

CANADA / JUDGMENT

## Folk v. Folk

2020 BCSC 1286

### COURT

Supreme Court of British Columbia

### DECIDED

31 August 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1286 Folk v. Folk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Folk v. Folk,

2020 BCSC 1286

Date: 20200831

Docket: M52309

Registry: Vernon

Between:

Colin Edward Folk, an infant by his Litigation Guardian

Irene Margaret Moerike and the said Irene Margaret Moerike

Plaintiffs

And

Robbie Vincent Folk, Barbara Elizabeth Morgan and

Barrie John Morgan

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiff:

R. Moffat

Counsel for the Defendants:

M. Prah

Place and Dates of Trial:

Vernon, B.C.

January 28-31 and March 11, 2020

Place and Date of Judgment:

Vernon, B.C.

August 31, 2020

## Introduction

- [1] Colin Folk was five years old when he was injured in a motor vehicle accident on April 15, 2008. He was restrained in a child car seat in the back seat of a vehicle owned by his parents, Robbie Folk and Irene Moerike, driven by his father.
- [2] As a result of the motor vehicle accident, the plaintiff suffered a fractured left collarbone.
- [3] The plaintiff maintains that he has suffered other injuries, including: changes to his personality and behaviour, angry outbursts, changes to and loss of emotional wellbeing, changes to cognitive and intellectual capacities and abilities, nightmares and sleep interruptions, speech impairment, and impaired memory.
- [4] It is these other injuries that constitute the disagreement between the parties. The plaintiff maintains that they were caused by the accident while the defence says that they were not.
- [5] The plaintiff claims that these losses have caused and will continue to cause a loss of earning capacity, and he will require future care and assistance. He also claims special damages.
- [6] The defendants agree that Colin Folk suffered a fractured collarbone as a result of the accident. Their position in respect of the remaining claims is that if they exist, they were not caused by the motor vehicle accident.

## Before the Accident

- [7] Colin Folk was born December 2, 2002. He was the youngest of three children; he has an older sister and brother.
- [8] As noted, the plaintiff was five years old when he was involved in the motor vehicle accident. Various witnesses gave evidence about Colin's demeanor before the accident. Generally, it appears that Colin was normal, happy and playful. Several of the witnesses, including his mother, described him as shy. One witness, Kerry Ansell, described him as a really friendly and lively little guy who would talk up a storm.

- [9] Colin's mother, Ms. Moerike, said that she was not sure whether Colin had issues with his speech development prior to the accident. Other witnesses, including Mr. Ansell, did not notice any speech difficulties at that time.
- [10] In his medical legal report of February 6, 2017, Dr. Michael Murphy, Colin's family doctor, refers to a note in his records of December 1, 2004 written by a locum physician who saw Colin during Dr. Murphy's absence. The note refers to speech delay in Colin, who was then two years old, and states: "return to clinic in 2-3 months if no better." Neither of Colin's parents recall this doctor's appointment or what gave rise to it. Nor do they recall noticing any speech delay in Colin at the time, or being told that the locum doctor had any concern. There was no follow-up.
- [11] Ms. Moerike said that she had planned to enroll Colin to begin kindergarten in September 2007, but declined to do so because she felt that Colin, as a December baby, was too young to start at that time and she reregistered Colin to start kindergarten in September 2008.
- [12] Colin did not attend daycare or pre-school. For some time before the accident and at the time of the accident, Colin was cared for by his father. Robbie Folk said that he had no concerns about Colin's emotional wellbeing. He was a normal young boy. He interacted with adults appropriately.

## The Accident

- [13] On April 15, 2008, Robbie Folk was driving eastbound on Highway 97A near Vernon at the intersection of Head of the Lake Road. At the same time, the defendant Barbara Elizabeth Morgan was driving westbound on Highway 97A approaching the intersection. The Folk and Morgan vehicles collided in the intersection. Ms. Morgan admits that the accident occurred as a result of her negligence.
- [14] As it happened, a family friend, Alice Renouf, arrived at the intersection a couple of minutes after the accident occurred. The Folk vehicle was upside down and Colin was inside, also upside down. Ms. Renouf said that Colin was removed from the vehicle and handed to her. She described him as very traumatised and "freaking out". Although he knew Ms. Renouf, he did not appear to know who she was at that time, and he was screeching and crying.
- [15] Ms. Renouf left the accident scene and went to get Ms. Moerike.
- [16] Colin was taken to the hospital by ambulance and was treated for a non-displaced clavicular fracture (or a fractured left collarbone) for which he was advised to wear a sling.

## After the Accident

2008-2009

- [17] Dr. Murphy saw Colin on April 23, 2008, when he diagnosed the non-displaced clavicular fracture. Dr. Murphy did not have any notations regarding Colin's speech behaviour or emotional wellbeing at that visit.
- [18] Ms. Renouf described seeing Colin after the accident. She said that they were staying with the Folk family. Colin would not even make eye contact with her or others. She found that his whole demeanour had changed, he was unhappy, and while she knew him as a shy boy before the accident he was now "a whole different type of shy". She said that Colin would not speak and he would not focus on conversations. Ms. Renouf has not seen Colin since 2008.
- [19] Colin's sister, Kristen Folk, described Colin's personality before the accident as "normal". After the accident, she said Colin was more shy and sheltered. She also noticed that he got angrier than he did before the accident. As an example, she referred to his response to the breaking of glass around him: if he broke it or if something broke it around him, he would become hysterical. She also noted that his speech had become more mumbled than it was before the accident. It was not loud or confident but more like "gargling". Kristen identified that she and her other brother also had problems with speech that required speech therapy when they were starting school.
- [20] Kerry Ansel, an employee of a lawyer who assisted Mr. Folk on a personal injury claim and a family friend, also observed that Colin did not make eye contact and was not willing to talk. He was overly shy and withdrawn and seemed scared.
- [21] On September 22, 2008, Ms. Moerike took Colin to see his family doctor. In his February 2017 report, Dr. Murphy provided a report concerning a September 22, 2008 appointment in his office. Ms. Moerike described to him Colin's reaction to glass breaking. Dr. Murphy said that:
- Colin was a shy individual able to laugh but did not speak very much during the visit. My experience is that it is not uncommon for children not [to] speak very much in the office when they see me who for all [intents] and purposes is a stranger to them. My impression was that these episodes of crying when glass broke were an adjustment reaction to his motor vehicle accident. Recommendation was to refer Colin to Vernon child and youth mental health for further assessment. The form was filled out at the end of that day and faxed the following day to Vernon child and youth mental health. The report reads as follows: child in MVA April 15, 2008, car turned on side he had a fractured clavicle, father driving had a broken leg. Since then when hears a glass break (so far twice once in house once a grocery store) patient goes into hysterics and cries inconsolably. Diagnosis reads adjustment reaction to MVA. In other words Colin was suffering psychological distress when he heard the breaking of glass reminding him of what he heard during the MVA.
- [22] Ms. Moerike filled out a family data sheet for École Beairsto Elementary School in Vernon on October 24, 2008 when Colin began kindergarten there (six months after the accident). In that form, she described certain developmental milestones. She stated that compared to other family members, Colin's development appeared the same. Ms. Moerike notes a concern regarding Colin's articulation of words (clarity of speech) saying that there was no

problem in his early development but there is in his present development and provides the following details: "sister, brother have had speech therapy in school". She does not note any problems with his present development in memory, hearing or vision. In respect of social skills (relations with other children) she notes a current concern with present development and provides this detail: "concerns because did not have preschool or daycare, also MVA in April". In response to a concern about emotional stability (excessive crying, insecurity, anxiety, temper tantrums) she notes a concern in Colin's present development and gives as detail: "motor vehicle accident in April 2008". Ms. Moerike does not note any concern about Colin's activity level or sleeping habits.

#### 2009 and Continuing

- [23] Ms. Moerike recalls being told that her son was not speaking in class. She recalled having a conversation with a Ms. Kohn, one of Colin's teachers, but could not recall what they spoke about.
- [24] Ms. Moerike acknowledged that she was the person primarily responsible for being in touch with the school regarding Colin. She said that she currently has concern that he is falling behind and may not graduate.
- [25] Ms. Moerike said she does not know if Colin was having issues academically from grades 1-7 (other than receiving some speech therapy at some point) and could not remember ever having a concern regarding his academics during that time; does not know if she had contact with any teachers or the speech therapist at Colin's school from grades 1-7; could not remember discussing any concerns regarding Colin's academics with her husband; could not remember if Colin was on the same "curve" or not as her other children; could not remember if any of Colin's report cards caused her concern during grades 1-7; could not remember following through with any of the recommendations found in Colin's report cards to assist with his academics or speech. She said that Colin did not tell her about how things were going in school at that time. She did not remember Colin being assessed by a psychologist in grade 6. She could not remember if she had a sense of whether Colin needed extra help in grades 1-7.
- [26] Ms. Moerike did state that at some point she became aware that Colin was not completing his assignments and therefore insisted that he do his homework at the kitchen table. He did, for some period, and then he started doing it in his room and she would ask him if he was finished.
- [27] Ms. Moerike could not remember ever being told by any medical person, counsellor, therapist, or any expert, that Colin's sleep difficulties, anger, or anxiety were caused by the accident.
- [28] Colin began seeing Louise Roberts, a clinical counsellor in November 2008. At that time, she noted that he was a polite, shy little boy with a notable language delay. She noted that he was "still working out the fairness of the accident and [the] repercussion [on] his life".

- [29] Colin continued to attend counselling with Ms. Roberts in 2009. She noted that he was adjusting to school and was starting to interact more. He still had indistinct speech. He had problems that Ms. Roberts connected to his anxiety and trauma arising from the accident.
- [30] Colin returned for further sessions in 2012. Ms. Roberts engaged in therapy related to relaxation and reduction of anxiety. She noted that "Colin does not see the extent that his social phobia (shyness) and other anxieties interfere [with] his life."
- [31] After a hiatus, Colin returned to counselling with Ms. Roberts in 2014. At that time he still had thoughts about the accident. She found that Colin was coping well and managing. Ms. Roberts was concerned that once Colin learned to drive, he may re-trigger memories connected to the accident.
- [32] In 2018, Colin attended two sessions with a speech and language pathologist, Shannon Lewis. She noted that he had been assessed by another speech pathologist in January 2018 and presented with severe speech delay, age-appropriate receptive language skills and moderate expressive language delay.
- [33] Since 2018, Ms. Lewis notes that Colin participated in the instructions and activities and made consistent progress.

### Colin Folk's Evidence

- [34] Colin has some recollection of the accident. He recalls broken glass in the vehicle and his being extracted from the vehicle. He prefers not to think about it. He thinks about it when he passes the scene, which he does each day on his way to school and he still has an "odd" feeling.
- [35] After the accident, Colin said that he had some odd dreams and some nightmares that caused him to join his mother in her bedroom. He said that he has had sleep problems since the accident, but they are not ongoing now.
- [36] Colin also described getting angry after the accident. He gets frustrated and has angry outbursts from time to time. There is no pattern to it. He is now able to control it to some extent.
- [37] Colin described having problems with school. He has trouble getting his assignments finished and even when he does, he will not hand them in. He said that that has always been the case. He also is unwilling to make a presentation in front of the class because of stage-fright. He has always experienced anxiety at school, but now he is able to calm down if he leaves and walks around.
- [38] Colin has a regular group of friends at school, some of whom have been friends since their primary grades.

- [39] Colin described having difficulty with pronunciation but cannot say when it started. He said that he knows that he was a talkative kid but after the accident he did not want to talk to people. He thinks that is where his speech problem came from.
- [40] Colin sees a lot of improvement in his speech and he can catch himself when he makes a mistake. He also considers that his socializing is getting better. He is able to talk to his friends because he trusts them. Sometimes they complain that he talks too much.
- [41] Colin has begun to drive and looks forward to having his own car. He does not experience any trauma or anxiety associated with driving.
- [42] In the past year, Colin has volunteered as a junior firefighter at the fire hall near his home. He feels that his experience in the accident will assist him as a firefighter; he can help others out after what he has been through. He considers himself a "whole new person" at the fire hall. The chief has told him that when he is at the fire hall it is not about himself - he is there to save lives. Colin has taken that to heart. Colin expressed interest in a career in firefighting.

### Expert Evidence

- [43] Both parties rely on the expert opinions of Dr. Susan Lazar, a child psychiatrist, who saw Colin on April 13, 2015 and June 22, 2017 and prepared reports in respect of those examinations on February 23, 2016 and July 24, 2017. She also provided a supplementary report on November 2, 2018.
- [44] The plaintiff relies on the expert opinion of Dr. Douglas Cohen, a psychologist, who assessed Colin on August 30, 2016 and on January 14, 2017 and provided a report on July 28, 2017. Dr. Cohen attended the trial for cross-examination.
- [45] The plaintiff relies on the report of Anne MacCallum, a speech pathologist, dated February 28, 2018.

### Dr. Lazar's Reports of February 2016 and July 2017

- [46] In her report of February 2016, Dr. Lazar considered that in the post-accident period Colin likely experienced physical symptoms of anxiety and panic. She described the essential features of panic disorder as including "recurrent unexpected panic attacks accompanied by a persistent concern or worry about additional panic attacks or a change in behaviour related to the panic attacks." She described a panic attack as "an abrupt surge of intense fear or discomfort that reaches a peak within minutes and is accompanied by a number of physical and cognitive symptoms."
- [47] Dr. Lazar goes on to describe Colin's panic attacks:

Colin's panic symptoms include feelings of depersonalization (feeling detached from oneself), an increased respiratory rate and heart rate, chest discomfort, paresthesia (a tingling sensation), sweating and intense fear. Colin's anxiety and panic symptoms, which now occur sporadically, are significantly reduced in frequency relative to the immediate post-accident period when they occurred on a nightly basis.

[48] Dr. Lazar opines that "although Colin likely experienced physical symptoms of anxiety and panic, these symptoms do not result in [Colin experiencing] a persistent concern or worry about additional panic attacks or a change in behaviour related to the panic attacks."

[49] In respect of Colin's anxiety symptoms, Dr. Lazar provides the following opinion:

Colin's anxiety symptoms (which features panic disorder but do not meet full criteria for this disorder) are best described in the DSM-5 by the probable diagnosis of 'other specified anxiety disorder,' a category that applies to presentations marked by the presence of clinically significant anxiety symptoms which cause distress and impairment in functioning; however, the full diagnostic criteria for a specific anxiety disorder are not met.

[50] Regarding the cause of Colin's anxiety symptoms, Dr. Lazar states:

In my opinion based on the medical records, my assessment of Colin and interview of Ms. Folk it is likely that as a result of his involvement in the motor vehicle accident Colin did not experience a change in his social, academic or recreational functioning.

In my opinion it is likely that subsequent to the accident Colin's home environment was exposed to increased psychosocial stressors related to Mr. Folk's injuries sustained in the motor vehicle accident, which likely exerted an adverse impact on Colin's emotional and psychological functioning in the post-accident period. I am unable to comment on any ongoing impact of this stressor on Colin's current relationship with Mr. Folk as I have not had the opportunity to interview Mr. Folk directly.

[A]s a result of his involvement in the motor vehicle accident of April 15, 2008, Colin likely experienced trauma-related anxiety that did not meet [the] diagnostic criteria outlined in the [Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)] for the diagnosis of post-traumatic stress disorder and physical symptoms of anxiety and panic that did not meet [the] diagnostic criteria outlined in the DSM-5 for the diagnosis of a panic disorder and which are best described by the DSM-5 by the probable diagnosis of "other specified anxiety disorder[.]" In my opinion as a result of his involvement [in] the motor vehicle accident of April 15, 2008, Colin likely did not experience any significant change in his academic, social, or recreational functioning.

- [51] After reviewing Louise Roberts' reports, and interviewing Colin and his mother, Dr. Lazar was of the view that Colin "likely experienced symptoms of 'intrusion' with possible nightmares related to the accident and ongoing psychological distress on exposure to cues that resemble the traumatic event ". She described them as mild and not functionally impairing. Colin likely experienced some post-traumatic stress symptomatology, but had no symptoms that were consistent with post-traumatic stress disorder.
- [52] Dr. Lazar provided her prognosis from a psychiatric perspective: there is no impediment to Colin's ability to engage in academic pursuits, future engagement in an intimate long-term relationship and parenting or competitive, full-time employment; it is possible that Colin will experience an increase in his driving-related anxiety in the future when he undertakes driving instruction; and Colin is at increased risk for worsening driving-related anxiety if he is involved in another motor vehicle accident.
- [53] In her report of July 2017, Dr. Lazar concluded, based on her reassessment of Colin as well as her collateral interview of his parents, that "Colin does not currently experience any emotional or psychological symptoms, specifically trauma-related anxiety or physical symptoms of anxiety and panic, consistent with [the] diagnostic criteria outlined in the DSM-5 for any specific psychiatric disorder." Her opinion regarding diagnosis, causation, and prognosis expressed in her February 2016 report was unchanged.

### Dr. Cohen's Report of July 2017

- [54] Dr. Cohen undertook neuropsychological testing of Colin in 2017. He extensively reviewed Colin's medical records, his school records, the records and reports of Louise Roberts and Shannon Lewis, as well as Dr. Lazar's February 2016 report. He had clinical interviews with Colin and his mother.

- [55] Dr. Cohen concluded that:

Colin's injuries, presentation and symptoms subsequent to the April 2008 MVA are consistent with Post-Traumatic Stress Disorder, arising from injuries and reactions to the April 2008 MVA. Colin was exposed directly to a traumatic event in which he directly experienced pain and injury, and in which he witnessed (and states that he recalls to the present) his father sustaining a serious injury and being trapped in the family vehicle, and in which he experienced fear and terror. Colin's recollection is of being fearful of getting into a car, and that there were some associations that reminded him of the accident afterwards.

- [56] In support of the diagnosis of post-traumatic stress disorder, Dr. Cohen referred to Colin's description of being in shock and crying immediately after the accident; Colin's initially experiencing intrusion symptoms of recurrent distressing dreams and nightmares, and intrusive recollections; Colin's reported feelings of panic and depersonalization at night; Colin's reported experience of marked social withdrawal and persistent reduction in the expression of positive emotions; Colin's report of a startle response, sleep disturbance, and irritable and angry behaviour; and developmental regression in toileting.

[57] In Dr. Cohen's opinion:

Colin continues to present with some residual symptoms of PTSD in that he continues to think about the possibility of getting into an accident nearly every time he gets into a car, and experiences these memories as unwelcome, continues to have a startle response, and some sleep issues (although these might not be entirely anxiety-related). However, his symptoms are no longer consistent with clinical levels of PTSD, and Colin is not likely currently experiencing any significant psychological or learning effects from his trauma symptoms.

[58] Dr. Cohen also opined that Colin exhibits symptoms of social anxiety disorder. He expressed the opinion that after the accident, "Colin became increasingly fearful and anxious in certain respects particularly in being able to express himself verbally at school, once he entered kindergarten." As Colin has remained very shy and significantly anxious, "this pattern post-MVA likely continues to represent the persistent residual effects of withdrawal and avoidance catalyzed by the initial trauma effects."

[59] Dr. Cohen is of the view that

Colin presents currently with symptoms consistent with Social Anxiety Disorder (Social Phobia), with marked anxiety at school when he has to talk in front of others, in which he dislikes being observed in this regard, fears being negatively evaluated and in particular being embarrassed about his speech, and that he continues to avoid speaking at school in particular due to his anxiety. As noted above, high levels of anxiety has cognitive effects in that it can of course disrupt attention and memory, increase one's level of fatigue and lower cognitive reserves otherwise, and make it more difficult to learn and retain new information.

[60] Dr. Cohen opines that Colin's post-accident symptoms are consistent with selective mutism as defined in the DSM-5, a social anxiety disorder, and in some instances it is directly associated with exposure to trauma and/or parental separation or disruption in attachment or family functioning, characterized by marked difficulty in responding to or initiating conversation, and is sometimes referred to as extreme shyness. Dr. Cohen is of the opinion that Colin's selective mutism is likely a product of and/or overlapping with his anxiety and trauma symptoms.

[61] Ultimately, it is Dr. Cohen's opinion that:

[T]he accident and attendant psychological sequelae were likely the most important factor[s] in Colin's development of mutism and social anxiety symptoms. Still, a comprehensive Speech Language assessment should be conducted to more precisely delineate Colin's pre-injury language functioning as can best be determined, and the history and extent of his post-injury language difficulties. Additionally, Colin was a somewhat shy and reserved child prior to the MVA, and this likely also represents something of a pre-injury risk factor for him developing Selective Mutism subsequent to trauma. Again though, absent the psychological injuries sustained in the 2008 MVA it would have been very unlikely that Colin would have developed Selective Mutism or PTSD in particular.

- [62] Dr. Cohen describes concerns for Colin's future, including limitations on his choice of career and work functioning and a long-term risk for social and emotional adjustment problems.
- [63] Dr. Cohen recommends psychotherapy services with a clinical psychologist over the short and long term; speech pathology assessment; educational assistance; schoolroom and classroom adaptations; medications to address his social anxiety; the provision of an educational consultant; occupational therapy; a further audiometry exam; and a reassessment of his cognitive, academic and psychological functioning and learning, and possibly his speech language functioning, before he completes high school, in order to assist with long-term vocational planning and planning for independent living. He also suggests that a vocational or occupational therapy assessment may be appropriate at that time as well, dependent on Colin's progress in high school and interests.

### **Anne MacCallum's Report of February 28, 2018**

- [64] Ms. MacCallum is a speech-language pathologist, registered with the College of Speech and Hearing Professionals of British Columbia. She reviewed Colin's school records and interviewed Colin and his mother in their home. Based on her findings, Ms. MacCallum was of the opinion that Colin's language skills were mainly in the low average to average range; however, some language comprehension skills were poor, i.e. his comprehension of vocabulary and of figurative language were below average for his age. She found that most of Colin's scores in the deficient range were related to expressive language skills, i.e. his expressive vocabulary and his ability to produce narratives, and to his higher level language functions, including generating ideas, language organization, and verbal abstraction. She found that Colin's written language skills were also in the deficient range.
- [65] Ms. MacCallum noted that Colin had selective mutism that continued until Colin was in grade 5, according to Ms. Moerike and school records.
- [66] In respect of whether the accident was causative of Colin's speech pathology, Ms. MacCallum remarked: "Relevant experts may opine on the links between Master Folk's car accident, his anxiety disorder, and his experience with selective mutism."

### **Dr. Lazar's Report of November 2018**

- [67] Dr. Lazar was asked to review the reports of Dr. Cohen and Ms. MacCallum and provide a supplementary report to her previous two reports.
- [68] In respect of Dr. Cohen's report, Dr. Lazar disagrees with Dr. Cohen's opinion that Colin's "injuries, presentation and symptoms following the April 2008 MVA are consistent with Post-Traumatic Stress Disorder."

[69] Dr. Lazar reviews the diagnostic core symptoms of post-traumatic stress disorder. She then refers to the post-traumatic stress symptomatology listed by Dr. Cohen that she considers to be consistent with the diagnostic criteria outlined in the DSM-5 for the diagnosis of post-traumatic stress disorder, but she says:

I am unable to correlate the symptoms listed in support of this diagnosis with those reported in the body of Dr. Cohen's report. Specifically, it is not clear that Colin experienced a "persistent reduction in the expression of positive emotions" related to the traumatic event, as opposed to the irritable and angry behaviour Dr. Cohen noted and which he included toward the required criteria of "alterations in arousal and reactivity associated with the trauma."

[70] Dr. Lazar notes that "Dr. Cohen opined that at the time of his assessment of Colin, Colin's symptoms were no longer 'consistent with clinical levels of PTSD' and Colin was likely not experiencing any 'significant psychological or learning effects from his trauma symptoms.'"

[71] Dr. Lazar levels the same criticism of Dr. Cohen's diagnosis of social anxiety disorder. Dr. Lazar reviews the symptomatology of the disorder and addresses Colin's symptoms listed in Dr. Cohen's report, specifically, "Colin's experience of stress when having to speak out in class and his worry of negative evaluation by others 'and in particular being embarrassed about his speech'". Dr. Lazar notes that while this is consistent with social anxiety disorder symptoms, it is her view that "it is unclear the extent to which Colin's longstanding speech sound disorder relates to this anxiety." She continues:

One of the diagnostic criteria for social anxiety disorder is that if there is a concurrent condition present, the anxiety and avoidance is 'clearly unrelated or is excessive.' In my opinion, it is not clear in Dr. Cohen's report, that Colin's articulation issues are 'clearly unrelated' to his anxiety in speaking out in class or that his anxiety [in] these situations is 'excessive' in the context of his articulation issues.

[72] In respect of Dr. Cohen's ultimate opinion that the "the accident and attendant psychological sequelae were likely the most important factors in Colin's development of mutism and social anxiety symptoms", Dr. Lazar comments that it is not clear. She continues:

In my opinion, it is likely that the accident resulted in emotional and psychological issues for Colin, specifically, anxiety concerns that might have generalized from the trauma of the accident to situations beyond the accident, including anxiety in social situations and the tendency to limit his engagement in social communications. However, in my opinion, Colin's anxiety in social situations and his limited social communication is likely multifactorial in origin, and includes temperamental factors, cognitive factors (such as the difficulties Dr. Cohen reported with respect to Colin's auditory working memory and processing speed which would impact Colin's communicative engagement) and psychosocial stressors (including the impact of his father's injuries from the index accident on the home environment and family functioning). In my opinion, it is not possible to apportion the contribution of these various factors to the development of these more generalized anxiety symptoms (anxiety in social situations and the tendency to limit his engagement in social communications) nor is it possible to identify the

accident as the primary causative factor in the development of these more generalized anxiety symptoms.

- [73] Dr. Lazar is unable to comment on Ms. MacCallum's assessment tools or results as that is outside her expertise. She does note that "it is generally accepted in the psychiatric community that children with selective mutism generally have normal language skills. Additionally, language disorders are highly heritable."
- [74] Dr. Lazar refers back to her first two reports to answer the question whether Colin "had or may have the difficulties identified by Ms. [MacCallum]." She notes that she considered that "Colin's speech was notable for articulation issues [but] his thought form was logical and he was able to engage in goal-oriented discourse."

## Discussion and Analysis

### Causation

- [75] There is no dispute that the accident of April 2008 caused Colin's physical injury: a fractured left collarbone that resolved within two months of the accident. He is entitled to damages for that injury.
- [76] The overarching issue in this case is whether the accident of April 2008 caused other injuries including post-traumatic stress disorder, social anxiety disorder, changes to the plaintiff's personality and behaviour, angry outbursts, changes to and loss of emotional wellbeing, changes to cognitive and intellectual capacities and abilities, nightmares and sleep interruptions, speech impairment, and impaired memory.
- [77] The test for causation is set out in *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32 at paras. 6-10:

6 On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) caused the injury. That link is causation.

7 Recovery in negligence presupposes a relationship between the plaintiff and defendants based on the existence of a duty of care -- a defendant who is at fault and a plaintiff who has been injured by that fault. If the defendant breaches this duty and thereby causes injury to the plaintiff, the law "corrects" the deficiency in the relationship by requiring the defendant to compensate the plaintiff for the injury suffered. This basis for recovery, sometimes referred to as "corrective justice", assigns liability when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm [citation omitted].

8 The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury -- in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

9 The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury [citations omitted].

10 A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss [citations omitted].

[Emphasis in original.]

[78] In this case, the anecdotal evidence given by the plaintiff and his mother relies on imperfect memories and snippets of information. I do not fault Ms. Moerike or Colin for this: they are being asked to recall details of events that occurred over a 15-year period.

[79] For example, there is evidence that the plaintiff was shy after the accident. Some witnesses, including Ms. Moerike, said that he was a shy little boy even before the accident.

[80] Some witnesses, including Ms. Moerike, said that Colin developed speech and language impairment after the accident; yet there is a note in Dr. Murphy's report concerning Colin's language delay when he was two years old. Ms. Moerike is unable to say whether Colin's speech impairment was present before the accident. However, in the family data sheet that she filled out in October 2008 she notes a concern regarding Colin's articulation of words (clarity of speech), saying that there was no problem in his early development but there is in his present development and provides the following details: "sister, brother have had speech therapy in school." She does not mention the accident as a source of his speech problems.

[81] Dr. Murphy concludes, after he examined Colin at a September 22, 2008 appointment and Ms. Moerike described Colin's emotional reaction to glass breaking, that these episodes of crying were an adjustment reaction to his motor vehicle accident. He referred Colin for a further mental health assessment. He considered that Colin was suffering psychological distress when he heard breaking glass, reminding him of what he heard during the accident.

[82] On the family data sheet, Ms. Moerike relates her concerns about Colin's social skills and emotional stability to the accident.

[83] Following the accident, Colin began to see Ms. Roberts, the clinical counsellor, off and on through to 2014. At his first visit in November 2008, she found him to have a notable language delay and at the same time Colin was "still working out the fairness of the accident

and [the] repercussion on his life". In 2009, she considered Colin still had problems related to his anxiety and trauma arising from the accident. However, when Colin returned to counselling in 2014, she noted a dramatic improvement in Colin's speech although he still had some anxiety. She noted he was coping well and managing.

- [84] The evidence demonstrates that Colin experienced some anxiety following the accident. This is supported by Dr. Lazar, when she says that "as a result of his involvement in the motor vehicle accident of April 15, 2008, Colin likely experienced emotional difficulties (specifically trauma-related anxiety)."
- [85] Dr. Lazar finds Colin suffered post-trauma anxiety, but disagrees with Dr. Cohen on the diagnosis of post-traumatic stress disorder and social anxiety disorder. They also disagree on the cause of Colin's anxiety in social situations and his aversion to speaking (which Dr. Cohen characterizes as "selective mutism"). This disagreement on causation is important, if I find that Colin's social anxiety and aversion to speaking would not have occurred "but for" the accident. Dr. Lazar says the causes of these ongoing symptoms are multi-factorial and cannot be attributed solely to the accident
- [86] I have referred to the evidence before me about Colin's experience with anxiety in social situations, aversion to speaking and speech impairment before and since the accident. The experts reviewed the documentation that they were provided, particularly Colin's school records, which were not proven in evidence before me. They have also relied, to a great extent, on what they have been told by Colin and his mother and father. In some circumstances, what they were told was what I heard in evidence, in other cases, the evidence before me was different.
- [87] Colin's evidence was honest, forthright and cogent. The speech pathologist, Anne MacCallum, has identified some speech impairment, and I accept that. As a witness, however, he was able to communicate his thoughts clearly. He acknowledged that he was nervous. Nevertheless, he was personable, social and did not demonstrate untoward anxiety. He explained his difficulties with school and some of his current experiences. He has friends, he is sociable and he appears to enjoy his life. He showed a great deal of enthusiasm for his future.
- [88] Having reviewed all of the evidence, I am satisfied that the plaintiff has demonstrated that but for the accident, he would not have experienced the panic and anxiety that he experienced after the accident. It is likely that those symptoms continued until 2014, six years after the accident occurred, based upon the reports of Dr. Murphy and Louise Roberts.
- [89] I also accept, on the basis of the lay evidence, that Colin's demeanour changed as a result of the accident. He became more withdrawn, angry and unhappy. While these symptoms abated, Colin has a speech impairment, some ongoing anxiety in social situations, including an aversion to speaking.

[90] However, I am equally satisfied that the plaintiff's speech impairment, and his ongoing, but much diminished, anxiety in social situations (including his aversion to speaking) cannot be considered to have been caused by the accident, applying the "but for" test.

[91] Neither Drs. Lazar nor Cohen clearly attribute Colin's speech impairment to the accident. Dr. Cohen, for instance, notes it was possibly a pre-existing condition and the result of "familial factors", which pre-disposed Colin to social anxiety and mutism. I am satisfied that Colin's speech impairment was not caused by the accident.

[92] On the causes of Colin's social anxiety and aversion to speaking, I prefer the evidence of Dr. Lazar over Dr. Cohen. As Dr. Lazar noted and I repeat,

Colin's anxiety in social situations and his limited social communication is likely multi factorial in origin, and includes temperamental factors, cognitive factors (such as the difficulties Dr. Cohen reported with respect to Colin's auditory working memory and processing speed which would impact Colin's communicative engagement) and psychosocial stressors (including the impact of his father's injuries from the index accident on the home environment and family functioning)

[93] I agree with Dr. Lazar that Colin's ongoing social anxiety and aversion to speaking likely results from multiple factors independent of the accident. Colin was shy before the accident, which indicates temperamental and cognitive factors (identified by Dr. Cohen) underlie his present symptoms.

[94] Moreover, it is plausible Colin's ongoing difficulties result from embarrassment about his speech impairment, as Dr. Lazar suggests. Dr. Cohen's report, for instance, notes that Colin attributes his anxiety to such embarrassment. As well, Colin testified that both his speech and his socializing have improved, which implies his ongoing social challenges arise from worries about his speech. Lastly, Dr. Lazar observes the general view among psychiatrists is that children with selective mutism generally have normal language skills and that language disorders are highly inheritable.

[95] There are several reasons why Colin may have ongoing anxiety in social situations, an aversion to speaking and a speech impairment. However, it cannot be said that but for the accident, these difficulties would not have occurred.

[96] I accept that the accident worsened Colin's shyness and aversion to speaking for a time. However, I find this effect likely resolved as his symptoms of panic and trauma-related anxiety subsided around 2014.

[97] Lastly, Drs. Lazar and Cohen disagree on Colin's prognosis. I accept Dr. Lazar's opinion that the accident will not impede Colin's academic, social or employment pursuits over the long-term. Colin testified he has formed friendships and is optimistic about his career, potentially as a firefighter. While Dr. Lazar opines that Colin may suffer an increase in his driving-related anxiety when he begins to drive, this has not occurred. Colin testified that he does not experience any trauma associated with driving.

## Damages

### Non-pecuniary Damages

[98] Colin is entitled to damages for the pain and suffering he has incurred as a result of the injuries that were caused by the accident.

[99] Non-pecuniary damages compensate a plaintiff for pain, suffering, loss of enjoyment of life and amenities: *Trites v. Penner*, 2010 BCSC 882 at para. 188. They provide "reasonable solace for [the plaintiff's] misfortune": *Lindal v. Lindal*, [1981] 2 SCR 629 at 636. The amount of an award for non-pecuniary damages does not depend solely on the seriousness of the injury, but its ability to ameliorate the condition of the plaintiff, considering his situation: *Lindal* at 637.

[100] In assessing the amount of a non-pecuniary damages award, the court must take into account a non-exhaustive list of factors. These include the plaintiff's age, the nature of their injuries, severity and duration of their pain, the disability experienced, emotional suffering, loss or impairments of life, impairment of family, marital and social relationships, impairment of physical and mental abilities, loss of lifestyle, and the plaintiff's stoicism (and that stoicism should not lead to a lower award): *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

[101] The parties have provided the courts with cases with facts they consider similar, on the basis that similar cases should attract similar awards. However, most of the cases do not address the injuries that I have found Colin to have sustained in the accident. Ultimately, an award for pain and suffering must be based on the circumstances of the particular case.

[102] In respect of Colin's fractured left collarbone, which resolved in a matter of months and had no permanent effect, I rely on the cases put forward by the defence, that quantify damages for such an injury in the range of \$15,000 to \$20,000. Because of the plaintiff's age at the time of the injury and his ability to heal quickly and the limited period of pain related to that injury, I find \$15,000 to be the appropriate award for that injury.

- [103] Colin's symptoms of anxiety and trauma were much more serious. They went on for six years. They interfered significantly with his childhood. Instead of the happy normal child that he was, Colin became withdrawn, unable to communicate, angry, frustrated and terrified by nightmares. His anxiety interfered in what would have been a carefree childhood. Though I have found that it has not had an ongoing effect on Colin's life, it had to have made his early school years and other psychosocial stressors harder for him to bear.
- [104] Of the cases cited by the plaintiff, Colin's psychological injuries are most similar to the plaintiff in *Nemoto (Litigation Guardian of) v. Phagura*, 2014 BCSC 262. The plaintiff in *Nemoto* was in an accident at age ten. He suffered neck, shoulder, and back pain; headaches; and symptoms of panic and anxiety, including nightmares. His physical and psychological injuries substantially resolved in three years. The trial judge awarded \$40,000 in non-pecuniary damages.
- [105] Colin's psychological injuries persisted for longer than the plaintiff's in *Nemoto*. They were also more significant. They impacted his social engagement, willingness to speak, and his ability to cope with his other psychosocial stressors. To account for these differences, I find that that this aspect of Colin's pain and suffering justifies a significant award of damages. I award \$50,000 in respect of this injury.
- [106] In total, the award for pain and suffering is \$65,000.

### Other Heads of Damages

- [107] The plaintiff also claims for future care, loss of earning capacity and special damages. These are related mainly to his speech impairment that I have not found to be attributable to the accident.
- [108] I accept Dr. Lazar's opinion that Colin did not experience any significant change in his academic, social, or recreational functioning as a result of the accident. I also accept her opinion that the accident will not impede Colin's employment opportunities. There is no evidence to support a loss of earning capacity arising from his panic and trauma-related anxiety symptoms.
- [109] These claims for damages are dismissed.

### Costs

- [110] The parties have leave to address costs.

"Gropper J."

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.bccourts.ca/jdb-txt/sc/20/12/2020BCSC1286.htm>

**CASE PAGE**              <https://chat.esheria.ai/case-law/canada/folk-v-folk-2020>

Prepared on 25 October 2026 · Esheria