
CANADA / JUDGMENT

Firman v. Quina

2020 BCSC 1424

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2020 BCSC 1424 Firman v. Quina

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Firman v. Quina,

2020 BCSC 1424

Date: 20200925

Docket: M175657

Registry: Vancouver

Between:

Kenneth Michael Firman

Plaintiff

And

Pauline Quina,

Joan Paul Lagat Quina

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for Plaintiff:

S. Herra

Counsel for Defendants:

C. Jago

Place and Date of Trial:

Vancouver, B.C.

June 8-12, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 25, 2020

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- [1] The plaintiff, Ken Firman, seeks damages for injuries he suffered in a July 2015 motor vehicle accident.
- [2] The defendants admit liability for the accident. The defendant, Pauline Quina, was driving the vehicle that caused the accident, which was owned by the defendant, Joan Quina. The parties agree on the amount of damages for past loss of income and special damages, but disagree on the appropriate amount for non-pecuniary damages, loss of future earning capacity, and cost of future care.
- [3] The defendants did not call any witnesses nor produce any expert reports for trial.
- [4] The plaintiff was a credible and reliable witness who testified in a straightforward manner. He had a stoic demeanour. I found his description of his injuries and the impact they have had on his life to be genuine, and consistent with the whole of the evidence.
- [5] The defendants do not challenge his credibility. In terms of reliability, the defendants only challenge his estimation of how much money he thinks he would have made, but for the accident.
- [6] In addition to the plaintiff, two of his friends testified: Scot Munro and Stacy Uher. Ms. Uher works at the same company as Mr. Firman. In addition, two other colleagues from their place of business testified: Tiar Hosier and Jerome Wall.
- [7] I also heard evidence from three expert witnesses: Mr. Firman's family physician (Dr. Margaret Budzianowska-Kwiatkowski), an expert in family medicine (Dr. Trent Faraday), and a physiotherapist who performed a functional capacity evaluation (Louise Craig).
- [8] Lastly, an economist (Darren Benning) produced a report containing multipliers for the claim for loss of future income. The defendants did not require his attendance at trial for cross-examination.
- [9] The plaintiff's witnesses were credible and reliable, and their evidence was consistent and corroborative of the plaintiff's position.
- [10] I will discuss the facts, law and my conclusions under each disputed head of damage.

I. NON-PECUNIARY DAMAGES

A. Legal Principles

- [11] There was no dispute about the applicable legal principles as set out in, among other cases, *Lindal v. Lindal*, [1981] 2 S.C.R. 629, *Stapley v. Hejslet*, 2006 BCCA 34, and *Trites v. Penner*, 2010 BCSC 882.
- [12] In assessing damages for pain and suffering, a number of factors are considered. In *Stapley*, the Court of Appeal articulated a non-exhaustive list of considerations to be taken into account (para. 46), which include the age of the plaintiff, the nature of the injury, the severity and duration of pain, degree of disability, emotional suffering and loss or impairment of life. Additional considerations which may be subsumed in the preceding list include impairment of family, social relationships and physical and mental abilities and loss of lifestyle.
- [13] In *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 at paras. 54-55, Justice Southin stated that a stoic "plaintiff who continues to work when it would be reasonable for him or her not to work should not be penalized for his or her grit." That guidance is particularly apt in this case.
- [14] Before turning to the cases relied upon by the parties to establish the appropriate range of damages for non-pecuniary loss, I will review Mr. Firman's circumstances.

B. Before the Accident

- [15] Mr. Firman grew up in Coquitlam. After high school he received an associate's diploma in arts from Douglas College and took some classes at Simon Fraser University, although he did not obtain a degree.
- [16] He is very involved in music and has played bass guitar from the age of 15. Over the years, he has played in a number of bands.
- [17] Scot Munro has known Mr. Firman since high school. They have been in a band together in the past, but were not at the time of trial. Their evidence was consistent that the band typically got together to practice once or twice a week. They also played shows about once a month. Those shows were mostly for enjoyment as the pay was minimal.
- [18] Mr. Munro described Mr. Firman as being "very talented" at bass guitar. He said there was a lot he could do and that "he was very fast on the frets." This fit well as the band played music in the punk-rock genre, which is high energy. Mr. Munro remarked that on stage, Mr. Firman was very energetic and moved around a lot.
- [19] At one point the band recorded an album in the hopes of building a larger fan base. However, both Mr. Firman and Mr. Munro confirmed they never intended to pursue a career in music, but rather pursued it passionately as a hobby.

- [20] Mr. Munro also testified that he and his brother have ridden motorcycles for years. Mr. Firman had been interested for many years in taking up motorcycling, largely because of his friends' interest. He took a course and obtained his motorcycle licence in 2015. Shortly before the accident, he bought his own motorcycle and was looking forward to riding it with his friends.
- [21] Mr. Munro aptly described Mr. Firman's excitement. He said that while the first bike Mr. Firman bought was not considered "cool," Mr. Firman polished it and clearly felt proud to own it.
- [22] Mr. Firman also enjoyed playing road hockey, golf and recreational baseball before the accident, all without any limitations or difficulties. In addition, he went camping every summer, and took some trips with friends to Jamaica and other places, again, without any complications.

C. The Accident

- [23] Mr. Firman was 26 years old in July 2015 when the accident occurred. He was driving his motorcycle eastbound along Austin Road in Coquitlam, and was in the left-hand lane to turn left onto Hillcrest Street. The light was green and there was a car ahead of the plaintiff waiting to turn left. As he was waiting for that car to turn, Mr. Firman was hit from behind. He fell backwards onto the hood of the vehicle that hit him, and then onto the ground. The motorcycle subsequently fell over and landed on his leg.
- [24] Although he felt he was in shock, he exchanged details with Pauline Quina and other witnesses. Because he was close to home, he rode his motorcycle home, but it was damaged sufficiently for it to be a total loss.
- [25] Mr. Firman testified after the collision he immediately felt neck and back pain. He had abrasions and had scrapes over his body. He had road rash on his arms, back, and hand. The scraping on his left hand was extensive.
- [26] In addition to feeling in shock, he testified he was emotionally frantic, going through a number of "what if" scenarios in his head about what could have happened.
- [27] Mr. Munro spoke with Mr. Firman the day of the accident and remembered being fairly shocked and feeling scared for what his friend had experienced. Mr. Munro first saw the plaintiff about two days later and noticed how much pain he was in. Mr. Munro's impression was that Mr. Firman felt dejected. Mr. Munro took a week off work to stay with the plaintiff. I find this action underscores the severity of Mr. Firman's injuries and the amount of pain he was suffering immediately after the accident.

D. Injuries

- [28] Mr. Firman saw his doctor the day after the accident. He testified that morning he could not lift his head from the pillow and had to roll over to make his way out of bed. His doctor prescribed medication to help him sleep and recommended he take time off work and attend physiotherapy.
- [29] Within a few days bruising appeared on his shin, knee and ankle. His knee was in pain and swollen.
- [30] Mr. Firman described his injuries for about the first month after the accident. His mobility was very limited. He testified that he could not bend at his waist or sit up without experiencing a lot of pain; also, twisting movements were extremely difficult and painful. He felt pain in his knee, but described the major injury at that time as being the pain in his upper and lower back and neck.
- [31] He was completely off work for six weeks. During that time, he rested at home, went to physiotherapy, and did some housework. He stated that he was in a lot of pain for the rest of 2015 and limited his activities outside of work.
- [32] His injuries have not resolved. He has daily pain. His back pain is aggravated by extended sitting, standing, walking, repetitive heavy lifting, sports, playing guitar or doing any other activity that requires him to reach his arms out in front of him. While he admits his back has improved compared to immediately after the accident, his improvement has plateaued and he still struggles.
- [33] His neck pain has also improved, but Mr. Firman still feels neck pain when he wakes up and lies down, as well as with movement.
- [34] He had experienced a lot of improvement with his left knee, but over the last year it started bothering him again, although not constantly.
- [35] The scarring on his hand was prominent for a few years, although it has since faded. He did feel self-conscious about his hand's appearance.
- [36] He is still anxious about the prospect of riding a motorcycle, and has not ridden since the accident.
- [37] Both Mr. Munro and Ms. Uher described Mr. Firman as being stoic. They both testified it was not in Mr. Firman's nature to seek out help or talk about his difficulties. Ms. Uher's observation was that Mr. Firman maintained a "tough guy" attitude around his male friends but opened up a bit more with her about his struggles. Specifically, he told her he worries about losing friends because of his inability to ride a motorcycle. Mr. Wall's description of Mr. Firman's demeanour was consistent with Mr. Munro's and Ms. Uher's testimony. Specifically, Mr. Wall confirmed that Mr. Firman would never complain or even talk about any difficulties he may have because of the physical demands of his job.

- [38] Mr. Firman testified that he is frustrated that five years after the accident he still suffers. He wakes up almost every day in a bad mood because of the pain. He admitted to feeling anger that he cannot contribute to his work as he could before the accident. Specifically, he is unable since the accident to take advantage of an important benefit of the job - significant extra income from overtime - which offset the unpleasant nature of the some of the work. He is also frustrated that his improvement has reached a plateau.
- [39] Mr. Munro perhaps summed up Mr. Firman's predicament best. His impression was that the accident affects every decision that Mr. Firman has to make. While he used to be a free spirit, he now has to stop and ponder the impact on his pain before doing something.

E. Impact of the Injuries

- [40] There is very little in dispute in the evidence or between the parties' positions under this topic. The defendants have accepted liability, and do not contest that the accident caused the injuries for which Mr. Firman seeks compensation.
- [41] They admit it is improbable that he will make a full recovery, or return to his pre-accident physical capabilities. They also accept his injuries have had a negative impact on several areas of his life. However, the parties disagree on what Mr. Firman's future employment prospects are likely to be, a topic addressed later in this judgment. First, I summarize the impact the accident has had on Mr. Firman.
- [42] While he continues to play bass guitar, Mr. Munro said Mr. Firman simply is not as good as he used to be. Specifically, he cannot play as fast as he used to and has a reduced energy level. This significantly affects his performance ability, particularly given the high energy nature of punk-rock shows. Mr. Firman now has to take more frequent breaks when playing. He also has to sit on a stool sometimes, something he never did before the accident. Mr. Munro says his playing style has never really recovered. I find that the injuries have taken much of the joy out of playing music that Mr. Firman previously enjoyed. Given that was his primary hobby, this is a significant impact to Mr. Firman's life.
- [43] Ms. Uher testified that she had seen Mr. Firman in visible pain. She sometimes sees him outside of work at social occasions about twice a month. She recalls a situation when he had to saw off the top of a Christmas tree and was in obvious discomfort doing so. She also confirmed that the plaintiff definitely works less hours than other people holding the same position at the company.
- [44] Mr. Wall had also seen the plaintiff in obvious pain on days at work. Mr. Wall confirmed that the plaintiff would never indicate he was in pain or not doing well, but that it was obvious from the way he walked and his facial expressions.

- [45] Mr. Firman has not ridden a motorcycle since the accident. He tried on one occasion, but all he could manage was to sit on a bike for about 30 seconds in a parkade. He testified he was overwhelmed by anxiety and could not drive it. He feels he is missing out spending time with his friends by not being able to ride.
- [46] He has not gone camping since the accident, nor played street hockey. While he has golfed, he finds it painful. He reported the same about baseball. He does play racquetball (there is a court in the building in which he lives) but needs to take a break every 20 minutes and plays with pain. He plays with pain because he is determined to stay fit.
- [47] He finds sitting for long periods to be painful. He took a road trip in the summer of 2016 with friends, including Mr. Munro, to Portland, but described it as excruciating to sit for up to five hours. He even found walking around the city to cause pain. Mr. Munro confirmed Mr. Firman's description. In addition, Mr. Firman has taken short flights (to California and Edmonton) and found sitting on the plane very painful.
- [48] Mr. Firman finds housework quite painful, especially activities like vacuuming for which he had to bend. It takes him longer to finish housework than it did before the accident, and he experiences pain while doing it.

F. Expert Medical Evidence

- [49] The plaintiff adduced opinion evidence from two medical experts. I briefly summarize their evidence.

1. Dr. Margret Budzianowska-Kwiatkowski

- [50] She has been the plaintiff's family doctor for at least 15 years. She was qualified as an expert entitled to give opinion evidence in general medicine, including the diagnosis, prognosis, and treatment recommendations for musculoskeletal injuries. Her report is dated January 15, 2020.
- [51] As a patient, Mr. Firman did not see his doctor very often. Dr. Budzianowska-Kwiatkowski confirmed that he had no relevant pre-existing injuries. She remembers seeing him on July 30, 2015, the day after the accident. She specifically recalled thinking at the time that he had so many abrasions, she did not know how he could be walking. She stated that, in her experience, someone with the amount of road rash he had would not be well.
- [52] She described his injuries in her clinical notes from that visit as follows:

He had injuries to his body. The patient had a helmet on during the accident. He had large road rash on his left forearm. He had abrasions just above his left dorsal wrist. He also had a large abrasion and road rash on his back as well as left lateral knee. There was bruising and swelling to the lateral patella. He also had bruising and swelling of the right ankle. The patient reported that when he woke up the next morning he could not lift his head from the pillow. He most likely sustained a concussion. The patient was also having spasm in his neck and lower back. He had pain in both areas. On examination tenderness was found in all areas involved. The thoracic area

was not tender. The patient was sent for x-rays and given a tetanus shot.

- [53] Dr. Budzianowska-Kwiatkowski was involved with treating Mr. Firman as well as monitoring and directing his return to work after the accident. She confirmed that he was very motivated to increase his tolerance from work. He consistently sought approval to work more hours, and they had a bit of a debate about that. Each time he increased his working hours, he experienced increased pain and difficulty.
- [54] In her report she diagnosed him with the following: a concussion; sprains in his cervical, thoracic and lumbar spine as well as bilateral shoulder; abrasions on his left forearm and wrist, back, and left knee; scarring of his left wrist; swelling and injury to the patella; and right ankle swelling and bruising. Her report was consistent with Mr. Firman's testimony, including his gradual return to work and the setbacks he experienced from increased activity leading to more pain.

She stated that Mr. Firman would likely have life-long problems with his lumbar area, since it has failed to improve despite his working extremely hard and undergoing vigorous treatments and home exercises. She opined lifelong lower back therapy will be necessary. In particular, she pointed out that he is getting older, which is a factor working against him.

- [55] She recommended that he engage in active rehabilitation to strengthen his core muscles. This would reduce the chance of re-injury, but not necessarily provide relief from pain. In her opinion, even if he does more treatment and exercise, he will not be able to return back to the full hours and overtime he was working before the accident.
- [56] In cross-examination, she stated she would not refer him to a pain specialist because she does not believe he suffers from any type of pain disorder or syndrome. In her view, pain clinics are intended for people who experience pain without associated physical evidence of injury, which in her view does not apply to Mr. Firman. Nor does she recommend facet joint injections because there is no indication in his X-ray or MRI of any nerve root pressure or injury. She also does not recommend steroids for him, because that treatment tends to make muscles weak and brittle.

2. Dr. Trent Faraday

- [57] Dr. Faraday was qualified to give opinion evidence in family medicine, with a specialization in musculoskeletal injuries and the assessment of occupational disability. He completed a report dated December 15, 2019.
- [58] He diagnosed Mr. Firman with musculo-ligamentous injury to his left knee, which has resolved, and musculo-ligamentous injuries to his neck, upper and lower back, with ongoing pain symptoms. He also diagnosed abrasions and contusions to Mr. Firman's left forearm, wrist, back, left knee and right ankle, all of which had healed. He noted anxiety symptoms related to riding a motorcycle with ongoing symptoms.

- [59] With regard to prognosis, he wrote that people with the type of injuries sustained by Mr. Firman typically see improvement and resolution of their injuries within 6 to 12 months. However, he noted that some people continue to have pain which becomes persistent. Because it was more than four years since the accident when he assessed Mr. Firman, Dr. Faraday opined he expects him to have ongoing neck and back pain into the future. He stated he would expect his anxiety around riding a motorcycle to improve with psychological counselling.
- [60] He agreed that Mr. Firman would not be able to tolerate working the same job he had before the accident, with the same hours and duties.
- [61] His treatment recommendations were for regular active exercise. The long-term goal was to increase his capacity for self management. He also opined that Mr. Firman will probably experience acute exacerbations of pain in the future, likely once per year and during those periods he would likely require passive paramedical care, up to four visits over two weeks, once a year.
- [62] Like Dr. Budzianowska-Kwiatkowski, he did not predict Mr. Firman's participation in an exercise program would lead to any significant improvements in his condition. Instead, the goal was to assist Mr. Firman with regard to his functioning and tolerance in the hope of reducing the pain symptomology by increasing core strength.

G. Analysis

- [63] The plaintiff emphasized that it had been five years since the accident and his condition has plateaued. He was 26 years old when the collision occurred and at the start of his career; he had only worked for a year and a half before the accident. He finds it very frustrating that he will not be able to work to the same extent he did before because he is a tough and motivated person who does not like to complain. He wants to contribute as much as he can and feels like he is letting his colleagues down.
- [64] He continues to suffer from chronic neck and back pain, daily. He submits this affects him in a profound way. He cannot play guitar to the same extent as he could before. He is unable to keep up with the physical demands of his work--an industry he had envisioned a career in as a young man. He misses out on motorcycle riding and said he would not be able to camp anymore because of his back issues. I find the impact of his injuries on his prowess at playing guitar is particularly significant. The change in his abilities has taken much of the joy out of that activity for Mr. Firman.
- [65] The plaintiff seeks \$100,000 in non-pecuniary damages. He relies on a number of cases where the range of damages for similar injuries was between \$85,000 and \$116,000, including *Demedeiros v Heinrichs*, 2001 BCSC 1475; *Duda v. Sekhon*, 2015 BCSC 2393; *Maldonado v. Mooney*, 2016 BCSC 558 *Mojahedi v. Friesen*, 2016 BCSC 1225; and *Tzotzolis v. Wyman*, 2019 BCSC 2026.

- [66] The defendants submit an appropriate amount of damages to award is in the range of \$75,000 and \$95,000. They rely on *Klein v. Sangha*, 2016 BCSC 1864; *O'Brien v. Cernovec*, 2016 BCSC 1881; *Senger v. Graham*, 2018 BCSC 257; and *Swieczko v. Nehme*, 2016 BCSC 399.
- [67] In my view, the most prominent features of Mr. Firman's situation guiding the appropriate award of damages is his young age at the time of the accident and the fact he had just embarked upon his chosen career. It is also significant that he experiences daily pain unlikely to improve which has had a major impact on activities from which he derived pleasure, including his music and camping.
- [68] I am satisfied based on my review of the cases and applying the general legal principles to the facts before me that the plaintiff is entitled to \$95,000 in non-pecuniary damages. Specifically, I find Mr. Firman's situation is more similar to that of the plaintiffs in cases at the higher end of the range than those at the lower end.

II. DAMAGES FOR LOSS OF EARNING CAPACITY

- [69] The parties reached an agreement for an amount representing Mr. Firman's damages for pre-trial loss of income. The main point of contention at trial was the appropriate amount to award for Mr. Firman's future loss of earning capacity.
- [70] The plaintiff's submissions outlined four possible scenarios for assessing future income loss which resulted in damages ranging from just under \$290,000 to just over \$1 million. Mr. Firman seeks damages in the amount of \$650,000. The defendants submit a fair amount to award is between \$30,000 and \$60,000. That figure is based on the defendants' submission that there is a real and substantial possibility Mr. Firman will move into a management position within five years.

A. Legal Principles

- [71] The parties referred to a number of cases, including *Jurczak v. Mauro*, 2013 BCCA 507 [Jurczak] and *Perren v. Lalari*, 2010 BCCA 140. Passages in *Harris v. Gill*, 2019 BCSC 1665 (paras. 162-164) and *Rosvold v. Dunlop*, 2001 BCCA 1 (paras. 8-11) are also helpful. As well, the defendant referred to a summary of the relevant principles contained in *Sharma v. Chui*, 2019 BCSC 2115:
103. A helpful summary of the applicable principles is set out in *Hoy v. Williams*, 2014 BCSC 234 at paras. 153-161 (adopted in *Arletto v. Kin*, 2016 BCSC 77 at para. 61). Drawing on those paragraphs, the following principles emerge:
- The assessment is a matter of judgment, not calculation.
 - The evidentiary burden to establish the loss of earning capacity is not the balance of probabilities, but a real and substantial possibility of the loss.

- c. The key task is to put the plaintiff in the same position she would have been but for the injuries caused by the defendant's negligence. The assessment is a comparison between what the likely future working-life would have been had the accident not occurred, with what will likely be the plaintiff's future work-life after the accident.
- d. There are two approaches to assess loss of future earning capacity: the earnings approach and the capital asset approach.
- e. The earnings approach can be undertaken in one of two ways:
 - i. the court postulates a minimum annual income for the plaintiff's remaining working years but for the accident and multiplies that by the plaintiff's pre-accident number of remaining working years; or,
 - ii. the court awards the plaintiff's entire pre-accident annual income for a period of one or two years.
- f. The capital asset approach is used when the future loss cannot be measured in a pecuniary way. It involves considering a number of potential factors including, whether the plaintiff, post-accident is:
 - i. less capable overall of earning income from all types of employment;
 - ii. less marketable or attractive to potential employers;
 - iii. less able to take advantage of all job opportunities; and,
 - iv. less valuable to herself as a person capable of earning income in a competitive labour market.
- g. Even though the court does not assess damages pursuant to the capital asset approach by way of a mathematical calculation, the factual basis of the award must be explained.
- h. The assessment must take into account the overall fairness and reasonableness.
- i. Allowance must be made for the contingency that the assumptions upon which the loss is based may not come to pass.

104. Of some importance in this case is para. 161 from Hoy:

The plaintiff may be able to prove a substantial possibility of future loss of income despite having returned to his or her usual employment and even where he has received a raise or obtained a promotion: *Perren v. Lalari*, *supra*; *Combs v. Bergen*, 2013 BCSC 321. There is no principle of law requiring the medical evidence to establish an impairment of earning capacity; rather, such impairment is established on the totality of the evidence: *Miscisco v. Small*, [2001] B.C.J. No. 2042.

[72] Also helpful is the Court of Appeal's observation that to some degree assessing future loss is akin to "gazing into a crystal ball", and in that sense, arriving at a conclusion about fair compensation is more of an art than science: *Shapiro v. Dailey*, 2012 BCCA 128 at para. 40. Lastly, in *Jurczak*, the Court of Appeal noted that while mathematical calculations cannot be the sole assessment tool, they represent a starting point for assessing loss of income (paras. 36-37).

B. Plaintiff's Work History

[73] The plaintiff has a strong work ethic, having held a job since his first paper route at 10 years old. He has worked almost continuously since then, working throughout high school and his post-secondary education.

[74] After his first year at college, he got a summer job working for Canstar, a restoration company. They agreed to keep him hired as a part-time worker as he finished his schooling at Douglas College. Apparently, it was unusual at that time for the company to hire anyone part time.

[75] When he was a student at SFU he worked full time in the summer and part time during the academic year at a window cleaning company. In April 2013, he decided to stop his studies and he accepted a full-time position at Canstar.

1. Plaintiff's Employment at Canstar

[76] In addition to the plaintiff, three witnesses who work at Canstar testified:

- a. Jerome Wall is the manager of the emergency services department, and Mr. Firman's direct supervisor. He has been with Canstar for about four and a half years. He has been in the restoration industry for over 20 years.
- b. Tiar Hosier has been working at Canstar since about 2017. He currently holds the same position as Mr. Firman.
- c. Stacy Uher is a dispatcher, and has known Mr. Firman for about four years. In addition to working together, they are friends.

[77] When he was hired as a full-time employee in April 2013, his position was flood technician. Flood technicians are the first people to arrive on site after a property owner reports an emergency or the need for repair work. Typically, upon arrival to a work site, flood technicians have to do demolition work. This can be anything from cutting out drywall or ceiling tiles, to removing carpet, flooring and baseboards.

[78] Removing carpeting and baseboard requires the technician to be on hands and knees while cutting (with a simple exacto-knife) and prying away the material. For some floors with linoleum or hardwood, a large machine has to be used. The machine is very heavy.

- [79] Removing ceiling tiles requires standing on a ladder, leaning back slightly and looking up, while using an exacto-knife to cut upwards into the tiles. Sometimes they use a specialized saw with a vacuum attached to it (referred to as a "Kett saw"). This saw can be awkward to operate, especially while standing on a ladder.
- [80] In addition, flood technicians typically install large fans and dehumidifiers. This equipment is heavy, with the larger machines weighing up to 120 pounds and the smaller ones up to 30 pounds.
- [81] After completing demolition, flood technicians remove and dispose of any items damaged by water. The damaged material is bagged and carried to a truck to be taken back to the company for disposal. The bags are kept to about 30 pounds each, and carried out two at a time. When they get back to the yard, those bags have to be thrown in a large bin that can be seven to eight feet tall.
- [82] Both Mr. Wall and Mr. Hosier have worked as flood technicians and their testimony corroborated Mr. Firman's description of the job. There is no doubt the job is physically demanding.
- [83] In May 2019, Mr. Firman was promoted to the position of zone supervisor. He has responsibility to oversee a number of team-members within the geographical area of his zone. This requires a lot of driving between sites and standing while at a jobsite. He also has to complete paper work.
- [84] Additionally, Mr. Firman still does some demolition work. To the extent that is required, the physical component of the job is the same as a flood technician; it differs only in the extent and frequency of that physical labour. Mr. Hosier, who is also a zone supervisor, commented that it was important for him to participate in demolition work as it improves team morale.

2. Overtime

- [85] Because emergencies can occur at any time, a requisite part of flood technicians' duties is to be on call one weekend a month and one day per week. If called out during that time, it is considered overtime and they are paid time and half for at least four hours. After 12 hours of work in the same day, they receive double pay.
- [86] In addition to the scheduled on-call rotations, flood technicians may also be required to do overtime for what the witnesses referred to as the "2 o'clock jobs." Because Canstar is an emergency response company, employees are required to attend to calls until they are satisfactorily dealt with, even if that call comes in towards the end of their work day. Other flood technicians in the area may also be called in to help. A call coming in at 2 o'clock or later inevitably leads to working overtime.

- [87] Mr. Firman testified he could not recall a time working as a flood technician when he was not called out to a job site on his on-call weekday or weekend. He does not recall ever turning down overtime, whether for a scheduled on-call or a "2 o'clock job." In addition, he had the ability (and choice) to pick up extra on-call shifts. For instance, when he wanted to buy his apartment, he took on extra overtime shifts to earn more money.
- [88] Mr. Wall and Mr. Hosier corroborated Mr. Firman's evidence that overtime is not only a mandatory aspect of the job, but one with which a person can make considerable extra income.
- [89] Mr. Wall explained the significance of overtime to restoration work. It helps make up for some of the less pleasant aspects of flood restoration work, such as dealing with upset or unpleasant people and working in situations involving sewage, rainwater, mold, and other possibly unsafe and unsanitary conditions. People who stay in the industry have done so because they are able to do that work and put in the time for which they are rewarded with significant overtime payments. As he stated, "overtime is the nature of the job."
- [90] Mr. Wall is responsible for hiring employees within his department, and specifically said that the opportunity to work a lot of overtime is one of the incentives he offers to prospective employees.
- [91] Mr. Wall also confirmed that overtime and on-call duties are a mandatory expectation for zone supervisors.

3. Plaintiff's Return to Work after the Accident

- [92] The defendants do not contest that Mr. Firman has not been able to work the same amount of overtime as he did before the accident.
- [93] Mr. Firman had a gradual return to work. Initially, he only worked four hours a day, a few days a week. This increased overtime to six and then eight hours a day; however, this increase was not steady, as he did suffer some setbacks.
- [94] At first, he did no demolition work or overtime. He primarily did paperwork and other tasks that did not involve physical labour. Still, even standing to do paperwork caused him neck and back pain. Although switching from standing to sitting (for instance, when driving) helped with the pain, by the end of his shift (no matter how long it was) he would be in a lot of pain. He found all he could do when he got home was rest.
- [95] Towards the fall of 2015, Mr. Firman tried increasing his hours from four to six and then to eight hours a day. Each increase in hours brought an increase in pain. He tried some heavy lifting by the end of 2015, but the amount of pain was too much and he could not repeat the activity.

- [96] By the end of 2015 and into 2016, he was able to work an eight-hour day, but not five days a week. He found an eight-hour day very painful and he needed significant rest afterwards to recover. He was guided by his doctor and his pain level. If he was feeling well, he worked a longer day. He was not doing demolition work and did minimal overtime, usually not more than an hour and simply to finish whatever task he was doing.
- [97] By the beginning of 2017, he was able to work eight hours a day, five days a week. He could do a bit of demolition work. However, he testified that all aspects of the job caused him pain. In particular, lifting equipment was very painful.
- [98] In addition to taking on less overtime, Mr. Firman has been unable to perform all the same tasks he did before. Mr. Hosier, who has worked on a few large jobs with Mr. Firman, confirmed that he is simply unable to do the same tasks as others. Specifically, he recalled an instance when Mr. Firman was unable to carry equipment up 10 flights of stairs; he had to stop mid-way and another worker had to carry it the rest of the way.
- [99] Mr. Firman's position is that he has lost and will continue to miss out on opportunities to earn overtime and double-time income. Although he still does the mandatory on-call rotations, it is not often at the job site, which is where employees are able to work for many hours. He mainly does work on the phone, which will not earn him the same amount of income.
- [100] He also misses out on the "2 o'clock jobs." Ms. Uher confirmed that she does not call Mr. Firman for those, echoing Mr. Wall's testimony. She admitted it was more challenging to schedule him because of his limitations. Nevertheless, she described him as a very hard worker and a loyal employee.
- [101] Mr. Firman stated he wants to stay at Canstar, and denied that he should or could consider going to another company. He noted he would have to disclose his back injury. As Mr. Wall testified, this would place him at a competitive disadvantage when compared to a fully fit candidate. Moreover, the company has accommodated his injuries. Both Ms. Uher and Mr. Hosier said Canstar is a great place to work and has a very supportive atmosphere. Mr. Wall described Mr. Firman as a very solid employee who is reliable.
- [102] Canstar was bought out by another company and came under new management in 2016. New management has been working to expand Canstar's operations, which has led to an overall increase in the company's business, meaning workers are busier. The defendants accepted that this increased the amount of overtime the plaintiff would have expected to earn, but for the accident. They also accepted that there was a labour shortage for flood technicians, which had some impact on the nature of the zone supervisors' work. Specifically, they would have to work more overtime to fill in that gap, but only if they could assist with demolition work. I find both factors are relevant to assessing Mr. Firman's loss.

- [103] The defendants adduced evidence during cross-examination about the prospect of Mr. Firman undertaking a position in management at Canstar. Such a role would not involve heavy physical labour, although it would entail long hours of sitting at a desk. Managers are paid a base salary and have no opportunity to earn overtime or double time. Mr. Wall testified he earns about \$75,000 a year. He stated that moving into a managerial position was a lifestyle choice he made in view of his age and family situation.
- [104] Mr. Firman did not deny moving into management may be the next logical step for his career at Canstar. However, he does not believe any position would become available soon. He also expressed concern about his competitiveness as an applicant for such a position. He worried that his inability to do the same amount of overtime and tasks as he did before the accident make him a less attractive candidate.
- [105] Mr. Wall did not necessarily agree that Mr. Firman's current limitations would hinder his potential application for a managerial position. He spoke about the importance of organizational and intellectual skills for that job. He stated that Mr. Firman would be a good candidate because of his knowledge and experience. He confirmed, however, that he would not be a candidate for a managerial position in any department other than the emergency services department. He also testified that while there was a shortage of applicants for flood technicians, managerial positions in the restoration business did not arise very often.

4. Mr. Firman's Income

- [106] There was no dispute about Mr. Firman's income and the amount of overtime he worked before the accident:
- From April to December 2013, he earned \$30,745.69. He worked 257.25 hours overtime paid as time and a half (OT) and 49.25 hours paid as double time (DT).
 - In 2014, he earned \$44,044.17; he had 341.25 hours OT and 53.75 hours DT.
 - In 2015 (the year of the accident), he earned \$33,702.26, worked 157 hours OT and 10.75 DT. These overtime hours were all worked prior to the accident so they are not an accurate reflection of an annual amount.
- [107] The following are the figures for Mr. Firman's income and overtime after the accident:
- In 2016, his income was \$32,561.22. He did not work any OT or DT.
 - In 2017, his income was \$47,105 with 120.5 OT and 4 DT hours.
 - In 2018, his income was \$55,210 with 129.25 OT and 3.5 DT.
 - In 2019, his income was \$57,577.43 with 114.75 OT and 2.75 DT.
 - As of May 2020, he earned \$26,712 with 54.34 OT and 13 DT.

C. Expert Evidence

- [108] The plaintiff relies on the expert evidence of Louise Craig, who was qualified as an expert to give opinion evidence in the fields of physiotherapy, functional capacity, life care planning and cost of future care. Her report is dated July 22, 2019. She performed a functional evaluation on July 18, 2019.
- [109] She concluded that the plaintiff does not demonstrate a capacity to meet the full physical demands of his pre-collision occupation. She said his reduced capacities in the areas of strength, body position, standing, walking, and sitting all limit his ability to perform tasks at work. Even in his present supervisory position, Mr. Firman faces difficulty with seated activity, such as computer work and driving.
- [110] While Mr. Firman is able to lift some of the equipment used at work, he is unable to lift items heavier than 35 pounds. This limits his ability to engage in demolition work. She opined that other physical work needs to be in short durations so as not to aggravate his lower back pain. He requires frequent position changes and breaks from seated tasks to avoid pain and stiffness.
- [111] Ms. Craig's recommendation was that he remain with only light to medium duties and regular hours and specifically avoiding overtime when possible.
- [112] With regard to competitive employability she stated the following:

Mr. Firman demonstrates limitations that reduce his ability to work at more physically demanding jobs. Occupations with medium to low range of heavy physical demands (although more in keeping with his current physical capacity) will require accommodation allowing for frequent positional and task changes, regular stretching, avoidance or minimized exposure to some tasks and proper ergonomics to best manage symptom aggravation. As such the scope of occupations once viable from a physical perspective for Mr. Firman is reduced, leaving him with reduced competitive employability.

D. Analysis

- [113] The parties dispute two main issues under this head of damage: how long Mr. Firman would likely remain in the position as zone supervisor, and how to assess the quantum of his future income loss.
1. Transition to Management
- [114] The defendants submit that Mr. Firman "has settled ambitions to move into management". On that basis, their position is that he has only experienced a loss of earning capacity of between \$30,000 and \$60,000. This is based on assessing the lost opportunity to earn OT and DT for a maximum five years at which time the defendants submit there is a good possibility Mr. Firman would move into management and earn more income than he could as a zone supervisor.

- [115] I do not agree with the defendants' position. Mr. Firman did accept that the next logical step for him was to move into management, but there were important caveats to that testimony. Among other things, he did not express that step occurring within a five-year window.
- [116] Moreover, I find there was insufficient evidence to support a finding of a realistic possibility that Mr. Firman could become a manager in five years. The only evidence on that point came from Mr. Wall, who stated that positions in management do not come up very often. Mr. Wall is 51 years old and stated he is dedicated to Canstar. I find it unlikely he would leave his position within five years.
- [117] Also, other evidence was inconsistent with the defendants' position. Mr. Wall spent over 20 years in the industry before moving into management. Likewise, Mr. Hosier has worked in the restoration business for 13 years without moving to management. Neither person's experience suggests Mr. Firman is likely to successfully move into management within five years.
- [118] I also find that that Mr. Firman's testimony about moving into management did not represent his plan or expectation. He merely agreed that that possibility made sense, but that statement falls short of establishing it is likely to happen.
- [119] Mr. Firman was a young man at the time of the accident and did not have dependants. As such, the ability to work overtime was an important incentive for him to remain in his role as a flood technician and zone supervisor. Despite the pain he experiences, he likes his work and enjoys being at Canstar. However, because of the accident, he is unable to tolerate the amount of overtime work that he aspired to before the accident. Because he is valued as an employee at Canstar, and they accommodate his condition, I find it most probable he will remain working as a zone supervisor, but without the significant overtime earnings that were available to him before the accident. That inability is the loss he continues to suffer because of the accident, and I find it is an ongoing loss likely to continue well beyond the next five years.

2. Assessment of the Loss

- [120] The parties had very different approaches to assessing Mr. Firman's loss.
- [121] The plaintiff posited four different scenarios. Each one followed the same general approach. The plaintiff came up with an average for OT and DT based on Mr. Firman's overtime hours in 2013 and 2014. Those figures were then multiplied by the applicable hourly rate. The plaintiff then identified figures for each subsequent year in both the "without accident" scenario against the "with accident" earnings. Subtracting one from the other resulted in an annual loss of about \$13,700. When multiplied by Mr. Benning's multiplier to age 67, the loss amounted to a loss of just over \$290,000. For subsequent scenarios, the plaintiff used the same approach but with greater estimates of OT and DT in the "without accident" figures.

[122] The four scenarios were:

- a) Mr. Firman would continue to work the same amount of OT and DT hours as he did prior to the collision. This would amount to just over \$290,000.
- b) Mr. Firman would work about 10 hours of overtime per week, resulting in 500 hours OT and 100 DT each year. This would amount to just over \$460,000.
- c) Mr. Firman would work an average of 15 hours OT per week, and 125 DT over the year. This would amount to just under \$750,000.
- d) Mr. Firman would work roughly the same amount as Mr. Hosier. This would amount to just over \$1,043,000.

[123] The plaintiff submits an award at the higher end of that range is appropriate and he seeks \$650,000.

[124] The evidence does not support the third and fourth scenarios posited above. Mr. Hosier's hours were identified to be an outlier. The third scenario assumes overtime hours well above Mr. Wall's expectation.

[125] While the overtime estimations in the first two scenarios are better supported by the evidence, neither takes into account a possible transition into a management position at any point in Mr. Firman's future. For those reasons, I do find all of the plaintiff's estimates to be too high.

[126] The defendants used \$53,070 as a base salary (the average of 2017 and 2018) and to that they added an amount representing overtime earnings. Mr. Wall testified that he expected zone supervisors to work approximately 300 to 500 overtime hours each year, although he did not break those hours down into OT and DT. However, that distinction is indicated on Mr. Firman's pay statements. The defendants calculated a ratio of OT hours to DT hours on Mr. Firman's 2014 pay stub. They submit it was appropriate to assume a 15.75% weighting between OT and DT. The defendants also submitted that any assessment must account for the possibility that Mr. Firman's condition improves such that he could better tolerate overtime hours.

[127] Based on that approach, the defendants submit one could reasonably approximate losses as follows: \$6,000 annually based on 300 hours of OT; \$10,000 annually based on 400 hours, and; \$15,000 annually based on 500 hours. They average that to be \$10,333 per year.

[128] They submit his loss would end or be significantly diminished after five years, at which time he would be earning a manager's salary. They therefore submit damages in the amount of \$30,000 to \$60,000.

[129] I have already rejected the notion that Mr. Firman is likely to move into a management position within five years. Thus, the defendants' position under-estimates Mr. Firman's loss to a very large degree.

[130] I also find the defendants' approach of coming up with a weighted relationship between OT and DT to be unsupported by the evidence. That approach represents a mathematical calculation, but that was not reflected in the witnesses' testimony. A number of variables affect how much overtime work is required in any given month, and the number of hours is dictated by the size and type of emergencies that come in. In my view, restricting the estimate of likely overtime hours by a mathematical formula is not justified.

3. Conclusions

[131] In my view, the capital asset approach is most appropriate for Mr. Firman's situation. Nevertheless, Mr. Firman's pre-accident earnings and overtime hours are helpful in assessing his future loss.

[132] The defendants' approach is too heavily dependant upon mathematical calculations. I also find the defendants did not sufficiently take into account Mr. Firman's significant loss of competitiveness and the possibility he would have difficulty finding comparable work, were he to lose his job at Canstar for any reason.

[133] The best evidence as to the amount of overtime Mr. Firman is likely to have worked, but for the accident, is Mr. Wall's testimony and Mr. Firman's hours before the accident. Two events after the accident are also relevant. First, the company was taken over in 2016, which the defendants agree would have allowed Mr. Firman to work increased overtime hours. Second, in May 2019, Mr. Firman became a zone supervisor, which generally entails less overtime than a flood technician.

[134] Mr. Wall testified he would expect zone supervisors to work between 300 and 500 hours each year in overtime (both OT and DT). He confirmed Mr. Firman's actual overtime hours were low for a zone supervisor.

[135] In addition to those considerations, I find that the injuries have resulted in a significant reduction of Mr. Firman's competitiveness. A consistent theme in the witnesses' testimony was that Canstar clearly cares for its employees. In the department in which Mr. Firman worked, there was very much a team and family approach.

[136] Mr. Wall's evidence illustrated that Mr. Firman is fortunate to work at Canstar. Mr. Wall supported Mr. Firman's gradual return to work. Indeed, Mr. Wall promoted Mr. Firman despite his inability to perform all the same functions he did before the accident.

[137] However, there can be no dispute Mr. Firman is not competitively employable for the job he had before the accident. Mr. Wall confirmed that were he faced with the choice between an applicant who could do physical labour and one who could not--with all other qualities being the same--he would not choose the one with the limitations. This represents a significant loss of Mr. Firman's capital asset.

- [138] Mr. Firman entered this industry after he finished his schooling and was very young when he was injured. He has no other experience and no other educational qualifications. It is difficult to imagine anyone hiring someone to perform heavy labour would take the chance on hiring Mr. Firman.
- [139] The defendants submitted he would be an attractive candidate for other restoration companies yet they adduced no evidence as to that possibility. In my view, that amounts to no more than speculation that is outweighed by Mr. Wall's testimony.
- [140] Mr. Firman did not testify about his thoughts on retirement; this is unsurprising since he was only 26 when he was injured. He did, however, confirm that the ability to make a lot of money was his biggest draw to Canstar and what tempted him to abandon his post-secondary education.
- [141] The evidence was consistent and not successfully challenged that Mr. Firman is a hard worker who is dedicated and valued by his employer. Mr. Firman was not successfully challenged on his stated intention to work hard at his job in order to earn as much money as possible. The evidence also supports an assumption that he would have worked at least until the age of 67, staying as long as possible in a position where he could supplement his salary with overtime. These factors support awarding damages towards the higher end of an appropriate range.
- [142] Notwithstanding that, it is difficult to imagine him wanting to perform the same duties as a zone supervisor, even absent the accident, as he got older. In addition to advancing age affecting his abilities, there is the possibility that as he became older, he would prefer the more stable work hours available in management. This is consistent with Mr. Wall's experience.
- [143] In light of this, I find it more likely than not he would be working at a job in which he was able to easily supplement his base salary with significant overtime for 20 to 25 years after the accident. After that, I find it most likely he would transition into a management position which would attract a higher base salary without overtime expectations. That justifies a reduction in the plaintiffs' estimates.
- [144] I also find there is a real and substantial possibility that if the plaintiff's employment with Canstar does not continue for any reason, he would be out of work for some time until he could retrain and find something else to do. Mr. Firman's continued employment with Canstar is highly dependant on upon the company and Mr. Firman's supervisor continuing to accommodate his reduced work capacity.
- [145] Taking into account all the preceding factors, I award Mr. Firman \$200,000 as damages for the loss of his future earning capacity.

III. DAMAGES FOR COST OF FUTURE CARE

[146] The parties did not dispute the relevant legal principles that must guide an award of damages for cost of future care. In *Sharma v. Chui*, those principles were summarized as follows (paras. 119-121):

119. The legal principles are not in dispute, and were helpfully summarized in *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244:

The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Krangle v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Langley Township*, 2008 BCCA 420; *Gregory v. ICBC*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.); *Penner v. ICBC*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128.

120. Assessment of damages under this head is complicated by the necessity to predict the future based on the evidence, but also make adjustments for contingencies: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. In *Bystedt v. Hay*, 2001 BCSC 1735 at para. 163, the court stated that the claim for cost of future care must be supported by evidence that demonstrates what a reasonable person of ample means would provide to meet the reasonable needs of the plaintiff. This is assessed on an objective basis that is fair to both parties.

121. However, the court must have some assurance that the plaintiff will incur the costs. Damages should not be awarded under this head if it is unlikely the plaintiff will avail herself of the services in future: *Maltese v. Pratap*, 2014 BCSC 18 at para. 78. In addition, whether adjustments are necessary to account for contingencies that are either positive (improvement in the plaintiff's condition) or negative (additional care will be required) depends on the specific care needs of each plaintiff: *Langille v. Nguyen*, 2013 BCSC 1460 at para. 234.
- [147] The parties' positions on what was appropriately compensable for cost of future care differed little. The plaintiff relied primarily on Ms. Craig's testimony and report for the cost of future care, but also referred to other expert evidence.
- [148] Like the other experts, Ms. Craig's recommendations for treatment were not premised on the expectation that Mr. Firman's condition is likely to improve. Rather, her recommendations are aimed at making him feel more comfortable and possibly increase his strength and tolerance for activity.
- [149] Ms. Craig recommended 12 supervised exercise sessions with a kinesiologist to work on strengthening, flexibility, and postural correction over the next year with periodic reviews in the following two years. The total cost for 12 sessions is \$660. The defendants agreed this was reasonable and justified.
- [150] The defendants also accept the recommendation for a gym/pool pass, which they suggested would cost \$462 per year. Their position was that the item should be awarded for five years, whereas the plaintiff asked that it be continued for his lifetime. Similarly, the defendants accepted Ms. Craig's recommendation of six annual physiotherapy treatments to address the flare-up of symptoms, at a cost of \$65 per session. Again, they suggested the item been awarded only for five years whereas the plaintiff sought an annual amount up to age 67.
- [151] The defendants' submissions to limit annual costs to five years is consistent with their position that Mr. Firman is likely to move into a management position in five years. As noted above, I have rejected that position.
- [152] There is support for Mr. Firman's position regarding lifetime amount for physiotherapy. Dr. Faraday's expert report does not specifically link the future likelihood of periods of exacerbated pain only to him doing the same job in the future. He opined that Mr. Firman faces a lifetime of pain, for which physiotherapy would help.
- [153] Lastly, during cross-examination, Dr. Budzianowska-Kwiatkowski did recommend an inversion table as something that she understood was now being recommended by neurologists for people to relieve symptoms of lower back pain. She estimated the cost to be between \$165 and \$500. The defendants accepted this was a reasonable item.
- [154] I note despite the plaintiff's submission that amounts for physiotherapy and a gym/pool pass should be awarded each year to age 67, or life, the actual dollar amount sought by the plaintiff was not based on that cost. In my view, Mr. Firman has made a modest and

reasonable claim for cost of future care that is well supported by the evidence. The evidence was uncontroverted that Mr. Firman was highly motivated and did follow treatment recommendations. There was very little dispute about the recommended treatments among the experts.

[155] Taking into account all matters discussed for cost of future care, I award Mr. Firman \$11,000 under this head of damage.

IV. CONCLUSIONS

[156] In light of what I have discussed above, I award the following:

Non-pecuniary damages

\$95,000.00

Past income loss, by consent as agreed by the parties

\$43,948.07

Loss of future income earning capacity

\$200,000.00

Cost of future care

\$11,000.00

Special damages, by consent as agreed by the parties

\$4,104.11.

Total

\$354,052.18

V. COSTS

[157] The plaintiff is entitled to his costs throughout. If there are circumstances of which I am unaware relevant to costs which the parties wish to address, they may seek a brief hearing to do so as long as that request is made no more than 30 days from the date of this judgment.

"Sharma J."

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