the evidence. I am satisfied that the therapies claimed are reasonable and medically necessary. Therefore, I am prepared to award the plaintiff the full amount claimed for cost of future care.

Summary of Orders Made

[80] I order the following damages payable by the defendant to the plaintiff:

Non-pecuniary damages

\$ 190,000

Past wage loss

\$ 135,300

Loss of earning capacity

\$ 680,000

Cost of future care

\$ 28,774

Special Damages

\$ 3,816

Tax gross up and managements fees^[1]

To be assessed

Total

\$1,037,890

[81] With respect to costs, if the parties are unable to agree, they may make arrangements to appear before me to speak to that issue, although I would ask that if they are to do that, they make such arrangements within 30 days of the date of these reasons for judgment.

"Madam Justice Francis"

[1] The parties have agreed that tax gross-up and management fees are to be assessed post-judgment.

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