
CANADA / JUDGMENT

De La Garza v. Carson

2018 BCSC 1858

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1858 De La Garza v. Carson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

De La Garza v. Carson,

2018 BCSC 1858

Date: 20181026

Docket: S030225

Registry: Chilliwack

Between:

Victor de la Garza

Plaintiff

And

Kit Carson and Katherine Lilian Legault

Defendants

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff:

M. Thornton

P. Thornton

Counsel for the Defendant:

J. Rusinek

Place and Date of Trial:

Chilliwack, B.C.

April 23 - May 4, 2018

Place and Date of Judgment:

Vancouver, B.C.

October 26, 2018

INTRODUCTION

- [1] On June 3, 2014, at approximately 4:30 p.m., Victor de la Garza was involved in a motor vehicle accident. As he was driving his 1985 BMW northbound on Young Road in the City of Chilliwack, British Columbia, a 1997 Chevrolet Cavalier travelling westbound on Lewis Avenue collided with his vehicle. The Chevrolet was owned by Katherine Lillian Legault and driven by Kit Carson. Struck on the passenger side, Mr. de la Garza's vehicle spun almost 180 degrees.
- [2] Both the BMW and the Chevrolet were written off as a result of the damage sustained in the accident.
- [3] The defendants have admitted liability. While the defendants concede Mr. de la Garza was injured in the accident, they contest the nature, extent, and duration of his injuries.

ISSUES

- [4] The issues raised in this matter are:
1. What are the nature, extent, and duration of the injuries Mr. de la Garza suffered in the accident?
 2. What is the appropriate award of non-pecuniary damages for pain and suffering?
 3. What amount, if any, should be awarded for cost of future care?
 4. What amount, if any, should be awarded for loss of housekeeping and yard work capacity?
 5. What is the appropriate award for past loss of earnings?
 6. What is the appropriate award for future loss of earnings or income-earning capacity?

BACKGROUND

- [5] The parties filed an agreed statement of facts outlining the background in this matter as follows.

1. The Plaintiff was born on March 3, 1966 in Mexico City, Mexico.
2. The Plaintiff and his family moved to Canada in 1981.
3. The Plaintiff attended Brookwood Secondary School (Grades 9/10) and Langley Secondary School (Grades 11/12) and graduated in 1984.
4. Commencing in 1986, the Plaintiff attended a full-time 2-year course at Columbia Academy studying inter alia music production.
5. Commencing in 2003 and continuing through 2005, the Plaintiff attended Kwantlen College in Surrey and completed levels C, B and A Welding courses.
6. Following high school graduation (1984) and prior to commencing the welding courses at Kwantlen College (2003), the Plaintiff was employed for varying periods of time as a:
 - a. janitor;
 - b. gas station attendant;
 - c. construction worker;
 - d. video store clerk;
 - e. pizza delivery person;
 - f. security guard;
 - g. courier driver; and
 - h. mutual funds salesman.
7. The Plaintiff commenced employment as a welder at Columbia Remtec Manufacturing ("Remtec") in June 2004.
8. From June 2004 - June 3, 2014, and again from September 30th - November 4, 2014, the Plaintiff was employed at Remtec as a welder.
9. As of June 3, 2014 the Plaintiff was at the top salary rate for a welder with Remtec, and in the result would not have received any further wage raises.
10. However, the Plaintiff would have been entitled to annual cost of living increases which in 2015 and 2016 were 2.5% per year.
11. The cost of living increases referred to in paragraph number 10 would have been back dated to January 1st of each year.
12. As of January 3, 2014 the Plaintiff's:
 - a. regular earnings rate was \$34.65; and
 - b. overtime earnings rate was \$51.975.

13. On June 3, 2014 at approximately 4:30 p.m. the Defendant Kit Carson, driving a 1997 Chevrolet Cavalier, was involved in a motor vehicle accident with the Plaintiff, driving a 1985 BMW, at or near the junction of Lewis Avenue with Young Road, in the City of Chilliwack, British Columbia (the "Accident").
14. Following the Accident, the Defendant Kit Carson was issued a Violation Ticket #AH61851822 (the "Violation Ticket"), charging the Defendant Kit Carson with "driving without consideration" contrary to Section 144(1)(b) of the Motor Vehicle Act.
15. The Defendant Kit Carson did not dispute the Violation Ticket.
16. By letter dated November 17, 2016 from Neil Green, the General Manager at Remtec, the Plaintiff's employment with Remtec was terminated effective November 18, 2016. The reason given by Remtec for the termination was that the Plaintiff's employment contract was frustrated due to his inability to perform the functions of his welding job.
17. The Plaintiff received a severance payment from Remtec in the sum of \$11,088, which sum was paid to the Plaintiff in January 2017.
18. On or about March 20, 2017 the Plaintiff was hired by KMS Tools and Equipment at its new store in Chilliwack. The Plaintiff's pay rate was \$17.00 per hour.
19. On or about August 9, 2017 the Plaintiff's pay rate at KMS Tools increased to \$18.00 per hour.
20. On November 10, 2017 the Plaintiff was let go from his employment at KMS Tools and Equipment.
21. In 2012, the Plaintiff earned employment income from Remtec in the sum of \$72,379.47.
22. In 2013, the Plaintiff earned employment income from Remtec in the sum of \$71,811.38.
23. In 2014, the Plaintiff earned employment income from Remtec in the sum of \$44,599.32.
24. In 2015, the Plaintiff earned employment income from Remtec in the sum of \$4,717.07.
25. In 2016, the Plaintiff earned employment income from Remtec in the sum of \$3,637.
26. In 2017, the Plaintiff received a severance payment from Remtec in the sum of \$11,088.
27. In 2017, the Plaintiff earned employment income from KMS Tools and Equipment in the sum of \$28,175.30.
1. Mr. de la Garza's Injuries - What are the nature, extent, and duration of the injuries Mr. de la Garza suffered in the accident?

Legal Principles

- [6] Mr. de la Garza must prove on a balance of probabilities that "but for" the accident, he would not have suffered the injuries he now complains of.

- [7] As per *Athey v. Leonati*, [1996] 3 S.C.R. 458, I must ascertain whether the accident is the cause of Mr. de la Garza's current issues and whether there were pre-existing injuries and therefore "a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence". A plaintiff is entitled to be restored to his original condition.

Mr. de la Garza's Evidence

- [8] Mr. de la Garza, at the time of the accident, was 47 years old and in good health. He had been involved in a couple of minor collisions prior to the date of the accident with no ill lasting effect. In addition, he had a number of minor workplace injuries over the years that appear to have been treated quickly and resolved.
- [9] Mr. de la Garza said he was "shaken up" in the accident but able to drive home. The evening of the accident, Mr. de la Garza suffered from headache, blurriness of vision and some buzzing in his left ear. His neck was sore along with his shoulder, mid back and lower back. His knees were also sore.
- [10] Mr. de la Garza did not sleep well and sought medical attention at a walk-in clinic the next day where he was told to take pain medication and time off work to rest. On June 12, 2014, he followed up with his family doctor, Dr. Goddard, who extended his absence from work for a further two weeks and recommended massage therapy and physiotherapy.
- [11] In July 2014, Mr. de la Garza started treatment with Fraser Valley Physiotherapy ("FVP"), which included massage, heat treatment, ultrasound and exercises recommended by the physiotherapist. Despite attending at these sessions, he did not see much improvement.
- [12] The FVP physiotherapist was not happy with Mr. de la Garza's results and recommended a work hardening program. Mr. de la Garza started this program in August of 2014. Mr. de la Garza attended this program from 10:00 a.m. to 2:00 p.m. five days a week until December 2014.
- [13] As part of the program, Mr. de la Garza engaged in a gradual return to work plan in September 2014 with the goal of building up strength to eventually return to Remtec. Unfortunately, the gradual return to work plan was unsuccessful
- [14] FVP ultimately discharged Mr. de la Garza on December 5, 2014 as he was not improving at their clinic. As part of his discharge, he was provided with a 3-month gym pass. Mr. de la Garza attended the gym regularly and did his home exercises. Again, despite these exercises he did not see much improvement.

- [15] By early 2015, Mr. de la Garza was still suffering from symptoms related to his neck. He had trouble turning it without pain. He had headaches and mid back pain two or three times a week. He described his low back pain as constant. The buzzing in his left ear, blurriness of vision and knee pain had resolved by this time. Dr. Goddard took X-rays and referred him for an MRI of his spine. Dr. Goddard further referred Mr. de la Garza to a number of health care professionals including Dr. Mutat, a neurosurgeon, in early 2015.
- [16] At present, Mr. de la Garza reports that his major difficulty is chronic low back pain, which is aggravated if he moves or bends the wrong way. The pain is always present and varies between a "dull pain" and a "sharp, almost stabbing pain". He has some stiffness in his neck and his mid back can be still aggravated by chores such as washing the dishes. He has difficulty sleeping because he cannot find a comfortable position due to the pain. He no longer does the yard work nor does he pursue outdoor recreational activities that he used to enjoy, such as camping and outdoor photography. He describes himself as much more irritable and snappy, which is having an adverse impact on his family.
- [17] Mr. de la Garza's wife confirmed this state of affairs. She indicated that their teenage son, Vincente, is now doing many tasks that previously had been attended to by Mr. de la Garza. Ms. Kaufman indicated that her husband used to be active and happy and that has changed. He is abrupt and does not have as much energy as before.
- [18] Mr. de la Garza indicated that prior to the accident, his plan had been to work to retirement age or longer. He liked his work and was happy with his payrate.
- [19] In order to deal with his back pain, Mr. de la Garza now takes over-the-counter medications, such as Tylenol 3.

The Medical Evidence

- [20] A review of the medical evidence establishes that Mr. de la Garza suffered a soft tissue injury in the accident and continues to suffer with neck stiffness and back pain.
- [21] Dr. Goddard testified with reference to his clinical records thereby having his "present memory revived" as per R. v. Violette, 2009 BCSC 503. He indicated that Mr. de la Garza was healthy prior to the motor vehicle accident on June 3, 2014. Dr. Goddard had only seen Mr. de la Garza once in 2008 due to a back injury and muscle strain that occurred November of that year. Dr. Goddard recommended physiotherapy and chiropractic therapy and the matter resolved.
- [22] When Mr. de la Garza visited his family doctor, Dr. Goddard, on June 12, 2014 with respect to the June 3, 2014 accident, he told Dr. Goddard that he was T-boned and advised he was suffering headaches, neck tension and strain. He had soreness in his mid back in between his shoulder blades consistent with whiplash symptoms. He had a decreased active range of motion and a general stiffness.

- [23] Dr. Goddard saw Mr. de la Garza again on July 2, 16, and 28, 2014. He did not consider Mr. de la Garza ready to return to work due to his ongoing back pain. He was also sore in his neck and rib cage and still had a decreased active range of motion.
- [24] Though Mr. de la Garza was due to start a gradual return to work the week of September 29, 2014, Dr. Goddard noted on September 12, 2014 that he was still having pain in his low back on the right side as well as continued neck pain and a decreased active range of motion. Despite that, he commenced the gradual return to work program but struggled due to his ongoing pain. Dr. Goddard saw Mr. de la Garza on November 10, 20, and 27, 2014 and noted pain, including chronic neck pain, was still present.
- [25] By March 2015, Mr. de la Garza advised Dr. Goddard that he still had severe pain and was unable to return to heavy duties. Dr. Goddard noted persistent pain was present on a visit of March 20, 2015. Mr. de la Garza's neurosurgeon, Dr. Mutat, recommended cortisone injections, along with gabapentin and meloxicam.
- [26] Dr. Goddard referred Mr. de la Garza to further physiotherapy in April 2015. Mr. de la Garza also had an epidural injection into his lower spine in July 2015. This was not successful and had minimal effect on his chronic pain. Dr. Goddard again noted in June and July 2015 that his back injury and pain was still ongoing.
- [27] Despite the pain, Dr. Goddard cleared Mr. de la Garza for work on his final visit on July 21, 2015. Dr. Goddard's only specified limitation was that he not be placed on sledgehammer duties, Dr. Goddard explained that this was intended to reflect that Mr. de la Garza could not do heavy work and needed light duties only. Dr. Goddard said that Ms. Lana Malinowski, Mr. de la Garza's occupational therapist, explained there were no light duties due to an economic downturn and the layoff of employees. Mr. de la Garza needed to find other lighter work.
- [28] Dr. Goddard closed his practice at some point in 2015 and has not seen Mr. de la Garza since that time. Following the closure of Dr. Goddard's practice, Mr. de la Garza began seeing Dr. Dressler as his family practitioner.
- [29] On October 7, 2015, Mr. de la Garza saw another neurosurgeon, Dr. Matishak, for the purpose of providing an independent medical examination. He concluded that Mr. de la Garza suffered soft tissue injuries of the cervical, thoracic and lumbar spine in the accident of June 3, 2014. He noted as follows:

Mr. de la Garza suffered soft-tissue injuries of his cervical, thoracic, and lumbar spine. He showed evidence of decreased range of motion of his neck as confirmed by both the walk-in clinic physician, as well as his family physician. He showed evidence of a (whiplash) injury [sic]. This prompted both physiotherapy and massage therapy, and chiropractic was not recommended because of his ongoing cervical spine complaints. In addition soft tissue injury of his cervical, thoracic and lumbar spine, Mr. de la Garza has shown both clinical and radiological evidence of a thoracic disc herniation at T9-10, as well as a 2-level disc herniation at L4-5, L5-S1. Based on Mr. de la Garza's plain film examination from November 2014, there is little evidence of disk space

narrowing. Therefore, it is unlikely he harboured significant disc degeneration at the 2 levels in his lumbar spine. Therefore, I would opine that the results are that the presence of 2-level disc herniation at L4-5 and L5-S1 is a direct result of the forces incurred in the motor vehicle accident of June 3, 2014.

[30] Dr. Matishak further opined on whether the injuries of the accident aggravated or precipitated any pre-existing medical condition, and if so, the extent thereof:

Based on the above findings, I would feel that Mr. de la Garza did not harbour significant degenerative disc disease. Based on his testimony, as well as the medical records, there is little evidence of complaints of low back or neck pain prior to the accident of June 3, 2014.

[31] When cross-examined on this conclusion, Dr. Matishak was clear that his opinion that Mr. de la Garza did not have pre-existing back injuries was based on radiology films he reviewed and an X-ray report titled "X-ray report, lumbar spine, Fraser Valley Medical Imaging, November 20, 2014". In addition, Dr. Matishak reviewed an MRI report of Dr. Michael Martin, referred to as "MRI report, thoracic and lumbar spine, Canadian Magnetic Imaging, March 12, 2015".

[32] When asked about the plaintiff's three back injuries in 2008, 2011 and 2012, Dr. Matishak noted these were muscle strains, which resulted in limited, if any, time off work and were very different from a disc herniation. When further cross-examined on Mr. de la Garza's exclusive use of over-the-counter pain medication (as opposed to prescribed medication), Dr. Matishak disagreed that this reflected an improvement or ability to manage the pain. He noted that in situations of chronic pain, persons like Mr. de la Garza become accustomed to their pain and prescribed medication ceases to be as effective. As a result, the side effects from the medication would be such that Mr. de la Garza would have more negative than positive experience with the prescribed medication.

[33] At the request of ICBC, Mr. de la Garza attended the Canadian Back Institute ("CBI") in April 2016. CBI provided vocational consulting and physiotherapy. None of this was effective.

[34] The defendants agree that as of April 23, 2018, the first day of the trial, Mr. de la Garza suffers from a lower back injury with very mild ongoing injuries to his neck and mid back. They maintain, however, that if not for the lower back injury, the other injuries would be unpleasant but not disabling. They also note that his other injuries arising from the accident were resolved within six months.

[35] The defendants further contend that Dr. Matishak's 2015 examination was not up to date. While Dr. Matishak found the primary injuries to be disc herniation, and the prognosis to be guarded, he agreed in cross-examination that Mr. de la Garza would be capable of light and sedentary work. Accordingly, the defendants maintain that Mr. de la Garza's injury is contained, specific and not severe.

- [36] Dr. Matishak, however, saw Mr. de la Garza again in February 2018. He indicated that Mr. de la Garza is in just as much pain as when he saw him previously in October 2015. Dr. Matishak reported that Mr. de la Garza is still suffering and not coping well. He again offered a guarded prognosis and was clear that Mr. de la Garza was not able to return to his previous job as a welder.
- [37] Dr. Heran, another neurosurgeon, examined Mr. de la Garza on October 13, 2017. He conducted several tests on Mr. de la Garza and ultimately opined that Mr. de la Garza was not exaggerating his symptoms or exhibiting malingering tendencies. He said Mr. de la Garza's persisting source of symptoms remains the mid back and low back predominately centred toward the right side. He continued to have some extension of low back symptoms into his lower extremities. His sleep disturbance appeared to be a consequence of his low back pain. Dr. Heran noted in addition that he is at future risk of exacerbation of these injuries.
- [38] Though Dr. Heran said he expected Mr. de la Garza's functional capacity to improve over time, he was unable to say if that improvement would eventually be a 30%, 70%, or 95%. He also said any improvement could take years. Accordingly, while the defendants rely upon Dr. Heran's evidence to maintain that Mr. de la Garza will improve, his evidence on this point is largely theoretical and insufficient to support such a definitive conclusion.
- [39] The medical evidence establishes that as a result of the collision of June 3, 2014, Mr. de la Garza suffered the injuries claimed in this matter. In particular, those injuries include: headaches; muscle stiffness; neck pain; mid back pain; low back pain. He continues to suffer from chronic pain, particularly in his lower back. As noted by Dr. Matishak, his prognosis is guarded.
- [40] Mr. de la Garza's evidence was corroborated by lay witnesses, including his wife. His actions since the accident support his evidence that he is genuinely suffering debilitation back pain: in particular, his departure from his job at Remtec where he was at the top rate of pay and highly senior within the company. Since then, as pointed out by plaintiff's counsel, Mr. de la Garza has sold numerous family assets, depleted his retirement savings to pay family bills, abandoned his recreational activities, socially isolated himself from friends and family and undergone numerous therapies to address his pain. He has participated in treatment such as physiotherapy, massage therapy, exercise programs, epidural injections, and the use of the TENS machine and inversion table. Additionally, he has taken prescription drugs to deal with pain.
- [41] Ms. Malinowski, his occupational therapist, conducted two functional capacity evaluations on Mr. de la Garza. The first occurred on December 7, 2015 and the second on October 12, 2017. Ms. Malinowski noted there were no significant changes in Mr. de la Garza's functioning during that time. She also said her overall perception of Mr. de la Garza was that he accurately reported his symptoms. In cross-examination, Ms. Malinowski said she was able to impartially report on Mr. de la Garza, despite having treated him between April 2015

and May 2016. She advised that she administers standardized assessments that enable her to impartially report on his functionality.

- [42] The defendants emphasize Dr. Dressler's comments that Mr. de la Garza's behaviour is unusual for someone with chronic pain because of his paucity of visits to the doctor. While the defendants admit that Mr. de la Garza experiences constant pain, they point to Dr. Heran's evidence that the baseline degree of pain is marginal and can be managed with a limited amount of painkillers.
- [43] Dr. Dressler's evidence, however, was inconsistent with much of the other medical evidence, including another defence witness, Dr. Heran. In addition, his evidence contained factual inaccuracies, including the important fact of whether Mr. de la Garza was working or not. Dr. Dressler also believed that Mr. de la Garza "quit" his work when, in fact, he had been terminated. Dr. Dressler did not conduct a medical examination in January 2018 when Mr. de la Garza last visited him nor did he conduct one before he provided his report. Ultimately, Dr. Dressler agreed he would defer to Dr. Matishak's opinion with respect to Mr. de la Garza's diagnosis and prognosis and defer to Ms. Malinowski's opinion concerning Mr. de la Garza's functional capacity. In view of all the above, I give it little weight.
2. Non-Pecuniary Damages - What is the appropriate award of non-pecuniary damages for pain and suffering?

Legal Principles

- [44] Mr. de la Garza is entitled to reasonable damages for pain and suffering. The jurisprudence establishes that he should be placed in the same position he would have been if the accident had not occurred, but not in a better position: *Parypa v. Wickware*, 1999 BCCA 88 at para. 29.
- [45] The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-89.
- [46] The leading case on assessment of non-pecuniary damages is *Stapley v. Hejslet*, 2006 BCCA 34 (see also *Hardychuk v. Johnstone*, 2012 BCSC 1359). The Court of Appeal outlined the factors to be considered in making such an award at para. 46, as follows:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering; and
 - (f) loss or impairment of life;

- (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).
- [47] Mr. de la Garza seeks an award of \$130,000 in non-pecuniary damages and relies upon *Switzer v. Buchi*, [1998] A.C.W.S. (3d) 961, *Sirak v. Noonward*, 2015 BCSC 274 and *Carver v. Or*, 2017 BCSC 1496.
- [48] The defendants rely upon *Mojahedi v. Friesen*, 2016 BCSC 1225, *Clubine v. Paniagua*, 2018 BCSC 146, *Larson v. Bahrami*, 2017 BCSC 2308, and *Hajikolai v. Lewis*, 2015 BCSC 980 to argue for substantially lower amounts ranging between \$60,000 and \$80,000.
- [49] The defendants argue that, while Mr. de la Garza is experiencing ongoing mild to moderate chronic pain, and has had lifestyle and professional interference, the medical evidence is that he is not debilitated and has no ongoing psychiatric or cognitive issues.
- [50] Furthermore, the defendants point out Dr. Dressler refused to characterize Mr. de la Garza as stoic. The defendants maintain that the evidence of Mr. de la Garza's wife and others establishes that Mr. de la Garza has unnecessarily withdrawn from activities with family and friends and was "pain-focused wallowing in cigarettes and alcohol rather than stoically working through his injury".
- [51] The defendants say that the cases relied upon by Mr. de la Garza, in which higher amounts were awarded, reflect more serious injuries and impairment of the respective individuals' lives.

Application to the Facts

- [52] In the past, Mr. de la Garza enjoyed an active lifestyle, which included camping and landscape photography. The latter required hiking into remote areas. While the defendants say he had not pursued these activities in the immediate time before the accident, Mr. de la Garza testified that he intended to do so once his son was a bit older. I accept this testimony. He also played guitar in a band, which enabled him to spend time with friends.
- [53] Prior to the accident, Mr. de la Garza also undertook significant tasks on the property on his home. This included: general maintenance of the home; digging a large trench; planting 30-40 hedges; rebuilding a deck in 2010; and building a "pool pad" for a backyard pool. While friends would assist when the scale of work was significant, Mr. de la Garza would otherwise undertake much of this himself. Since the collision, he is unable to undertake these activities, including playing his guitar, as it is too painful. His teenage son is now doing some of the heavier tasks.

- [54] The pain and discomfort from the collision has also affected Mr. de la Garza's mood. He is now short-tempered with his family and frustrated that he is no longer able to perform maintenance around the house. This has impacted his wife and teenage son. His wife indicated he is no longer a happy person. He is abrupt, spends significant periods alone and no longer seems connected to his family.
- [55] Mr. Trevor Pinchin, Mr. de la Garza's brother-in-law corroborated this testimony. Prior to the accident, he participated in regular activities with Mr. de la Garza including hiking, biking, and annual camping trips with Vincente and the family. The camping trips would last 3-4 days and included Mr. de la Garza helping lift a 150 lbs boat onto a trailer and cutting wood.
- [56] Mr. Pinchin also helped Mr. de la Garza with servicing vehicles and with major yard projects, like digging and planting a large hedge as well as building a new deck. While engaging in these activities, Mr. Pinchin said that Mr. de la Garza's mood was great and that he was a "happy guy". Mr. de la Garza no longer participates in these activities. His teenage son now goes camping with Mr. Pinchin. Mr. Pinchin said Mr. de la Garza spends a lot of time alone and leaves family events early to go home by himself. He is not able to stand without discomfort and "seems to have given up on life".
- [57] I have reviewed the various cases provided by counsel regarding the appropriate range for general damages. In my view, the cases relied upon by Mr. de la Garza reflect plaintiffs with injuries that are more similar to the ones he has suffered than those relied upon by the defendants. The evidence of Dr. Dressler relied upon by the defendants, is not helpful for the reasons set out earlier.
- [58] Many of the cases relied upon by the defendants involved younger individuals whose symptoms were less significant or ultimately resolved. I find the recent case of Carver cited by the plaintiff to be the most helpful. In Carver, the plaintiff was 56 years old at the time of an accident where he suffered a soft tissue injury. His injury resulted in chronic and disabling lower back pain. Along with chronic pain, he suffered emotionally from the loss of his ability to work and care for himself. He no longer derived the same enjoyment from life and was unable to participate in previously enjoyed recreational activities. He was a stoic individual who also engaged in activities designed to facilitate his return to work along with other activities while suffering this pain. The plaintiff in this case was awarded \$115,000 in non-pecuniary damages.
- [59] I find Mr. de la Garza be in the same category. He has demonstrated determination and is a stoic individual who has persisted in trying to return to work despite his chronic pain. Furthermore, despite Mr. de la Garza's prognosis as "guarded", he has pursued other opportunities and found a new job that he was able to do with accommodation. While he was unfortunately terminated from this position, his determination should be taken into account in considering an award for non-pecuniary damages.

[60] Mr. de la Garza's relationship with his family has been affected by his short temper and isolation due to evident unhappiness. He is no longer able to participate in the way he previously did both recreationally but also in the upkeep of the house. This has fundamentally affected his sense of self-worth.

[61] The assessment of non-pecuniary damages depends on the particular circumstances of the plaintiff in each case. Having considered Mr. de la Garza's age, the nature of the injuries, the severity of his symptoms, the guarded prognosis for recovery, and the case authorities, I am of the view that the appropriate award for non-pecuniary damages is \$115,000.

[62] With respect to a pre-existing condition, Mr. de la Garza in cross-examination was asked about a number of workplace incidents. These included the following:

- In 2008, he incurred a strained muscle in his back while swinging a sledgehammer. He was off work for two to three days and received "VISIO" treatment. The muscle strain resolved within three to four months.

- In 2011, he again strained his mid to lower back when bending down to lift a steel plate weighing 200 to 250 lbs. He received physiotherapy and chiropractic treatment and ultimately recovered.

- In 2012, another workplace injury resulted "from having to climb to take apart shelving" and from "repetitive bending down and lifting heavy parts". On this occasion, he suffered a muscle strain in his mid back and shoulder area. He recovered from this injury as well.

[63] As noted earlier, the medical evidence does not establish a pre-existing condition that should be taken into account with respect to the non-pecuniary award. The previous workplace injuries largely resolved and did not require any significant time off work.

3. Cost of Future Care - What amount, if any, should be awarded for cost of future care?

[64] Mr. de la Garza is advancing a cost of future care in the amount of \$28,875. The defendants submit only the cost of over-the-counter analgesics should be awarded at \$50 a year as presently there is no therapy that would ameliorate his current symptoms. That amount, multiplied by a formula for cost of care calculations proffered by two economist witnesses in this case, produced a total amount to \$1,112.

Legal Principles

[65] The test to establish an award for cost of future care is objective. For an award of future care: (1) there must be a medical justification for the claim, and (2) the claim must be reasonable: *Simmavong v. Haddock*, 2012 BCSC 473 at para. 126. In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13, the Court noted that common sense should inform awards for future care.

[66] With regard to adjustments for contingencies, the Court in *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253, stated:

[253] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts.

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

Application to the Facts

[68] Ms. Malinowski, the plaintiff's occupational therapist, summarizes recommendations for further treatment and/or therapies at page 26 of her October 31, 2017 report:

the client would benefit from working with an Occupational Therapist to identify an appropriate height adjustable desk and ergonomic chair, were he to move into a more desk-based type of work.

The client may also benefit from intermittent physiotherapy, kinesiology and/or massage therapy treatment to facilitate his ability to manage symptom flare-ups. I will leave it to the client's physician to comment on this further.

[69] Dr. Heran in giving his evidence at trial supported these recommendations.

[70] I adopt plaintiff's summary and calculations of the costs in Ms. Malinowski's addendum report dated January 24, 2018 at page 5. Ms. Malinowski's used Mr. Peever's "Costs of Care" report for a calculation of the multiplier. The plaintiff summarizes these expenses as follows:

Work Place Ergonomics (KMS type jobs)

Sit-Stand Stool

\$336 every 6 years

Multiplier: = 2.566

2.566 x \$336 =

\$ 862

Anti-fatigue Mats

\$418 once

\$ 418

Total:

\$ 1,280

Ongoing Symptom Supports

Physiotherapy

10 sessions each year at \$65 each = \$650

Multiplier: 15

15 x \$650 =

\$ 9,750

Kinesiology

3 sessions each year at \$75 each = \$225

Multiplier: 15

15 x \$225

\$ 3,375

Massage

10 sessions each year at \$104 each = \$1,050

Multiplier: 15

15 x \$1,050 =

\$15,750

Total:

\$28,875

[71] The defendants say, however, as per Ms. Malinowski's October 31, 2017 report at page 23, there is no definitive information to suggest that through participation in further rehabilitation the client will make any significant gains in terms of his ability to manage his physical symptoms and limitations.

[72] I disagree. While there must be medical justification for future care cost claims and those claims must be reasonable, the evidence is overwhelming that workplace ergonomics would have greatly assisted Mr. de la Garza in his KMS Tools job.

[73] Furthermore, Mr. de la Garza set out recent and specific instances (such as stacking paving stones and running out of his house) that resulted in significant "flare-ups" of his condition thereby necessitating his ongoing symptom supports such as physiotherapy and massage. While Mr. de la Garza appears averse to continuing some of these treatments for general

improvement, that is not the case with respect to support for the "flare-ups" that have occurred and no doubt will occur in the future. The amounts requested are modest and I accept the calculations as set out above, this is inclusive of the \$1,112 for over the counter analgesics of \$50 per year. The requirement for kinesiology has however not been established. This results in an award of \$25,500 for the cost of future care.

4. Cost of Housekeeping - What amount, if any, should be awarded for loss of housekeeping and yard work capacity?

[74] Mr. de la Garza is unable to perform many of the domestic tasks he was able to perform prior the accident. These include mowing the lawn, trimming the edges with a weed eater and pruning the hedges and trees. He has also been unable to perform tasks such as fixing the gutters, attending to a rodent problem in the attic, and repairing the shed. Some of these tasks are now performed by his wife and son.

[75] The plaintiff says a reasonable rate for both yard work and housework is \$15 per hour. He argues that a modest provision for yard work would be three hours a week for a period of 26 weeks each year for a total of \$1,170. With respect to housework, the plaintiff says 2 hours per week x 52 weeks a year is \$1,560. The total of these two combined expenses is \$2,730.

[76] The plaintiff says a reasonable provision for the yard and household work capacity lost to date, would be in the range of \$10,000. For the last four years, these services have been provided by Mr. de la Garza's wife and son.

[77] With respect to future loss of this capacity, the plaintiff says it is reasonable to assume that Mr. de la Garza will continue to require this assistance until age 75, at which point he would probably need this assistance in any event.

[78] Taking an annual value of \$2,730 and applying the appropriate economic multiplier 17.63 as per Table 1 Mr. Curtis Peever's "Cost of Care Multipliers" report dated January 24, 2018: $\$17,630 \text{ cumulative value at age 75} / \$1,000 = 17.63$, the total present-day value is \$48,129. The plaintiff says therefore a reasonable provision for this future loss should be in the range of \$45,000.

[79] There is no doubt, that Mr. de la Garza has difficulty doing household chores and in particular, the yard work he did for many years. This is reflected in both Mr. de la Garza's testimony and Dr. Heran's report.

[80] The defendants say a small award of \$2,000 would be justified representing a subsidy for annual exterior home maintenance. They rely on Dr. Heran's report at page 15 where he notes as follows:

His limitations in domestic and recreational activities parallel his limitations defined in his work life. The need for assistance around the home has been reasonable. With his wife and his son, hired help is likely not required.

- [81] The defendants say Ms. Kaufman was largely responsible for domestic work and due to Mr. de la Garza's son assistance, hired help is likely not required. That situation is however not sustainable and pre-supposes that his teenage son will be doing those tasks indefinitely.
- [82] I am inclined to agree with the plaintiff's submission on this point. The rate and hours for both house and yard work is modest - being two hours per week for housework and three hours per week for yard work at \$15 per hour. This takes into account the reality that Ms. Kaufman did the majority of the housework.
- [83] I agree therefore that a reasonable provision for future loss should be \$45,000. As however Mr. de la Garza's son has been providing some assistance and will likely provide some in the future, I discount that loss to \$30,000. Applying these figures for past wage loss for the yard and household work over the last four years results in an additional award of \$10,000.
5. Past Wage Loss - What is the appropriate amount for past wage loss?

Legal Principles

- [84] The Court in *Hardychuk* summarized the law concerning the past loss of earning capacity at paras. 175-178. The law is clear that compensation is based on what the plaintiff would have earned but for the accident: at para. 175. This, however, is an assessment, not a calculation as it involves the consideration of hypothetical events: at para. 177.

Application to the Facts

- [85] At the time of the accident, Mr. de la Garza worked as a welder in the barrel department at Remtec, having commenced his employment with the company in June 2004. Remtec builds transport and cargo trailers that haul petroleum and crude oil products. Mr. de la Garza's work in the barrel department was physically demanding and included swinging heavy sledgehammers and welding large sheets of steel. The nature of this work was that the department received large 23-27 foot barrels and the workers prepared them for the finishing department. Much of the preparation included working with and lifting parts such as heads and baffles that weighed 100-125 lbs.
- [86] Teams of two worked in the barrel department. Mr. de la Garza's work partner was Michael Ackerman, who was junior to Mr. de la Garza. Mr. Ackerman in his testimony indicated that prior to the accident, Mr. de la Garza had no difficulties with the significant physical demands of the job.
- [87] The teams of two would place 8-10 baffles in a tanker each shift. Each baffle weighed approximately 120 lbs. The task required swinging a sledgehammer to hammer the baffles into the tank. The senior person would undertake this task because experience was necessary to determine the exact positioning of the baffle. The senior person was also necessary because difficult to reverse an error - if a mistake was made, the entire baffle had to be replaced.

- [88] In addition, welding the baffle required awkward positioning due to the curvature of the tank. The welder was required to hold a welding gun in a static position for a long period while in an awkward position. The welder was also required to crawl into the tank from the manhole on top and squeeze through the holes in the baffles already welded in. Once the welder made his way to the back of the tanker, he would use a sledgehammer while inside the tank to position the endcap on the tanker.
- [89] As indicated, Mr. de la Garza could not return to work after the accident until the end of September 2014. At that time, he commenced his return to work program designed by his occupational therapist, Ms. Malinowski, in conjunction with the general manager of Remtec, Neil Green. The expectation was that he would eventually return to his previous duties. The return to work plan had Mr. de la Garza working a variety of 4-6 hour shifts undertaking his normal duties, with the exception of swinging the heavy sledgehammer. Remtec paid for the time he was at work, with the remainder of the 8-hour shift listed as "sick leave - unpaid".
- [90] Mr. Ackerman continued to work with Mr. de la Garza during Mr. de la Garza's participation in the return to work program. He indicated Mr. de la Garza was not able to weld for long periods of time and could only do so in short bursts. He was also not physically able to lift and hold component parts without physical complaint. Mr. Ackerman testified that Mr. de la Garza was just not able to do his job.
- [91] Mr. de la Garza's testimony was similar. His partner would regularly have to step in and perform his duties. In the course of his return to work, Mr. de la Garza's back and neck were sore. The pain level increased, especially with his 6-hours shifts, and by October/November 2014 he started to miss full days. At this point, he approached Remtec management to see if they could reassign him to a less demanding position. By this time, however, the company was experiencing a downturn in business and no position was available. The company had laid-off non-essential personnel and continued in this vein until 2017. Mr. de la Garza's return to work program was unsuccessful and he was taken off the schedule.
- [92] Mr. Neil Green confirmed this testimony. He also confirmed that while Mr. de la Garza was not paid at this time, Remtec still considered him an employee. The company gave him time to complete his treatment and consider his options. Mr. Green testified that Remtec would have taken or hired back Mr. de la Garza as an employee if he was physically able to do the job.
- [93] Mr. Green, in his testimony, explained the two-man teams were set up with the expectation that each team member would share the work 50/50. During Mr. de la Garza's return to work, Mr. Green said the work share was 70/30 with Mr. de la Garza's partner doing 70% of the work. Approximately two years later in the fall of 2016, Mr. Green said Mr. de la Garza dropped by to explore the possibility of an accommodated position. In view of the layoff circumstances, Mr. Green indicated that the company did not have a position that could accommodate Mr. de la Garza's limitations.

[94] After considering the circumstances, the company decided to terminate Mr. de la Garza, as he could not fulfil the requirements of his job.

[95] On November 17, 2016, Columbia terminated Mr. de la Garza as an employee based on "frustration of contract" in a letter as follows:

Dear Victor;

We have carefully reviewed the information you have provided with respect to your restrictions and limitations. It appears clear from this information that you can no longer perform the functions of your welding job, and that there is no reasonable prospect that this will change going forward.

We have also carefully reviewed our Company's current and anticipated future needs to determine whether there is other available work either now or in the foreseeable future that would come within the scope of your qualifications and limitations.

Regrettably, we have concluded that there is no such work available. Not only do we not have any vacant positions of any kind, but in fact we are in the process of implementing a job-sharing program due to a significant slowdown in our business due to market forces.

As a result, it is appropriate at this point to terminate our employment relationship with you on the basis of frustration of contract. Therefore, we are terminating your employment for cause - i.e., frustration - effective November 18, 2016.

You will continue your current coverage under the Company's benefit plans until December 31, 2016 in order to give you time to obtain alternate coverage.

We sincerely wish you the very best in terms of your recovery and hope that you are able to obtain retraining in a field that you enjoy.

Please do not hesitate to contact me for any assistance in terms of potential job prospects and opportunities.

Yours truly,

Neil Green

Mr. Green noted that other departments in the company were either equally physically demanding or only somewhat less demanding and therefore, not a good fit. Further, no other opportunities existed because of the downturn in business. Mr. de la Garza's benefits were maintained until December 2016 and he ultimately received \$11,000 in severance pay based on his long-term service.

Calculations

[96] Turning to a calculation of past wage loss, I note Mr. de la Garza earned \$72,379.47 and \$71,811.38 in the two years prior to the accident. The average of those two years, \$72,095.43.

- [97] Mr. de la Garza's 2014 actual income was \$44,599.32. He therefore lost income of \$27,496.11 in 2014.
- [98] The evidence establishes that Mr. de la Garza would have received a 2.5% raise in each of 2015, 2016 and 2017, giving respective incomes in those two years of \$73,897.82, \$75,745.27 and \$77,638.90.
- [99] In 2018 up until the date of trial his income can again be increased by 2.5% to \$79,579.87. That figure can be multiplied by 112/365 (representing days elapsed up to the first day of trial) giving a potential loss for 2018 of \$24,419.03.
- [100] These figures add up to a total of \$279,197.13.
- [101] Mr. de la Garza earned \$28,175.30 from KMS Tools in 2017.
- [102] He received benefits of \$4,707.17 and \$3,637 in 2015 and 2016 respectively.
- [103] In 2017, Remtec paid him severance pay of \$11,088.
- [104] The combination of his benefits; his severance and his KMS Tools earnings in 2017 is \$47,607.47, which should be subtracted, equalling \$231,589.66.
- [105] Taxes would still need to be deducted from the total. Taxes are estimated at 20%, based on the fact that in 2012 and 2013. Mr. de la Garza's gross income was reduced by 20% as a result of income tax and employment insurance premiums. This would establish Mr. de la Garza's past wage loss at approximately \$185,271.73.

Failure to Mitigate Wage Loss by Job Search Efforts

- [106] The defendants, however, argue that prior to when Mr. de la Garza's job search began in September of 2016, it had already been made clear to him that he did not have a job to return to at Remtec. The defendants further note that Mr. de la Garza's medical advisors also repeatedly told him to find a job.
- [107] At the end of the graduated return to work program in November 2014, Mr. Green informed Mr. de la Garza that he could only return if he was cleared to work in the barrel department.
- [108] In February 2015, when it was clear that Mr. de la Garza did not have other sources of income, he applied for long-term disability.
- [109] In May 2015, Ms. Malinowski did a site visit to Remtec where Mr. Green made clear to her that Mr. de la Garza had no prospect of working outside of the barrel department. Due to the unchanging nature of his back injury, this meant that there was also no reasonable prospect of Mr. de la Garza being able to resume work at Remtec.
- [110] The defendants point out that in July 2015, Mr. de la Garza had a meeting with Ms. Malinowski and Dr. Goddard where he was informed that future work as a welder was unrealistic and he should pursue alternatives.

- [111] The defendants say Mr. de la Garza is improperly seeking compensation for almost two years where his injury status was unchanged and where he knew he had no realistic chance of return to Remtec. The defendants say he took no practical steps to find remunerative work despite the advice of Dr. Goddard, Dr. Dressler and Ms. Malinowski and the message from Mr. Green that there was no position available at Remtec.
- [112] The defendants say that when Mr. de la Garza went on long-term disability on February 1, 2015, he no longer had a reasonable prospect of returning to Remtec and thus, should have sought out alternative employment in an efficient manner. Therefore, they submit a 24% reduction in his past wage loss is appropriate. This amount is approximately \$56,000.
- [113] The defendants also say his bad attitude led to his loss of employment at KMS Tools and a further \$17,000 should be deducted leaving a sub-total of \$158,000 for past wage loss less 25% taxes would result in approximately \$119,000 as past wage loss.
- [114] I will deal with this latter point first.
- [115] In March 2017, Mr. de la Garza was hired by KMS Tools in Chilliwack. At the time, the store had not yet been opened so KMS Tools Chilliwack employees completed their training in other locations. He was hired as a retail person. Mr. de la Garza said he let the company know his limitations with respect to lifting, pushing and pulling and indicated that this was the reason why he was switching from a welding job to retail. The store officially opened on June 3, 2017. He worked in that job from March 20, 2017 until November 10, 2017.
- [116] Mr. de la Garza worked Mondays, Tuesdays, and Wednesdays from 7:15 a.m. to 3:45 p.m. with Thursday off. He then worked Friday from 7:50 a.m. to 3:45 p.m. and Saturday from 9:00 a.m. to 5:00 p.m.
- [117] Mr. de la Garza said the job went well, though he did have to take stretching breaks and when necessary, relied on help from his coworkers. Mr. de la Garza's primary role was in-store sales with an emphasis on the welding and metalworking department. He looked after customers (both in person and via telephone), restocked shelves and completed other general duties. He indicated that standing was difficult due to the all concrete floor and that is why he would take stretching breaks.
- [118] Mr. de la Garza indicated he would be tired by Wednesday and welcomed the Thursday day off in order to rest for his Friday and Saturday shifts. The job went relatively well until, it appears, a difference arose between himself and the manager, which resulted in his termination on November 10, 2017.
- [119] Both Mr. Terry Allin, Mr. de la Garza's immediate manager at KMS and Mr. Chris Zacharias, the Human Resources manager testified in this matter. Their testimony does not detract from the fact that Mr. de la Garza was a good employee. Mr. Allin had documented Mr. de la Garza as a good employee and provided him with above-average scores in all categories during a performance review in August 2017.

- [120] Despite attempting to resile from this while testifying, Mr. Allin identified only one or two issues that ultimately led to Mr. de la Garza's termination. These issues were in effect minor differences of opinion. The "overtime issue" as discussed by Mr. Allin, was to a great extent precipitated by Mr. Allin's angry reaction to Mr. de la Garza seeking approval for overtime. As per company policy, Mr. de la Garza sought this approval for overtime when he was asked to assist a customer once his shift had clearly ended. Mr. Allin was unnecessarily provocative saying he would personally pay for Mr. de la Garza's overtime and trying to give him a 20-dollar bill in front of the customer.
- [121] Ultimately, Mr. Allin was unable to identify any real concerns with Mr. de la Garza's work performance. The KMS Tools Chilliwack store has undergone high employee turnover during Mr. Allin's tenure. Mr. de la Garza was a casualty of this approach.
- [122] Mr. Zacharias had no personal knowledge of the circumstances and simply parroted Mr. Allin's words. Indeed, Mr. Zacharias ultimately said KMS Tools let Mr. de la Garza go mainly because he did not attend a product knowledge event that was after hours and completely voluntary. All of this demonstrates KMS Tools had no basis for the termination of Mr. de la Garza. The defendants' argument that \$17,000 should be deducted for Mr. de la Garza's bad attitude at KMS Tools is therefore not sustainable.
- [123] Mr. de la Garza continues to look for work, and has recently had an interview with another company.
- [124] I do not agree that Mr. de la Garza took no practical steps to find remunerative employment. Following the gradual return to work program, Mr. de la Garza continued to rehabilitate his injuries with an eye on eventually returning to Remtec. He and Ms. Malinowski, his treating occupational therapist, continued to be in touch with Mr. Green to see if there was any possibility of a return to work, even when it became clear that Mr. de la Garza could not return to his previous position in the barrel department.
- [125] Furthermore, during that time, Mr. de la Garza began to work on a "back-up" plan if it was ultimately determined that he could not return to his pre-accident employment. He and Ms. Malinowski attempted to set the groundwork for a transition to work as a mortgage broker.
- [126] It is apparent that Mr. de la Garza did take practical steps to find remunerative employment during those two years. A reduction in past wage loss is therefore not appropriate.
- [127] Mr. de la Garza worked at Remtec for ten years from 2004 to 2015. In seeking employment after his termination from Remtec, his preference was to work in the welding field in some capacity, perhaps becoming a welding inspector. He inquired into this latter profession and ascertained that BCIT had a course at a cost of \$10,000. Mr. de la Garza discovered on further investigation that it involved outdoor work where he would have to carry heavy machinery in awkward positions. As a result, he concluded this would not be a good fit.

- [128] Mr. de la Garza investigated whether being a heavy equipment operator would be possible. He noted, however, that the requirement that the operator undertake maintenance on the machines would involve physically demanding work.
- [129] In 2016, he attended workshops with WorkBC in an effort to find employment. These workshops included writing effective resumes and learning about the "hidden job" market. He applied for a position at Tycrop, a local manufacturer of trailers, but did not receive an interview. As indicated earlier, in September 2016 he asked again if he could return to Remtec and was willing to work in any department where he could be accommodated. The company indicated, however, that it did not have a position due to the downturn in business. Shortly thereafter, on November 17, 2016 the company terminated his employment on the basis he could not undertake the tasks of his job.
- [130] In late December 2016, Mr. de la Garza applied to work as an investment advisor with Edward Jones. In January 2017, he underwent a telephone interview and moved onto the next round with his application. He was advised that he would need to go to Toronto for two months of training. Though the company would provide a salary of \$2,000 a month during the training, if he was not successful in the position, Edward Jones would seek the return of those funds, which ultimately could amount to \$70,000-\$80,000. He concluded this was not an acceptable risk.
- [131] As noted earlier, Mr. de la Garza had explored becoming a mortgage broker. The work location of the one broker that responded, however, was in Vancouver and he concluded that the commute to Vancouver was too aggravating for his back.
- [132] Throughout this time, Mr. de la Garza had been using a number of websites to search for jobs, particularly using the "Indeed" job search website.
- [133] In early 2017, Mr. de la Garza was finally able to obtain an interview with Tycrop Manufacturing. While the interview went well, his weld test did not. The setup required him to stoop, and due to the pain this caused in his back, he could not concentrate on the weld. He was not successful in this application. Similarly, he interviewed at MJM Metals and performed a weld test that, again, he did not pass. He had the same issues and could not concentrate on the weld.
- [134] In March 2017, he was finally able to obtain a job with KMS Tools. This, of course, ended in November 2017.
- [135] Mr. de la Garza was evidently diligent in his job search efforts. Therefore, there will be no discount to his claim on the basis of a failure to mitigate wage loss by job search efforts. The award for past loss of earning capacity is therefore \$185,271.73.
6. Future Loss of Earnings - What is the appropriate award for future loss of earnings or income-earning capacity?

Legal Principles

- [136] In *Perren v. Lalari*, 2010 BCCA 140, the Court noted that the first inquiry in dealing with a claim of this nature is whether there is a substantial possibility of a future income loss. The Court stated at para. 32:
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss. [Emphasis in original.]
- [137] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 32-33, the Court discussed the assessment of an award for loss of future income as follows:
- [32] In my view comparator cases are of limited utility in the assessment of awards for future losses, generally. It is well settled that an individual's earning capacity is a capital asset: *Parypa v. Wickware*, 1999 BCCA 88 at para. 63. An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. The degree of impairment to the plaintiff's earning capacity depends upon the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue.
- [33] In valuing the award, the judge must consider the likely duration of the plaintiff's prospective working life and must account for negative and positive contingencies which are unique to each case. The final award must be fair and reasonable in all the circumstances. This assessment requires a very fact-intensive, case-specific inquiry. I am persuaded by what Macfarlane J.A. said in *Lawin v. Jones*, 98 B.C.L.R. (2d) 126, [1994] B.C.J. No. 2107 at para. 35, about the lack of utility in comparisons to other cases:

[G]iven the fact that we cannot foresee the future, it is impossible in a case like this to find any comfort in resort to other cases where the future may be more predictable. Judges will differ, perhaps widely, in making assessments in cases which have been said to depend on what may be seen in a crystal ball. What is certain is that a trial judge who hears and observes the witnesses is in a much better position than an appellate judge to come to a conclusion as to what is fair and reasonable in the circumstances. ...

[138] In *Perren*, at para. 11, the Court discussed the approach to be taken in the context of a future loss of earning capacity where the loss, though proven, was not measureable in a pecuniary way. The Court endorsed the approach set out in *Brown v. Golai* (1985), 26 B.C.L.R. (3d) 353 (S.C.):

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[139] In conducting the analysis under this head, the Court then has to consider the contingencies, both positive and negative, that are applicable in arriving at a final sum: *Perren*, para. 29.

Application to the Facts

[140] Mr. Derek Nordin, a vocational consultant, testified as to his opinion on how the injuries affected Mr. de la Garza's prospects for future employment. He indicated that a job similar to the KMS Tools job would be suitable for Mr. de la Garza provided some accommodation such as sitting when necessary could be provided. An inside sales job was probably within his abilities. With respect to retraining, Mr. Nordin indicated that Mr. de la Garza's age (now 51 years old), and his background being largely in hands on work such as welding, meant that it was unlikely he would become retrained in a different career. Despite that, Mr. Nordin further said that Mr. de la Garza indicated in his interview that he was looking for a job.

[141] Mr. Nordin noted in his opinion report that Mr. de la Garza was not a candidate for attainment of more education now. In particular, at para. 56 of his report he notes:

While I think it likely he has the cognitive potential to do so, realistically, he is now 51 years of age and has not been in school (except for welding) since 1984. Further, he now has low back pain ("24/7"), limited sitting tolerance and possible mood issues (i.e., as per results of the BDI and BAI). Given these factors (even accepting potential retraining options could be identified for Mr. de la Garza) I do not think it likely he would now undertake formal retraining. Consequently I do not have any retraining recommendations for him at this time. *[Italics in original.]*

[142] He then concludes at para. 62:

in my opinion, Mr. de la Garza's involvement in the June 2014 MVA has had a significant impact on him vocationally. He is no longer suited to his pre-MVA job (and career) as a welder, and he is now 51 years of age having to redefine himself in the workforce (and he must do so with physical limitations and the need for accommodation from an employer). As a result, he has reduced employment options, reduced employability and in my opinion, is unlikely to match his pre-MVA earnings/earning potential absent of the MVA.

[143] In cross-examination, when questioned about whether Mr. de la Garza could become a mortgage broker, Mr. Nordin noted that while he could train for it, he would likely have difficulty finding a job. He would be competing against others who have both experience and post-secondary education. That reality makes it unlikely that he would obtain a job in this area.

[144] Dr. Colleen Quee Newell, a vocational consultant with a Ph.D. in Counselling Psychology, testified on behalf of the defendants in this matter. She provided a general report dated January 22, 2018. This report was based on a review of the December 30, 2015 report of Ms. Malinowski, the November 19, 2015 report of Dr. Matishak and the November 24, 2017 report of Dr. Heran. Dr. Quee Newell did not conduct an assessment of Mr. de la Garza.

[145] The report as a result was not particularly helpful and contained inaccurate assumptions. The inaccuracies included that Mr. de la Garza had worked as a supervisor and had started a mortgage broker course, neither of which were true. Furthermore, there was some question as to her assessment of the availability of the jobs in Chilliwack. These shortcomings adversely affected her report. Dr. Quee Newell was also argumentative in cross-examination. This detracted from the validity of her opinion, potentially straying into advocacy. Mr. Nordin conducted an assessment of Mr. de la Garza and his opinion has more weight.

The Economists

[146] Mr. Curtis Peever, an economist, provided an opinion for the plaintiff on the estimate of present values of future employment income (or losses of employment incomes expressed) as lump sum values with a valuation date of April 23, 2018 (the first day of trial). In doing so, he used actuarial income multipliers that can be used to calculate present values of future employment incomes.

- [147] Mr. Mark Szekely, another economist, provided an opinion for the defendants, but on an "economic basis" as opposed to a predominantly actuarial model. He noted that income multipliers estimated on an economic basis account for labour market contingencies, such as the likelihood of part-time work or the likelihood that a person will leave the labour force early.
- [148] I agree that the evidence has established that Mr. de la Garza's earning capacity has been impaired by his injuries and will continue to be so impaired into the future. Given that his future prospects of employment and respective wages are unknown, the loss of "capital asset approach" as per Brown, is the best means by which to quantify his loss of earning capacity.
- [149] The plaintiff points out that all of the factors from Brown (also see para. 197 in Hardychuk) apply to Mr. de la Garza:
1. Mr. de la Garza is less capable of earning income in all types of employment. Mr. Nordin, the vocational consult opined (and Dr. Quee Newell even agreed) that Mr. de la Garza's disability renders him less capable of obtaining employment generally. His age, limited driving capacity, and lack of experience in any other field mean that he is at a significant disadvantage in terms of being competitive as a prospective employee.
 2. For the same reasons, Mr. de la Garza is less marketable and attractive as a potential employee. His need for accommodations, his advanced age, his limited ability to retrain, and his lack of useful work experience mean he will be at the bottom of the pool of candidates for any job he applies for.
 3. Mr. de la Garza has lost the ability to take advantage of job opportunities that would have otherwise been open to him. As discussed above, he could have moved into one of the other departments at Remtec if he was capable of physical work. Similarly, he could have moved to other welding positions that were even more lucrative than his job at Remtec. Furthermore, Mr. de la Garza has lost the ability to apply for jobs outside of the Chilliwack area due to his limited sitting/driving capacity.
 4. Mr. de la Garza is less valuable to himself in the context of a competitive labour market. Again, the evidence is clear that Mr. de la Garza loved being a welder and was proud of his job. As a result of the injury and subsequent loss of that job, he has become a shell of his pre-accident self. Any job he does obtain will likely be similar to what he did at KMS Tools and he will be similarly vulnerable to losing his job on almost no notice.
- [150] But for the accident, Mr. de la Garza would have continued to work at Remtec until at least age 65, earning at least \$80,000 annually.
- [151] Applying the appropriate discount rate, Mr. Peever's multiplier to age 65 under the actuarial model is 11.348 (\$11,348/\$1,000). Applying this multiplier to the projected annual income of \$80,000 results in a projected without-accident earnings to age 65 of \$907,840.

- [152] The plaintiff submits it is not appropriate to apply any general contingency reduction to this number because of the stability of Mr. de la Garza's work with Remtec and his intentions to continue working there until at least age 65.
- [153] The defendants, however, say in relation to Mr. de la Garza's potential future income, that if the Court were to assume that Mr. de la Garza would retire at age 65, the normal retirement age for Remtec employees, his lifetime earnings at Remtec if paid today would be \$655,099.40; multiplying his expected pre-trial income of \$79,579.87 by 8.243 (the multiplier of future income to age 65 as identified in Mr. Szekely's report).
- [154] Mr. de la Garza has, however, demonstrated that he is both capable of and interested in working, and has, in fact, been employed since the accident. At KMS Tools his entry level salary was \$17, and within six months he had earned a raise to \$18 per hour. The defendants say Dr. Quee Newell indicated there are a number of jobs that largely meet the criteria required for Mr. de la Garza's situation, namely that there is a relatively low barrier to entry, there is the possibility of postural accommodation, and there is no requirement for heaving lifting.
- [155] If the Court presumes that Mr. de la Garza will earn on average until retirement at age 65 between \$20/hour and \$24/hour, then the chart of ranges of wage loss is as follows:

Potential lifetime Average Annual Salary

Lost Future Earnings

Potential Future Earnings

Annual Loss

Multiplier to age 65

Lifetime Loss

\$24

\$79,579.87

\$49,920.00

\$29,659.87

8.243

\$244,486.31

\$23

\$79,579.87

\$47,840.00

\$31,739.87

8.243

\$261,631.75

\$22

\$79,579.87

\$45,760.00

\$33,819.87

8.243

\$278,777.19

\$21

\$79,579.87

\$43,680.00

\$35,899.87

8.243

\$295,922.63

\$20

\$79,579.87

\$41,600.00

\$37,979.87

8.243

\$313,068.07

[156] The defendants also say in light of Mr. de la Garza's two previous careers (courier and welder) that he would excel in a new profession until he reaches a plateau. The defendants submit that this would result in an average hourly wage of \$22/hour over a 13-year career. This would represent an entry level position in whatever Mr. de la Garza decides to pursue in the mid-high teens/hour and an ending salary in the \$30/hour range for the later few years of his working life which is a realistic prospect for many of the job opportunities suggested by Ms. Quee Newell.

- [157] This view of Mr. de la Garza's future earning potential is not realistic. Dr. Quee Newell had not met Mr. de la Garza. She could only offer a general opinion which, as noted by the plaintiff, has not been found to be helpful in similar circumstances (*Lauriente v. Schoonhoven*, 2017 BCSC 2246). She also strayed into advocacy. Thus, I give limited weight to her testimony.
- [158] It is far more likely that Mr. de la Garza could, with the right accommodation, work in a job with a payrate similar to his position with KMS Tools. His need for accommodation does, however, make him less competitive in the job marketplace. Based on his experience at KMS Tools, \$18/hour is a reasonable estimate of what Mr. de la Garza's income will be in the future. Mr. Peever estimated Mr. de la Garza's pre-accident projected income to age 65 of \$80,000 with the appropriate discount rate applied would be \$907,840. His post-accident \$18/hour income at the \$18/hour x 40 hours x 52 weeks is \$37,440 annually. He is likely to work to age 70, given his financial situation. While Mr. Szekely applies a labour force participation rate from age 52 to age 70 of 68%, given his financial situation, as noted by the plaintiff, 80% is a more feasible contingency given his intentions to work until age 70.
- [159] Mr. de la Garza may well face periods of unemployment and therefore a 25% contingency should be applied to the \$37,440 to reduce it to \$28,080. Not applying any further contingency for unemployment as it is accounted for by the reduction noted above, and applying a multiplier of 11.408 yields a projected with-accident future income of \$320,337. This 11.408 multiplier calculation is derived with reference to Mr. Szekely's report at Table 2 (note that, as indicated above, the 7.5% amount for unemployment has been omitted due to unemployment having already been accounted for):
- $\$1000 \times 80\%$ (determined to be the feasible labour force participation rate for Mr. de la Garza at age 70) = \$800;
 - $\$800 \times 4.4\%$ (average of percentages for part-time/other employment) = \$764.80;
 - $\$764.80 \times 14.916$ (fully adjusted and discounted income) = \$11,407.76;
 - $\$11,407.76/\$1,000$ = a multiplier of 11.408.
- [160] While the plaintiff says he would have worked to age 70 even with pre-accident income and would be able to supplement his annual income by \$50,000 until age 70, this is less predictable. It is more likely he would earn \$18/hour and therefore similar figures would apply. Applying the appropriate multiplier for income earned from age 65-70, 3.57, with \$28,080 = a possible \$100,246. The 3.57 multiplier calculation is derived with reference to Mr. Peever's report at Table 1:
- $\$14,918$ (the value of the multiplier up to age 70) - $\$11,348$ (the value of the multiplier up to age 65) = \$3,570; and
 - $\$3570/\$1,000$ per year = 3.57.

[161] Therefore, a fair and reasonable award is \$907,840 (projected without accident earnings) + \$100,246 (projected income earned from 65-70 years of age, factoring in the age that Mr. de la Garza intends to work until) - \$320,337 = \$687,749.

Special Damages

[162] The parties have agreed on the quantum of special damages for the plaintiff in the amount of \$2,452.69. The plaintiff has received certain treatment and rehabilitation expenses from his accident benefits insurer, pursuant to Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 105/2018. The defendants have agreed not to seek a deduction for expenses, pursuant to section 83 of the Insurance Vehicle Act, R.S.B.C. 1996, c. 231 from any judgment awarded to the plaintiff in this action.

CONCLUSION

[163] In summary, I have awarded the following amounts:

.

Non-pecuniary damages

\$115,000.00

.

Loss of housekeeping and yardwork

(\$10,000 - past)

(\$30,000 - future)

.

Past loss of income

\$185,271.73

.

Future loss of income earning capacity

\$687,749.00

.

Future cost of care

\$25,500.00

.

Special damages

\$2,452.69

TOTAL

\$1,055,973.42

[164] If the parties cannot agree on costs, they are at liberty to make submissions.

"The Honourable Madam Justice E. Burke"

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