

CANADA / JUDGMENT

## Dhaul v. Meahan

2019 BCSC 990

### COURT

Supreme Court of British Columbia

### DECIDED

18 June 2019

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2019 BCSC 990 Dhaul v. Meahan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhaul v. Meahan,

2019 BCSC 990

Date: 20190618

Docket: M177295

Registry: New Westminster

Between:

Bobby Dhaul

Plaintiff

And

Derrick L. Meahan,

South Coast British Columbia Transportation Authority and

Frank Raviolos

Defendants

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Plaintiff:

Charles D. Jago and

Christine Purewal

Counsel for the Defendants:

Kiran K. Dhaliwal and Scott Somers

Place and Date of Trial:

New Westminster, B.C.

October 29-31, November 1-2, 5 & 7, 2018

Place and Date of Judgment:

New Westminster, B.C.

### **June 18, 2019**

- [1] The plaintiff claims for damages suffered as a result of two motor vehicle accidents, which occurred April 23, 2014 ("the 2014 MVA") and July 14, 2015 ("the 2015 MVA"). Liability has been admitted by the defendants in both actions.
- [2] Mr. Dhaul has claimed significant damages for past wages and future loss of earning capacity with his employer, Delta Marpole Services Ltd. ("Delta Marpole"). He submits when the 2014 MVA occurred, he was in training for the position of local haul dispatcher with Delta Marpole. His position is that but for the injuries suffered in the 2014 and 2015 MVAs, he would have attained the position of local haul dispatcher. Instead, due to memory and other cognitive issues including depression caused by both MVAs, he continued in a less complex position at a lower salary than he would have attained if he had advanced to the position of local haul dispatcher.
- [3] Although much of the evidence at trial focused on the claims for lost income, Mr. Dhaul also advanced claims for non-pecuniary damages, the cost of future care, loss of housekeeping capacity, a subrogated claim, an in-trust claim and special damages.

### **Mr. Dhaul Before the MVAs**

- [4] At the time of the 2014 MVA, Mr. Dhaul was forty years old and was living in a home in Burnaby B.C. with his wife, daughter and his parents. Previous to the accidents, he had achieved a degree in economics from Simon Fraser University and had completed courses in securities and financial management at the British Columbia Institute of Technology.
- [5] Mr. Dhaul previously worked in management for a car rental company and as a fleet manager for the Vancouver 2010 Olympics before joining Delta Marpole on March 4, 2013.
- [6] The person who hired Mr. Dhaul at Delta Marpole was the operations manager, Rejinder Mattu. Mr. Mattu testified at trial and stated that he had hired Mr. Dhaul to train and eventually work into the position of local haul dispatcher and he would oversee Mr. Dhaul's progress. Mr. Mattu stated that as Mr. Dhaul had no prior experience in the trucking

business, he was not prepared to guarantee the position to Mr. Dhaul in the future. He added that since Mr. Dhaul had a university degree he was hopeful that he was trainable but that the position required toughness, knowledge of customers and regulations, knowledge of the many drivers, the ability to make quick decisions and to exude confidence in carrying out his tasks. He stated he would not guarantee promotion and continued employment to Mr. Dhaul as Mr. Dhaul needed to train for the position and in so doing, show that he was able to cope with the demands of the position.

- [7] Training was anticipated to take up to three years. Upon commencing work, Mr. Dhaul worked as an assistant to Ken Kovasenko, who at that time was the primary local haul dispatcher. Unfortunately, Mr. Kovasenko was unable to work past December 2014 and died in March 2015. After Mr. Kovasenko left his job at Delta Marpole, Mr. Mattu stepped in and took over the role of primary local haul dispatcher with Mr. Dhaul assisting him.
- [8] Mr. Dhaul testified the job did have physical aspects to it which included lifting boxes of approximately thirty pounds. Mr. Mattu testified there was no heavy lifting in the position of local haul dispatcher.
- [9] Mr. Mattu, who I accept was hopeful that Mr. Dhaul would in time be able to cope with the stresses and demands of the position of prime local haul dispatcher, testified he was told by Mr. Kovasenko prior to his passing that he had concerns regarding Mr. Dhaul's suitability for the job. He continued to testify that in September or October of 2014, Mr. Kovasenko told him he may have to reconsider Mr. Dhaul as his potential replacement, that Mr. Dhaul's skill sets were "not there", particularly his lack of memory.
- [10] Considering the statements to Mr. Mattu by Mr. Kovasenko were essentially hearsay, I accept the accuracy of the statements as related by Mr. Mattu under the principled rule of hearsay since there was an obvious necessity due to the passing of Mr. Kovasenko and the reliability of Mr. Mattu's testimony. I found Mr. Mattu to be very knowledgeable on the trucking business, was forthright and direct in his answers, and particularly since he had made an investment in Mr. Dhaul's success by hiring Mr. Dhaul and assigning him to work with Mr. Kovasenko. I am satisfied Mr. Mattu wanted Mr. Dhaul to succeed and eventually become the prime local haul dispatcher.
- [11] The 2014 MVA occurred in April of 2014, slightly over a year after Mr. Dhaul had been hired.
- [12] Mr. Mattu also testified that at the time of the 2014 MVA, Mr. Dhaul was still in training as an assistant local haul dispatcher working under the supervision of Mr. Kovasenko who had expressed concerns regarding Mr. Dhaul's capabilities before the 2014 MVA. Mr. Kovasenko expressed concerns over Mr. Dhaul's abilities but mainly his memory, both before and after the 2014 MVA.

- [13] Mr. Mattu also testified that before the 2014 MVA, "it", i.e., the local haul dispatch position, was "totally beyond his capabilities, it was still a big question prior to the accident if he would get the prime local haul dispatch position, that he was not showing the necessary skill sets which became really evident when I stepped in", i.e., after Mr. Kovasenko left.
- [14] Regarding his health prior to the 2014 MVA, Mr. Dhaul testified that he had been pain free with no neck or back pain. He led an active life which included playing soccer, hiking and spent considerable time with his daughter during her activities. Also prior to the 2014 MVA, Mr. Dhaul worked on chores around the house including yard work, vacuuming, washing the cars and also helping out his elderly parents. Mr. Dhaul also testified as to his plans to take care of his aging parents in the future as is common in the South Asian community.
- [15] Mr. Dhaul's wife, Susan Dhaul, testified regarding Mr. Dhaul having been an active family man, athletic, a great help around the house, that he was happy and not negative. Ms. Dhaul stated they used to run together, go out often for dinner and other activities and enjoyed intimacy.
- [16] Mr. Dhaul's mother also briefly testified regarding the assistance Mr. Dhaul provided to her and his father around the home.
- [17] In addition to his work at Delta Marpole, Mr. Dhaul also worked as a security guard on weekends to earn additional income. He has not returned to that work since the accidents.

## The MVAs

- [18] In the 2014 MVA, Mr. Dhaul was stopped in his vehicle at a traffic light when he was "rear-ended hard". He heard a crack in his neck and soon experienced significant pain. He continued on to work after the accident and later in the day went to Royal Columbian Hospital. After the 2014 MVA Mr. Dhaul described having significant headaches, neck, back and shoulder pain, numbness in his arm and right leg.
- [19] The 2015 MVA also occurred while Mr. Dhaul was stopped at a red light when his vehicle was struck from behind by a bus. Mr. Dhaul's vehicle was actually struck by the bicycle rack on the front of the bus. He testified that the accident aggravated his pain in the areas affected in the 2014 MVA but also suffered pain in his left arm and leg.
- [20] After the 2015 MVA, Mr. Dhaul described the pain in his neck and shoulders was "reactivated" and the headaches increased to three or four hours per day "almost every second day". A video recording from the bus indicated a low impact accident and Mr. Dhaul testified that the damage to his new vehicle was so minimal that he did not have it repaired. Mr. Dhaul did not seek medical assistance until August 15, 2015, approximately one month after the 2015 MVA.

**Mr. Dhaul After the MVAs**

- [21] Mr. Dhaul testified that on a scale of one to ten, the pain from his headaches and neck is at a level of seven. He added that since the accidents, his shoulder pain has improved.
- [22] Mr. Dhaul also testified the pain from the accidents has affected his mood, and memory, and he feels depressed. In order to manage his neck and back pain in particular, Mr. Dhaul was prescribed pain killers and muscle relaxants. In 2016 he began to receive Botox treatment which, he stated, resulted in some improvement in his headaches and muscular pain.
- [23] Currently, Mr. Dhaul described ongoing significant neck pain and limited movement in his neck which was apparent from observing him during his testimony. He reports ongoing numbness in his arms and left leg as well as low back pain. Physiotherapy has helped improve his shoulder pain.
- [24] Since the accidents, Mr. Dhaul has described sleep deficiencies which have recently improved, depression and frustration at his inability to continue with household chores and family activities and in his daily work.
- [25] Mr. Dhaul's wife, Susan Dhaul, and his parents, who live with the plaintiff's family, all testified as to Mr. Dhaul's activities, moods and their observations of how he coped with his pain. Based upon all of their testimony, it is apparent that Mr. Dhaul's daily life experiences and quality of life changed considerably following the 2014 MVA. With physiotherapy, massage, Botox treatments and prescriptions he is experiencing less pain and discomfort. Throughout the evidence of all family members, Mr. Dhaul himself and even his fellow employees, his stoicism stands out. He rarely complains, even though it has been apparent to those witnesses that he has been in various stages of pain and depression since the accidents.
- [26] Also, family members testified that since the accidents Mr. Dhaul has rarely exercised with his daughter and has not been involved in attending his daughter's soccer games and other activities whereas he previously had been very much involved and encouraging of his daughter's activities.

**Mr. Dhaul's Work History Following the MVAs**

- [27] Mr. Dhaul testified as to having missed two weeks work after the 2014 MVA which was contradicted in the testimony of Mr. Mattu who said Mr. Dhaul missed a few days of work after the first accident. Payroll records indicated Mr. Dhaul missed six days of work after the first accident.
- [28] The parties agree that Mr. Dhaul lost time at work in his part-time work as a security guard.
- [29] After the first accident, Mr. Dhaul stated that he had been moved into a "line haul dispatch" position with his company and that, although he could not be sure when that occurred, he believed the transfer occurred in 2017. Mr. Mattu testified that Mr. Dhaul was moved to the

line haul dispatch position in February 2018. The line haul dispatch position involved dispatching longer haul routes into the U.S. and that the position is not as challenging nor as stressful as the "primary local haul dispatch" position. There are fewer daily pick ups and drops and only six trucks to dispatch in the line haul dispatch position, as opposed to twenty trucks to manage daily in local haul dispatch position. The line haul dispatch position also offered a lower salary than that of "local haul dispatch".

- [30] Mr. Mattu testified that at the time of the 2014 MVA, Mr. Dhaul was training under Mr. Kovasenko as an assistant local haul dispatcher. He said Mr. Kovasenko had expressed concerns regarding Mr. Dhaul's capabilities before the 2014 MVA.
- [31] After the 2014 MVA, Mr. Kovasenko advised Mr. Mattu he may reconsider Mr. Dhaul for the local haul dispatcher role, and expressed concerns over Mr. Dhaul's abilities but mainly his memory, both before and after the 2014 MVA.
- [32] Mr. Dhaul was moved to line haul dispatch as it was a much easier job involving fewer trucks with fewer daily moves, less activity generally for the dispatcher, "less going wrong" and less problem solving.
- [33] Mr. Mattu added that the prime local dispatcher position had a base pay of \$75,000 per annum plus a bonus, usually in the range of \$5,000 to \$10,000 with a vehicle paid for by the company. He stated that with salary and benefits the prime local haul dispatcher effectively earned in the range of \$100,000 per annum. Also, he testified that if things had worked out for Mr. Dhaul in the prime local haul dispatch position, he would be paid what the current prime local haul dispatcher was earning.
- [34] In the line haul position, he said Mr. Dhaul was "capped" in salary at \$55,000 per annum with no vehicle benefits.
- [35] On cross-examination, Mr. Mattu stated:
- Mr. Dhaul was hired for the primary local haul dispatch position but there was no guarantee given to Mr. Dhaul that he would reach that position, and that he needed to see if Mr. Dhaul was the right fit for that position.
  - He repeated Mr. Dhaul's memory problems were present from the beginning.
  - The learning curve for the position of prime local haul dispatch was three years at most and eighteen months after his hiring, Mr. Mattu was concerned regarding Mr. Dhaul's ability to handle the job. He added that by the time Mr. Kovasenko left for health reasons in the fall of 2014, Mr. Dhaul was not fully trained.
  - Before and after Mr. Kovasenko's departure, Mr. Mattu had observed Mr. Dhaul at the assistant position and had concerns as to whether he had the requisite skills needed for the prime local haul dispatch position.

· Subsequent to the 2014 MVA, Mr. Dhaul complained regarding his injuries, neck pain at first and that he worried for his job. He added that Mr. Dhaul was doing the "best he could, tried hard but it was beyond his capabilities". In any event, he confirmed that Mr. Dhaul received bonuses in 2015 and 2016 because he "tried hard".

· Mr. Mattu was never aware of the 2015 MVA.

· Referring to Mr. Dhaul, he testified that before the 2014 MVA the local haul dispatch position was "totally beyond his capabilities".

[36] The current primary local haul dispatcher as of May 2017, Chris Parker, also testified for the defence. Mr. Parker previously had twenty years experience as a dispatcher before accepting the position with Delta Marpole.

[37] Mr. Parker was asked questions on direct examination regarding his experiences with Mr. Dhaul, who was working with Mr. Parker as his assistant local haul dispatcher and commented as follows:

· Mr. Dhaul did not like confrontation which is common in the position.

· Mr. Dhaul was unable to multi-task as required.

· Mr. Dhaul had no "people skills".

· Mr. Parker was not aware while working with Mr. Dhaul that Mr. Dhaul had any injury which was affecting his work.

· Mr. Dhaul was removed from the role of assistant local haul dispatcher after three months of working together. He noted that Mr. Dhaul had not gained the respect of the drivers involved in local haul.

[38] On cross-examination, Mr. Parker noted a dispatcher's lack of concentration makes the local haul dispatcher position very difficult, that line haul was easier to administer and also that physically, there was only a requirement to lift a box of way bills once per month.

#### Medical and Other Evidence

#### Dr. Howard Wong

[39] Dr. Wong has been Mr. Dhaul's family doctor since 2014 and prepared a report based upon his clinical records and recollections of attending to Mr. Dhaul and other reports prepared by physicians in connection with this litigation. He diagnosed Mr. Dhaul to have a soft tissue whiplash-type injury to his neck/upper back which he stated explained the majority of his shoulder pains as well. Dr. Wong also identified right thigh numbness and pain, and right arm numbness, both of which he opined were likely caused by the accidents.

- [40] Dr. Wong referred to "feelings of depression" and on June 25, 2014 documented sleeping difficulty, emotional distress and feeling tense while driving although not severe enough to warrant medications or a referral to a psychologist. No major psychological issues were documented after June 2014.
- [41] Dr. Wong opined that Mr. Dhaul had reached a plateau in recovery and stated at p. 5 of his report that "[a]ctive rehabilitation and a supervised exercise program would be expected to maintain/improve function in the face of chronic pain and hopefully help address his weight gain issue". Mr. Dhaul has gained approximately 40 pounds since the accidents.

### **Dr. Zeeshan Waseem**

- [42] Dr. Waseem was a witness for the plaintiff and is a physiatrist qualified to opine on issues relating to rehabilitation. Dr. Waseem prepared two reports dated May 30, 2017 and July 25, 2018.
- [43] Significant opinions and testimony from Dr. Waseem include the following:
- 2017 Report, p. 12 - "Mr. Dhaul appears to have initially sustained sprain/strain soft tissue injuries predominantly of the cervical spine as a result of the [2014 MVA] and re-injured the cervical spine in the [2015 MVA]. The injury to the cervical spine has resulted in chronic myofascial pain and post-traumatic headaches with both migraine and cervicogenic features".
  - 2017 Report, p. 9 - "Mr. Dhaul previously took Lyrica after the [2014 MVA] and "discontinued after the pain resolved" and . . . previously took Aventyl after the [2014 MVA] and discontinued use after his depression resolved".
  - 2017 Report, p. 13 - Numbness in his right thigh could not be traced to the accidents.
  - 2018 Report, p. 5 - "Physiotherapy and massage therapy help alleviate symptoms with the benefit lasting for a couple days" and "Mr. Dhaul's current exercise routine includes daily walking for 10 minutes. Home exercises are performed every other day for 10 minutes".
  - 2018 Report, p. 10 - Continuing neck pain and headaches are likely the result of Mr. Dhaul's head having struck the headrest of his vehicle. Although one report relied upon by the defence was of Mr. Dhaul striking his neck, not his head, on the headrest, the Court accepts his head must have struck the headrest, simply because it would logically be difficult for one's neck to strike a headrest without the head also being impacted.
  - 2018 Report, p. 6 - Mr. Dhaul reported sleeping some eight hours per night with disruptions due to pain and numbness.
  - 2018 Report, p. 10 - "Furthermore, given the chronology of onset of his lower back pain and the lack of apparent injury to the lumbar spine, this complaint would not appear to be related to the subject accidents". This opinion was reinforced on cross-examination.

· 2018 Report, p. 11 - "The prospects for a full symptomatic recovery are poor. He will continue to experience neck pain and headaches. His physical condition would be considered chronic and unremitting and, therefore, permanent".

· Testimony - Dr. Waseem reported Mr. Dhaul with a normal manner of walking, some movements in his shoulder were reduced by 25%. The doctor further reported that Mr. Dhaul's only disability at work currently would be his inability to lift heavy objects, although the testimony of Mr. Mattu was that there was no heavy lifting involved in the job.

[44] Dr. Waseem recommended active rehabilitation for endurance and strength, a gym membership for one year, intermittent physiotherapy and massage along with the continued use of Botox for headaches.

### Dr. Mohammad Nagaria

[45] Dr. Nagaria is a neurologist with a specialty in movement disorder, headaches and sleep disorders who provided a report dated July 4, 2018 who found Mr. Dhaul's "most likely diagnosis" to be post traumatic concussion headache and soft tissue injury arising from the accidents. The trauma to Mr. Dhaul's head referred to at p. 4 was likely having struck the headrest in his vehicle as a result of the impact of the 2014 MVA. At p. 6 of his report, the doctor says that "the neurological symptoms that Mr. Dhaul is presenting with are caused by the motor vehicle accident of April 23, 2014".

[46] At p. 7 of his report, Dr. Nagaria stated the following respecting his prognosis for Mr. Dhaul:

Based on the patient's history and neurological examination findings and review of the chart material and documents provided by your office, I am of the opinion Mr. Dhaul is partially disabled and I am of the opinion that with proper comprehensive pain management he may continued to improve in the foreseeable future. At the present time, his prognosis is guarded.

At the present time, based on the clinical evaluation of the patient as well as the neurological symptoms and findings, Mr. Dhaul has improved however, at the present time he still has some ongoing pain with regards to his headaches and neck pain. As a part of a comprehensive pain management approach he has been receiving Botox Injection Therapy for headaches and neck pain.

[47] Also at p. 7, Dr. Nagaria stated:

I am of the opinion Mr. Dhaul is partially disabled and I am of the opinion that with proper comprehensive pain management he will continue to present with the above symptoms in the foreseeable future.

[48] Finally, at p. 8, Dr. Nagaria stated:

At the present time Mr. Dhaul should continue with conservative treatments such as physiotherapy, massage therapy, active rehab, acupuncture, yoga therapy and strengthening exercises for the treatment and management of soft tissue injuries.

[49] Dr. Nagaria reported the plaintiff had experienced significant improvement in his pain following treatment and was hopeful of being able to stop taking pain medication including Botox, which Mr. Dhaul was taking for headaches but respecting. The plan was to ultimately end Botox treatment.

### **Dr. Abi Dahi**

[50] Dr. Dahi is a psychiatrist who examined Mr. Dhaul in April 2018 and issued a report on May 23, 2018. He diagnosed Mr. Dhaul with adjustment disorder with depressed mood but found he did not meet the criteria of DSM 5 for Post-Traumatic Stress Disorder.

[51] In his report, Dr. Dahi was asked the following question and gave the following answer at p. 6 relating to causation:

2. What is the likelihood that the above-noted accidents caused or materially contributed to the patient's injuries and/or conditions?

There are no other incidents or any situations, other than the MVAs in 2014 and 2015 that could have caused all of these limitations and subsequent conditions that have been listed in the answer to Question 1.

It is understood that, by process of elimination of any other possible causes of the conditions, the cause was most likely the accidents.

[52] At p. 7 of his report, Dr. Dahi stated:

His improved concentration and his ability to work full 8 hour shifts over the last year, indicate gradual improvement and recovery. One can hope by increasing the length and duration of his walks, in addition to physiotherapy and massage therapy, his body gets stronger, his weight decreases, and he will eventually be able to resume playing sports with his daughter and to carry and play with his infant son. Any improvement in his ability to more fully participate in his children's lives will improve his mood, which in turn will positively affect his self-esteem.

[53] Finally, Dr. Dahi stated at p. 8:

Mr. Dhaul is sensitized to the trauma because of his experience with the two MVAs in 2014 and 2015 and there is a degree of hypervigilance around driving or being in a vehicle.

[54] On cross-examination, Dr. Dahi agreed there was no treatment for adjustment disorder in this case.

**Dr. Jon Hummel**

- [55] Dr. Hummel is an orthopaedic surgeon who assessed Mr. Dhaul, prepared a report and attended trial for purposes of cross-examination. He diagnosed Mr. Dhaul as having suffered soft tissue injuries, which is not in dispute.
- [56] As an orthopaedic surgeon, Dr. Hummel testified to being qualified to provide a diagnosis of soft tissue injuries, however, agreed on cross-examination that in his practice he is not involved in treatment in that he would generally refer a patient to a physiatrist or other professional engaged in treatment who would also be qualified to provide a prognosis.
- [57] As a result, the Court found little evidence of value arising from the testimony of Dr. Hummel insofar as it related to the treatment and prognosis for Mr. Dhaul.

**Mr. Prasad Johar**

- [58] Mr. Johar is a physiotherapist who has treated Mr. Dhaul for several years for stiffness in his neck and shoulders. He has attended on Mr. Dhaul approximately twice a week since 2014.
- [59] Mr. Johar testified that physiotherapy provided some temporary improvement but overall there has been no significant improvement. He recommended active exercise for range and strength improvement.
- [60] Mr. Johar also testified to having treated Mr. Dhaul for low back pain which was not related to the accidents.

**Ms. Beraih Chandoo**

- [61] Ms. Chandoo is an occupational therapist who was qualified at trial to opine on a functional capacity evaluation undertaken by her and the cost of future care of Mr. Dhaul flowing from his injuries suffered in the accidents. Her report of November 12, 2017 was also filed in evidence.
- [62] In her report, Ms. Chandoo opined, in response to a question as to whether Mr. Dhaul meets the physical demands of the essential tasks of his employment:

· At p. 5 - "Based on the findings of the assessment completed on November 10, 2017, Mr. Dhaul does not appear able to competitively achieve the required tasks and light work associated with his job as a security guard. Mr. Dhaul's current limited ranges of motion, strength, and endurance also indicate that he would be unable to competitively achieve the tasks required of a logistics coordinator. Mr. Dhaul is currently able to achieve full-time work as a logistics coordinator due to workplace and job modifications provided by his employer. Mr. Dhaul is currently able to achieve full time work with modifications including: restriction from heavy lifting and workstation modifications and equipment".

· At p. 6 - Following reference to observed significant impairments of Mr. Dhaul with ranges of motion and ability relating to walking and sitting tolerance, carrying weights greater than "2-5 lbs.", tasks requiring overhead reaching and more, that: "Based upon the level of impairment of the neck, shoulder and trunk (cervical, thoracic and lumbar) which were observed during the FCE, Mr. Dhaul would not be able to achieve the job tasks of security guard or logistics coordinator with an alternate employer".

[63] I note the references to pain in the lumbar or lower reaches of the spine which were not the result of the accidents and first appeared in or about 2016.

[64] As well, I accept the testimony of Mr. Mattu to the effect that there is little if any heavy lifting involved in the job of local or line dispatch, the only exception being to lift a box of forms once per month which can be done by anyone in the dispatch area.

## Findings

[65] Mr. Dhaul has suffered soft tissue injuries which have become chronic and continue to effect his daily life and activities. The Court accepts that those injuries have reached peak improvement. The Court further accepts that treatment, including physiotherapy, active exercise and other treatments will continue to assist Mr. Dhaul in his activities. The Court also accepts that Mr. Dhaul has suffered depressed mood as a result of his ongoing pain which has affected his moods. Mr. Dhaul has been stoic and has avoided complaining about the pain and effects of his injuries, although, future treatment will likely continue to abate his pain and issues with moods as well as headaches.

[66] The Court accepts that Mr. Dhaul has experienced significant frustration as a result of the continuing pain he has experienced.

[67] What is not clear is how his cognitive issues have affected his work since the 2014 MVA in light of the evidence of the concerns of Mr. Kovasenko and Mr. Mattu as to Mr. Dhaul's ability to cope with the demands of the positions of local and line haul dispatcher prior to the accidents.

[68] Regarding Mr. Dhaul's credibility, I accept that there has been some inconsistent reporting by Mr. Dhaul to the medical experts and as between his testimony at trial compared to that of his examination for discovery. However, those inconsistencies are not of great consequence. Some minor inconsistencies are to be anticipated without going to the root of a witness's testimony.

## Non-Pecuniary Damages

[69] Mr. Dhaul seeks an award of non-pecuniary damages in the range of \$100,000 to \$140,000, according to the several authorities submitted to the Court by counsel.

[70] Defence submissions suggest an award for non-pecuniary damages in the area of \$85,000.

[71] Both counsel have referred to the factors for consideration in arriving at appropriate compensation for non-pecuniary damages as detailed in the oft-quoted decision of *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46 [Stapley]. I will not repeat those factors in these reasons but all have been considered in assessing Mr. Dhaul's claim for non-pecuniary damages.

[72] The authorities referred to by Mr. Dhaul include the following with my comments:

- *Ferguson v. Watt*, 2018 BCSC 1587 - The plaintiff was an operating room nurse and was unable to return since the accident to the operating room "where her passion for her profession is rooted" at para. 4. Madam Justice Marzari found significant impairment to the plaintiff's enjoyment of life but emphasized "most significantly" her injuries "affected her identity as a capable and significant contributor to the direct care of patients, and has led to her to question her own worth" at para. 196. Also, the injuries suffered in that case were more extensive than those endured by Mr. Dhaul. The award for non-pecuniary damages was in an amount of \$140,000. In the case of Mr. Dhaul, he had not received an education and the experience of a profession such as nursing in the case of Ms. Ferguson where the loss of her ability to continue with her profession was demoralizing.

- *Kingston v. Warden*, 2017 BCSC 794 - An award of \$100,000 was granted to the plaintiff who suffered headaches together with neck pain. She also suffered an injury to her left breast implant in the accident which led to surgery. The plaintiff was a personal trainer whose very active physical life was significantly impaired and she was able to work significantly less time than before the accident.

- *Evans v. Keill*, 2018 BCSC 1651 - The plaintiff received an award of \$110,000 in non-pecuniary damages for neck, mid and upper back, shoulder, headaches and psychological injuries which interfered with her ability to do any physical work. Also following the accident, the plaintiff suffered two major depressive episodes and somatic symptom disorder, attempted suicide on two occasions and began to drink excessively. Fortunately, the plaintiff eventually had "reworked her life into a place where she is happy": para. 170. The effect of the injuries on the plaintiff's lifestyle and emotions was much more grave than in the case of Mr. Dhaul.

[73] The plaintiff also referred the Court to the decisions of *Lauriente v. Schoonhoven*, 2017 BCSC 2246; *Scelsa v. Taylor*, 2016 BCSC 1122; *Kam v. Van Keith*, 2015 BCSC 1519; and *Parfitt v. Mayes*, 2006 BCSC 125 which were in a range of \$100,000 to \$125,000 for non-pecuniary damages, all of which can be distinguished from the situation of Mr. Dhaul on similar grounds as the cases referred to above.

[74] The defence has referred to two decisions regarding the appropriate quantum of non-pecuniary damages. Those are *Larsen v. Moffett*, 2015 BCSC 222 [Larsen] and *Gleason v. Yoon*, 2015 BCSC 586 [Gleason].

- [75] In *Larsen*, the plaintiff continued work in the construction industry at a reduced level with similar neck and back pain plus headaches and reported problems working with a computer screen. The soft tissue injuries led to a negative effect on the plaintiff's sense of self-worth and emotional well being which was expected to continue in the future and resulted in an award of \$70,000.
- [76] In *Gleason*, the plaintiff was awarded \$75,000 in non-pecuniary damages as a result of soft tissue injuries to her upper back, neck and left shoulder and was suffering from post-traumatic thoracic outlet syndrome and headaches that continued for approximately one year following the accident.
- [77] After considering all factors as set out in *Stapley*, the extent of injuries to Mr. Dhaul, the effect of those injuries on his quality of life and comparing those factors with similar factors in the referenced authorities, I find a reasonable award for non-pecuniary damages in this case is \$90,000.

### Past Loss of Income and Future Loss of Earning Capacity

- [78] The principles applicable when determining both past and future loss of earning capacity were described by Madam Justice Dardi in *Midgely v. Nguyen*, 2013 BCSC 693.

235 The legal principle that governs the assessment for loss of earning capacity is that, insofar as is possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendants' negligence: *Lines v. Gordon*, 2009 BCCA 106 (B.C. C.A.) at para. 185. It is well-settled that an award for future loss of earning capacity represents compensation for a pecuniary loss: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 (B.C. C.A.) at para. 32. Compensation must be made for the loss of earning capacity and not for the loss of earnings: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 (S.C.C.); *X. v. Y.*, 2011 BCSC 944 (B.C. S.C.) at para. 188.

236 The recent jurisprudence of the Court of Appeal has affirmed that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 (B.C. C.A.) at para. 32. Regardless of the approach, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 (B.C. C.A.) at para. 19; *X. v. Y.* at para. 183.

237 As enumerated by the court in *Falati v. Smith*, 2010 BCSC 465 (B.C. S.C.) at para. 41, aff'd 2011 BCCA 45 (B.C. C.A.), the principles which inform the assessment of loss of earning capacity include the following:

(i) The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 (B.C. C.A.) at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.

(ii) The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C. S.C.), at 79, *aff'd* (1987), 49 B.C.L.R. (2d) 99 (B.C. C.A.). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* (1990), 75 O.R. (2d) 622 (Ont. C.A.), at 636 .

(iii) The court must assess damages for loss of earning capacity, rather than calculating those damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (B.C. C.A.) at para. 43. The assessment is based on the evidence, taking into account all positive and negative contingencies. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 (B.C. C.A.) at para. 11.

238 Although a claim for "past loss of income" is often characterized as a separate head of damages, it is properly characterized as a component of loss of earning capacity: *Falati* at para. 39. It is compensation for the impairment to the plaintiff's past earning capacity that was occasioned by his or her injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 (B.C. C.A.) at para. 30; *Bradley v. Bath*, 2010 BCCA 10 (B.C. C.A.) at paras. 31-32; *X. v. Y.* at para. 185.

239 While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27.

240 This court in *Falati* at para. 40 summarized the pertinent legal principles governing the assessment of post-accident, pre-trial loss of earning capacity and concluded that:

[40] ... the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity. ... As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 29,

What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[79] In light of the central issues, reiteration of the law on lost future earning capacity is warranted. The principles and standards bear repeating. The leading decision for assessing entitlement and quantum of claims for future loss of income or loss of future earning capacity is the Court of Appeal's decision in *Perren v. Lalari*, 2010 BCCA 140 [Perren]. The approach to wage loss applicable at the time this Court heard the case is summarized in *Goguen v. Di Maddalena*, 2018 BCSC 106.

- [86] In advancing a claim for the loss of income-earning capacity, the plaintiff must prove a real and substantial possibility of such loss, as opposed to a theoretical one. In other words, the award cannot be based merely on speculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 9 [Rosvold]; *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [Perren]. As observed by the Court of Appeal in *Kim v. Morier*, 2014 BCCA 63 at para. 7, the onus on the plaintiff is not a heavy one but must nonetheless be met in order to justify a pecuniary award. Where a real and substantial possibility of loss has been established, compensation is awarded based on an estimation of the chance that the event leading to such loss will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17 [Steward].
- [87] Quantification of loss is an assessment meant to reflect the non-speculative positive and negative contingencies at play in the particular case. As quantification is not a strict mathematical calculation, there is no particular formula or methodology to be employed, however, the court must base its decision on what is reasonable in all the circumstances: *Rosvold* at para. 11; *Jurczak v. Mauro*, 2013 BCCA 507 at para. 36.
- [88] Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185. The essential task of the court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.
- [80] Accordingly, in order for such a claim succeed, "[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": *Perren* at para. 32 [emphasis in original].

## Discussion

- [81] Mr. Dhaul has submitted his injuries are the cause of his inability to advance from assistant local haul dispatcher to prime local haul dispatcher, the latter position being the position he was hired to work towards under the tutelage of Mr. Kovasenko until Mr. Kovasenko was forced by health to leave the senior position.
- [82] I have previously stated in these reasons that Delta Marpole never did guarantee or promise Mr. Dhaul that after a period of training, which could have continued for three years, he would advance to the position of local haul dispatcher with an increased salary in a very demanding job. I accept the evidence of Mr. Mattu in the respect that when he hired Mr. Dhaul, he was aware that Mr. Dhaul had no previous experience in the trucking business, much less in the dispatch aspect of the trucking business. It was the intention of Delta Marpole to advance Mr. Dhaul into the prime local dispatch position if he was found to be capable of taking on that position, i.e., if he was found to have the skills and determination to be able to work his way into the prime local dispatch position.

- [83] Mr. Kovasenko expressed concern to Mr. Mattu prior to the 2014 MVA as to whether Mr. Dhaul possessed the skills necessary for the role of prime local dispatch, particularly his memory. Mr. Mattu testified that before the 2014 MVA the job was "totally beyond his capabilities".
- [84] If, before the 2014 MVA, Mr. Dhaul was unlikely to be able to secure promotion to the role of prime local haul dispatcher, the result would be that he would most likely remain in an assistant role in the local haul dispatch office. Alternatively, and what occurred in this case, was that Mr. Dhaul was eventually moved into the role of line haul dispatch, a role much less demanding than in local dispatch.
- [85] The claim of Mr. Dhaul is based upon the difference between what he did earn in his roles as assistant local haul dispatch and in line haul dispatch and the amount he would have made had he been promoted to prime local haul dispatcher. If it was unlikely that he would ever succeed in the promotion, then his claim based upon the salary he would have earned would fail.
- [86] Based upon all of the evidence on this issue, the Court finds Mr. Dhaul was unlikely to have eventually advanced into the prime local haul dispatch position. Even though Mr. Dhaul was well educated, with a Bachelor's degree from U.B.C. and other completed courses from B.C.I.T., the personality, aggressiveness, problem-solving nature required in the desired role were not traits within his skill set or compatible with his personality. That is not to say that Mr. Dhaul was not sufficiently intelligent to handle the position, only that his memory issues, lack of aggressiveness and not being able to obtain the respect of the truck drivers meant he was unlikely to succeed in the local haul dispatch role. He was unlikely to be promoted, and therefore unlikely to earn the salary and benefits that come with the promotion.
- [87] I accept the evidence of Mr. Mattu as stated previously as I found that he genuinely wanted Mr. Dhaul to succeed. He hired Mr. Dhaul. He admired Mr. Dhaul's determination, and acknowledged Mr. Dhaul had tried very hard to succeed. Mr. Mattu was of that opinion before the 2014 MVA. Mr. Dhaul worked in the assistant position for approximately one year before the 2014 MVA during which time there was serious doubt as to his capabilities according to Mr. Mattu. Would a further two years of training have prepared Mr. Dhaul for the position he desired? I conclude it would not have made a difference. The job demanded personality traits that Mr. Dhaul was observed by his supervisors to not possess. This kind of deficiency is unlikely to be remedied with additional years training. If he had not shown the skill sets before the 2014 MVA it was unlikely he would have subsequently succeeded given the nature of the deficiencies.
- [88] The wages Mr. Dhaul might have earned as a local haul dispatcher cannot inform the determination of his past or future income earning capacity losses.

[89] The parties agree that Mr. Dhaul is entitled to net sum of \$19,498 to compensate him to loss of past earnings related to his security guard job. I make an award for lost wages in this amount.

### Cost of Future Care

[90] The test for cost of future care awards was confirmed in *Paur (Committee of) v. Providence Health Care*, 2017 BCCA 161 at para 109, citing *Tsalamandris v. McLeod*, 2012 BCCA 239.

[62] The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at page 78; affirmed (1987), 49 B.C.L.R. (2d) 99 (C.A.):

3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.

[63] McLachlin J., as she then was, then went on to state what has become the frequently cited formulation of the "test" for future care awards at page 84:

The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.

[91] The plaintiff claims cost of future are associated with medications, psychological counselling for depression, health and strength maintenance, ergonomic equipment for the home, and service expenses for housekeeping, yard work and exterior home maintenance. He submits the present value of these expenses is \$392,763, according to Mr. Benning's report.

[92] The plaintiff suffers from soft tissue injuries and headaches as a result of the MVAs. His injuries continue to cause him pain in his daily activities. I accept he has reached peak improvement and still experiences pain symptoms. It is likely he will be in pain for the foreseeable future. His evidence is that he manages his pain with medication and passive modalities to get through everyday life. He will likely pursue these pain management methods in the future. He will likely do so over the course of his life, as his symptoms will always be somewhat present.

[93] I accept the present value amounts put forth for passive modalities, i.e., massage therapy and physiotherapy, which medical experts opine would help to relieve his symptoms.

[94] I accept the present value figures put forth in Mr. Benning's report for medication, subject to two adjustments.

- [95] First, I subtract the present value attributable to Tylenol. Mr. Dhaul and his family likely would have purchased Tylenol in any event of the MVAs: Tylenol is a common fixture in family medicine cabinets, and Mr. Dhaul's lower back complaints would reasonably warrant its purchase regardless of the MVAs.
- [96] Second, I make a downward adjustment of the amounts attributable to Botox treatment. I accept Dr. Nagaria's opinion that patients are generally tapered off Botox as their conditions improve and needs demand. Dr. Waseem opines the headaches and cervical spine pain are connected. Mr. Dhaul's need for Botox treatments may decrease with management of his physical symptoms through medication, active and passive rehabilitation, and improving his fitness. In light of my finding that the plaintiff reached peak medical improvement, it is likely Mr. Dhaul will have Botox administered indefinitely, however perhaps infrequently. I do not accept the defendants' submission that Mr. Dhaul will continue to improve and therefore only require Botox for the next 10 years.
- [97] Dr. Dahi traces the plaintiff's depressed mood to his limitations at work and decreased involvement at home, which result from physical injuries caused by the MVAs. It is likely that as Mr. Dhaul gets his symptoms under control with the pain management regime recommended, he will be able to return to some of his pre-MVA activities, importantly resuming more involvement with his family. It follows his self esteem should improve, and depressed mood diminish. His depressed mood is likely to resolve as his physical symptoms abate. The causes of his psychological upset will likely resolve without further psychological intervention. A psychological assessment to investigate psychological intervention is therefore not justified.
- [98] For health and strength maintenance, the medical evidence recommends active rehabilitation and a gym membership. The defendants agree active rehabilitation is justified and I conclude the present value claimed reasonable. The defendants contest the plaintiff's claim for a gym-membership in excess of one year because Mr. Dhaul has not used the gym in the past. The evidence establishes Mr. Dhaul was an active person before the MVAs. It is reasonable that Mr. Dhaul will return to an active lifestyle if able to do so.
- [99] Regarding ergonomic home equipment, while there is evidence that Mr. Dhaul is less helpful around the house, there is not evidence that Mr. Dhaul has troubles navigating his home to the extent that changes are medically justified. Ergonomic home upgrades are not medically justified.
- [100] Mr. Dhaul's injuries have rendered him unable to perform heavy outside yard work and indoor housekeeping chores. The evidence establishes that Mr. Dhaul's indoor tasks were mostly assisting Ms. Dhaul, and while his contributions were very much appreciated, it is not reasonably likely Mr. Dhaul will use recommended replacement services. However, Mr. Dhaul did the lion's share of outdoor home, car, and yard maintenance tasks. Mowing the lawn, cleaning the gutters, shovelling snow and washing the cars are necessary to keep one's property in good repair. His parents and children did not do these tasks. Ms. Dhaul's

role has been limited to helping Mr. Dhaul. Absent anyone in the household able to do these tasks, Mr. Dhaul will likely use and incur costs associated with replacing his labour. I accept the present value of yard work and exterior home maintenance costs put forth in Mr. Benning's report, with a downward adjustment to account for the contingency that Mr. Dhaul may do some of the lighter tasks if his symptoms abate and he returns to some pre-MVA activities as recommended. Compensation for cost of housekeeping service expenses addresses a different loss than does his compensation for loss of housekeeping capacity.

[101] After making the necessary adjustments, I award cost of future care in the amount of \$300,000.

#### Loss of Housekeeping Capacity

[102] Madam Justice Adair recently summarized guidance on loss of housekeeping capacity awards: *Rabiei v. Oster*, 2019 BCSC 733:

205 Compensation for loss of homemaking capacity is distinct from compensation for cost of future care. An award for loss of homemaking capacity is intended to reflect the value of the work that would have been done by the plaintiff but which he or she is incapable of performing due to the injuries caused by the accident. It is not dependent upon whether replacement costs are actually incurred. However, a cautionary approach is to be taken in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss. See *Westbroek v. Brizuela*, 2014 BCCA 48, at paras. 72-78.

[103] See also *Kim v. Lin*, 2018 BCCA 77.

[104] Mr. Dhaul testified he was responsible for many outdoor tasks including taking out the garbage, mowing the lawn, cleaning the gutters, shovelling snow and washing the cars. Ms. Dhaul did most of the inside tasks but Mr. Dhaul would help from time to time.

[105] Dr. Waseem said the plaintiff is unable to engage in the heavier aspects of his domestic tasks, which reasonably includes the home, yard and car maintenance described. The accidents have impaired his capacity for outdoor work. I consider the contingencies that may result from the plaintiff's unrelated lower back complaints. Taking a cautionary approach to ensure an award commensurate with the loss, \$20,000 is the appropriate award to compensate the plaintiff for his lost capacity. See e.g., *Lewis v. Gibson*, 2018 BCSC 1713;

#### Subrogated Claim

[106] Great West Life has advanced a subrogated claim in the amount of \$819 for benefits provided to Mr. Dhaul. I make an award in this amount.

#### In-Trust Claim

[107] It is clear that Mr. Dhaul's family is close and loving. I accept that Mr. Dhaul's family members have taken on additional responsibilities as a result of his injuries.

[108] Awards in trust are "generally limited to seriously injured plaintiffs for support services beyond those normally to be expected in a marital or family relationship": See *Farand v. Seidel*, 2013 BCSC 323 at para. 99. The factors relevant in making an award were set out in *Bystedt (Guardian ad litem of) v. Hay*, 2001 BCSC 1735 at para. 180, *aff'd* 2004 BCCA 124.

[109] The evidence before the Court was not sufficient to prove the familial contributions were above and beyond what would reasonably have been provided out of the natural love and affection of family members, or that they suffered economic disadvantage in order to provide the services.

## Special Damages

[110] The plaintiff claims \$21,210 in special damages. The defence submits \$17,039 is the proper figure. The discrepancy comes from want of evidence, and because the plaintiff has not provided medical justification for some expenses, i.e., the mattress (\$4,033) and the Ramipril medication (\$25). I award \$17,039 to cover all reasonable expenses.

## Conclusion

Non-pecuniary damages

\$90,000

Loss of earning capacity (past)

\$19,498

+ Wages for 6 days missed work after the 2014 MVA as indicated on the payroll records.

Loss of earning capacity (future)

\$0

Cost of future care

\$300,000

Loss of housekeeping capacity

\$20,000

Subrogated claim

\$819

In-trust claim

\$0

Special damages

\$17,039

"Jenkins J."

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