
CANADA / JUDGMENT

G.P. v. W.B.

2017 BCSC 297

COURT

Supreme Court of British Columbia

DECIDED

23 February 2017

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2017 BCSC 297 G.P. v. W.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.P. v. W.B.,

2017 BCSC 297

Date: 20170223

Docket: M159786

Registry: New Westminster

Between:

G.P.

Plaintiff

And

W.B. and B.B.

Defendants

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Plaintiff:

B. Findlay

M.A. Sandor

Counsel for the Defendants:

R.V. Burns

M.K. McConnell

Place and Dates of Trial:

New Westminster, B.C.

January 16-20, 2017

Place and Date of Judgment:

New Westminster, B.C.

February 23, 2017

Introduction

- [1] The plaintiff, G.P., is a 44 year old man who has bipolar and obsessive compulsive disorders.
- [2] G.P. recognizes his illnesses and takes pride in living as "normal" a life as possible despite his illnesses.
- [3] G.P. and his wife married in 2006 and their son was born in 2009.
- [4] On May 11, 2012, the car G.P. was driving was rear-ended by a sports utility vehicle driven by the first defendant, W.B. (the second defendant, B.B., is the owner of that vehicle) (the "May 11, 2012 accident"). Liability has been admitted.
- [5] As a result of the accident, G.P. suffered whiplash type injuries, including injury to his lower back which has not resolved. At this time, the medical advice is that surgery should occur as soon as reasonably possible.
- [6] The pain and stress associated with his physical injury have destabilized his psychiatric well-being. As a result, his wife may now leave him. G.P.'s relationship with his son is no longer close as it was before the accident. His son, too young to appreciate matters, now calls his father names.
- [7] G.P. has for many years worked as a labourer or a truck driver. Prior to the accident, he was working at a paper mill.
- [8] The plaintiff has claimed damages under the following heads:

Non-pecuniary damages:

\$100,000 to \$150,000

Diminished earning capacity:

\$250,000 to \$350,000

Cost of future care:

\$20,000

Past loss of housekeeping capacity:

\$20,000

Future loss of housekeeping capacity:

\$20,000

Special damages:

\$1,812

Total:

\$411,812 to \$561,812

[9] Of particular note, G.P. seeks approximately \$15,100 as part of future care so that his back surgery can be done within the next month at a private clinic as recommended by his neurosurgeon rather than wait approximately 12 months for the surgery to be done under our Province's public medical system.

[10] Excluding an award for diminished earning capacity, the defendants state that the appropriate award should be :

Non-pecuniary damages:

\$45,000 to \$70,000

Cost of future care:

\$0

Past loss of housekeeping capacity:

\$0

Future loss of housekeeping capacity:

\$0

Special damages:

\$1,812

Total:

\$46,812 to \$71,812

[11] Counsel for the defendants suggested a modest award for diminished earning capacity and left it to the Court to make the determination.

[12] For the reasons that follow, G.P. is awarded \$479,612. He will also have his costs at Scale B.

initials and sealing order

- [13] At the conclusion of his expert testimony, I asked Dr. H. Gopinath, G.P.'s psychiatrist, whether publicity would affect G.P.'s mental well-being. Dr. Gopinath testified that publicity which identifies G.P. could definitely be harmful to G.P.'s mental health.
- [14] I subsequently raised with counsel whether the Court should anonymize the names of the parties and the witnesses by initializing their names in the reasons for judgment (except for the names of doctors) and whether the file should be sealed.
- [15] G.P.'s counsel asked for the names in the reasons for judgment to be initialized as I had suggested and that the file be sealed. Defendants' counsel took no position. Accordingly, I made the necessary order. Authority for such an exceptional approach and order may be found in *C.W. v. L.G.M.*, 2004 BCSC 1499 at paras. 6 to 9 and 25 and *C.P. v. RBC Life Insurance Company*, 2014 BCSC 117, appeal dismissed except for a variation of costs, 2015 BCCA 30, leave to appeal ref'd.
- [16] G.P.'s counsel co-ordinated the sealing in accordance with Practice Direction PD - 35 Sealing Orders in Civil and Family Proceedings. The sealing order allows members of the public or the press to apply upon reasonable notice to counsel to have parts of the file unsealed. The Court must balance transparency of the proceedings with the medically recognized potential of serious mental harm to G.P.

key dates

- [17] As with most claims related to a motor vehicle accident, I find a chronology to be helpful in considering the evidence. I have attached as Schedule A the chronology.

the may 11, 2012 accident

- [18] Mid-afternoon of May 11, 2012, G.P. was driving his car eastbound on Lougheed Highway and was stopped at a traffic light when his car was rear-ended by a sports utility vehicle driven by W.B. G.P. was wearing his seatbelt.
- [19] As mentioned above, the defendants have admitted liability for the accident.
- [20] The collision was with force and caused approximately \$3,000 damage to G.P.'s car. G.P. described "flying around" with his seatbelt restraining him. In cross-examination, G.P.'s description of the accident was not challenged.
- [21] W.B. was called by the defence. In cross-examination, he conceded that it was possible that the speed of his vehicle was 15 to 20 kph, although maintaining that he was driving in stop-and-go traffic.
- [22] G.P.'s injuries are consistent with the whiplash nature of a rear-end collision. I find that the accident was a rear-end collision of force certainly sufficient to cause, and did cause, the whiplash-type injuries for which G.P. claims.

plaintiff's background

a) Generally

- [23] At the time of trial, G.P. was 44 years old. He has been married for ten years and, with his wife, has one son. They live in a townhouse in the Lower Mainland.
- [24] G.P. has a high school education and several certificates from short vocational courses, including Community Mental Health (2001), Psychosocial Rehabilitation (2001), Building Service Worker (2008), Basic Workplace Hazardous Materials Systems (2008), and Forklift Operation (2011).
- [25] The plaintiff was first diagnosed with bipolar disorder when he was approximately 21 years old. He first noticed that he had symptoms of the illness when he was 16 years old while at a hockey camp.
- [26] When G.P. was approximately 27 years old, he was diagnosed with obsessive compulsive disorder.
- [27] G.P. still suffers from both disorders. He testified that he may "go up and down with [his] mood really profoundly" and that he may get thoughts that repeat for days, months, or in some cases, years. While describing the repetitive frequency of his obsessive thoughts, G.P. made a motion with both hands moving in a forward circular motion around each temple, evoking the image of an operating Gestetner cyclograph. G.P. testified that his obsessive thoughts are unwanted and disturbing. I understand the thoughts are not of a violent nature.
- [28] Between 1993 to 2006, G.P. was hospitalized approximately 38 times, with stays of one to 39 days. During this period, the frequency of hospitalizations decreased. Between 2000 to 2006, there were "only five admissions for extremely brief periods of time".
- [29] In his late 20s, G.P. lived in a half-way house for people with mental disorders and then later in a facility which was subsidized by our Province for individuals suffering from mental disorders.
- [30] In the more recent years, G.P. has also had only a few hospitalizations. G.P.'s last hospitalization (for three days) was in May 2011. G.P. testified that, in his view, the cause for his last hospitalization was the financial stress related to WorkSafeBC challenging a claim he had made in relation to an October 29, 2010 foot-related injury (WorkSafeBC subsequently allowed the claim). As G.P. described, "I went a little crazy".
- [31] For the past 14 years, G.P. has been under the psychiatric care of Dr. Gopinath. Over time, the frequency of G.P.'s visits with Dr. Gopinath has decreased from approximately once every two weeks to approximately once every two months at present.

- [32] G.P. is on approximately seven medications prescribed by Dr. Gopinath. The medications mollify his mood and reduce the frequency and intensity of his obsessive thoughts. The plaintiff testified that the medications help, but "I am never normal but the fact is I can function properly".
- [33] G.P. testified that pain and stress affect his bipolar and obsessive compulsive disorders negatively, often making him agitated and confused.
- [34] G.P. takes pride in accomplishing a reasonably "normal-looking" life. He did not wish to live on or with public assistance and is proud that he does not do so now. He attributes much of his success in addressing his disorders to his wife who he says "changed my life" by giving stability to his life. He described his life in the four or five years prior to the May 11, 2012 accident as "quite well". He had a generally supportive marriage, a young and loving son, and a job with full-time work, subject to the general economic vagaries of the paper mill industry.

b) Work History

- [35] At the time of the May 11, 2012 accident, G.P. was working at a local paper mill. He was on the spare board but received full-time work. He had been working at the mill for approximately four years. He earned \$27 per hour with an annual income of approximately \$58,000.
- [36] As noted, G.P. had suffered a work-related right foot injury on October 29, 2010 which led to surgery on May 16, 2011. He underwent surgery on his right foot again on February 13, 2012 to remove cannulated screws. After his first surgery, he returned to work on October 3, 2011 at the paper mill but was laid off two weeks later. He returned again to work in late December 2011.
- [37] After the February 13, 2012 surgery, he started a graduated return to work program on April 23, 2012. On May 7, 2012, he returned to full-time duties at the paper mill.
- [38] As a result of the foot injury, G.P. received a partial disability benefit of \$238 per month from WorkSafeBC. G.P. testified that once the right foot injury had healed to the extent it would, it did not generally interfere with his ability to work or to play with his son.
- [39] In June 2012, G.P. testified that the paper mill laid off 200 employees which created stress for him. G.P. decided to find another job. He then started to work at a local plumbing, drainage, and heating company. He was paid \$23 per hour by the plumbing company.
- [40] At the plumbing company, G.P.'s initial duties consisted of driving a truck for the purpose of picking up and delivering materials and supplies. He worked approximately 40 hours per week. Subsequently, his employer started to require him to help with heavy lifting and heavy physical labour which his back injury from the May 11, 2012 accident would not allow him to do without pain. Accordingly, he quit this job in December 2012 and started to work at a local sheet metal fabricator in early January 2013 and continues to work there.

- [41] For the sheet metal fabricator, G.P.'s duties involve driving one of the two delivery trucks owned by his employer. G.P. picks up supplies and delivers fabricated products to job sites. Some lifting is required. G.P. manages to handle matters with planning and the help of co-workers. He is well-liked and co-workers and job site workers are willing to help him with moving heavier or awkwardly-shaped items. He earns \$24 per hour and works approximately 40 hours per week.
- [42] The defence called G.P.'s supervisor at the sheet metal fabricator as a witness. He is a cousin of G.P.'s wife and has known G.P. for many years. In his examination-in-chief, G.P.'s supervisor described G.P. as hard-working and reliable, the "perfect employee". He was "trustworthy", "a quick learner", and "intelligent".
- [43] Prior to working at the paper mill, G.P. had worked for a landscaping company for approximately nine years, earning approximately \$18 per hour. He went to work at the paper mill in order to make more money.
- [44] Prior to working at the landscaping company, G.P. had tried to establish a bar in Puerto Rico but was not successful. Prior to that, he had worked for a painting and home renovation company for approximately four years and, before that, he worked for approximately two years for the landscaping company to which he later returned.
- [45] The layoff of G.P. at the paper mill was not related to his injuries from the May 11, 2012 accident. Despite his injuries, he has been able to continue to work at jobs earning approximately the same income he would have enjoyed if the May 11, 2012 accident had not occurred. As a result, G.P. is not making a claim for past wage loss.

c) Injuries

- [46] Prior to the May 11, 2012 accident, G.P. had the right foot injury from work at the paper mill, a mild degree of gout in his left foot (which was generally controlled with medication and diet), sleep apnea (which was controlled successfully with a sleep breathing device), and the two mental disorders described above. He functioned well at work and at home.
- [47] With respect to the pre-existing right foot injury, G.P.'s long-time family physician, Dr. Richards, testified at trial that the foot injury was still healing by late 2012 or early 2013. Dr. Richards was qualified as a medical doctor specializing in family medicine with the ability to give expert evidence with respect to the treatment of musculoskeletal injuries including chronic pain.
- [48] G.P. testified that, after the May 11, 2012 accident, he had pain and soreness in his neck, shoulders, wrists, lower back, hips, groin, buttocks, and legs that he did not have prior to the accident. As noted above, the May 11, 2012 accident caused these injuries; the accident was one of force and the injuries are consistent with whiplash injuries commonly arising from rear-end motor vehicle collisions.

- [49] In argument, G.P.'s counsel stated that the injuries to G.P.'s neck, shoulders, and wrists resolved in approximately six months. G.P. does not complain of injuries in these areas after approximately six months. Such a period is not an uncommon period of time in which such injuries resolve. I find that the foregoing injuries resolved within six months.
- [50] After the May 11, 2012 accident, G.P. drove to his parents' home. He did not feel well and returned home to his wife.
- [51] On May 14, 2012, G.P. went to a local medical clinic. His then family physician, Dr. Richards, was away at the time (in recent months, Dr. Richards started work as a hospital doctor and no longer undertakes a family practice). The doctor who saw G.P. at the local medical clinic told G.P. that one of the medications (a prescription for gout) he was already taking should help with his symptoms.
- [52] The following day, G.P. returned to the clinic because he was still experiencing pain. The doctor did a physical examination of G.P. G.P. understood Dr. Richards would see the results of his physical examination upon his return to the clinic because he was also associated with the clinic.
- [53] Two days later, on May 17, 2012, G.P. was experiencing so much pain, especially when walking, that he decided to get further medical help and went to a local hospital. He was given an injection of Toradol. He then went to Osoyoos with his wife to rest at his parents' condominium. They stayed there for about a week. The rest did not help. He felt "brutal" and it "felt like his back would pop-out behind" him.
- [54] On May 28, 2012, G.P. went to see Dr. Richards regarding his motor vehicle injuries. Dr. Richards recommended physiotherapy. G.P. started physiotherapy on May 30, 2012 (which included traction, an ice ball, stretching, heat therapy, and electrotherapy). G.P. went almost weekly until March 2013 (37 times). He stopped because he felt that there was only limited improvement to his lower back pain.
- [55] In February 2014, G.P. returned to physiotherapy in order to seek relief. He stopped in November 2014 because again he did not feel that it was helping. He went approximately 20 times in 2014.
- [56] Despite pain, G.P. returned to work at the paper mill shortly after the May 11, 2012 accident. I am satisfied that G.P. is a person of fortitude who was willing to work through considerable pain in order to maintain his job and income to help support his wife and son.
- [57] G.P.'s injuries related to his lower back have not resolved. He has low back pain, hip pain, and varying numbness in his groin, buttocks, and legs. Often when he urinates, the numbness prevents him from realizing when he has finished urinating. The leg numbness which has progressed in severity affects his ability to walk for long periods.

- [58] G.P.'s ongoing symptoms prevent him from engaging in activities with his son such as roughhousing, skating, kicking a soccer ball, or skiing. With respect to household chores and maintenance, he no longer shares these duties with his wife. He finds walking their dog difficult and leaves the household chores and maintenance to his wife, parents, and in-laws. His pain also prevents him from enjoying a full night's sleep on a regular basis.
- [59] G.P. directs all his physical energy to his job and is exhausted at the end of the workday. I am satisfied that he needs the evenings and weekends to recover, especially having regard to his interrupted sleep.
- [60] As discussed below, the physical injury to G.P.'s back can be seen with modern medical imaging.
- [61] G.P. has followed substantially all of the recommendations of his various doctors with respect to his injuries.
- [62] In brief, G.P.'s doctors expected that G.P.'s lower back injury would resolve over time as most back injuries similar to those of G.P. do (approximately 95% is the general experience). Unfortunately, G.P. falls within the minority of the population with similar injuries that do not resolve. Back surgery is now recommended. Prior to this recommendation, G.P.'s doctors had adopted a conservative approach, giving time for the lower back injury to resolve on its own with physiotherapy and other non-surgical assistance. G.P. is willing to undergo the back surgery and has told his employer he will need time off for the surgery.
- [63] The psychological impact of G.P.'s injuries has been significant. Prior to the May 11, 2012 accident, G.P. enjoyed support of a thoughtful and caring spouse and the joy of a young child. There were challenges but, in my view, within the norm of a generally harmonious marriage. G.P. felt that his spouse nagged him from time to time. He felt financial stress related to his foot injury and WorkSafeBC's initial denial of his claim. In January 2012, he feared his wife might seek a divorce because of his weight gain and his inactivity related to his foot injury. G.P.'s foot injury has now generally resolved with only minor limitation.
- [64] G.P.'s spouse also testified. She was aware that G.P. suffered from mental illness before they met. Prior to the accident, she described her marriage as "good". She described some arguments prior to the May 11, 2012 accident, including one where the police were called. She attributed the incident to G.P.'s mental illness. G.P. stayed with his parents for several days and she and G.P. "were able to work things out".
- [65] G.P.'s wife also described their general activities, including movies, dinners, and family gatherings. G.P. shared in household chores, upkeep, and small projects. In sum, G.P. did his fair share.
- [66] G.P.'s wife also described G.P.'s relationship with their son prior to the May 11, 2012 accident as "really good". They had a "close" emotional bond.

- [67] G.P.'s wife testified that she had never considered leaving G.P. prior to the May 11, 2012 accident. She does now. She describes G.P. now as "belligerent", "angry", and "stressed-out". She describes matters as "constant" and she "can't take it anymore". Their son now calls G.P. "a loser" and he "doesn't respect" G.P.
- [68] I found G.P.'s wife to be a credible and reliable witness. She testified in a straightforward and direct manner which conveyed the poignancy of the change in their marriage and their family. Cross-examination did not reveal significant inconsistencies between either G.P.'s testimony or her testimony-in-chief.
- [69] Ongoing physical pain is wearing on most people and leads to irritability and decreased happiness. For G.P., his ongoing lower back pain made it more difficult for him to cope with his mental disorders and exaggerated the effects of his disorders, which in turn, negatively affected his marriage and family, which in turn, made matters worse.
- [70] The defence attacked G.P.'s credibility. A key attack was based on the fact that at examination for discovery, G.P. swore that he had not completed some of the tests associated with his WorkSafeBC claim. At trial, he testified that he had. His testimony at trial was consistent with the assessment test records. I am satisfied that at the examination for discovery, G.P. felt duress and could not function properly. I am satisfied that his testimony at trial was truthful and that the discrepancy arising at his examination for discovery is probably attributable to his mental disorders. As noted, his testimony at trial was consistent with the assessment records.
- [71] Generally, G.P.'s testimony was consistent with the testimony of his wife, the medical records, the testimony of his employer's supervisor, and the nature of his physical injuries observable through medical imaging: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).
- d) Journeyman Sheet Metal Fabricator
- [72] Plaintiff's counsel submitted that with his current employer, absent the May 11, 2012 accident, G.P. would very likely have applied to become a journeyman sheet metal fabricator (with a Red Seal certificate). Upon completion of the program, G.P. could have earned between \$38 and \$41 per hour.
- [73] The journeyman program can be undertaken through the union certified for G.P.'s employer with his employer's sponsorship. The program is a four-year program with six to eight weeks of courses (with exams) each year. G.P.'s supervisor testified that past drivers with G.P.'s employer had become journeyman sheet metal fabricators. He stated that there is a high market demand for journeyman sheet metal fabricators.
- [74] G.P.'s supervisor testified that if G.P. had approached him for journeyman sponsorship, he would have supported G.P. (without the back injury). As noted, G.P.'s supervisor viewed G.P. very favourably. He agreed that G.P. would have been an "excellent candidate for the apprenticeship program".

- [75] Coincidentally, W.B., the defendant, is approximately the same age as G.P. and had worked at a paper mill before seeking to become a journeyman sheet metal fabricator. He is near completion of the journeyman program.
- [76] W.B. testified that although he was much older than most of his classmates, he found a supportive learning environment, and with effort, despite struggling with mathematics, he has been able to successfully complete the courses and examinations to date. He currently earns \$35 per hour with additional benefits and a pension.
- [77] Under the assessment of an award for diminished earning capacity, I will address this aspect further.

Medical - diagnosis, prognosis, and treatment

- [78] As noted, Dr. W. Richards M.D. was G.P.'s family physician from 2003 until several months ago when he undertook full-time hospital duties.
- [79] As described in his July 20, 2015 medical-legal report, Dr. Richards confirmed that "[G.P.] did not have a history of chronic back pain nor radicular pain down his legs, or ongoing musculoskeletal symptoms specifically related to his back."
- [80] In his July 20, 2015 report, Dr. Richards states (in part):

[G.P.] was followed by myself and was also seen in consultation with a neurosurgeon, Dr. Heran. During that consultation, Dr. Heran found he had a symptomatic disc herniation with radiculopathy. He found this distribution to be between L4-L5 and most likely L4. Conservative management has been recommended and he was given the option to re-evaluate if his symptoms should worsen.

A CT scan of the lumbar spine was done December 31, 2012. The impression was severe facet joint degeneration bilaterally at the L3-4, on the right at L5, and moderate central compression at L3-4 due to a combination of osseous hypertrophy at the degenerative facet joint and also compression of the emerging L4. Mild right sided and perhaps minimal left sided compression of existing L5 nerve roots at L5-S1 due to facet joint degeneration.

MRI scanning of the lumbar spine done March 15, 2014 showed diffuse disc bulging at L3-4, and as noted on a prior CT scan, moderate central canal stenosis, existing nerve roots were not displaced but appeared to be contracted by diffuse disc bulging, mild to moderate bilateral neuroforaminal narrowing, slightly more prominent on the right, L4-L5 diffuse disc bulge with facet joint arthropathy however there was no significant central canal stenosis or bilateral neuroforaminal narrowing noted. The existing nerve roots did not appear to be compacted to displaced. At L5-S1 there is diffuse disc bulging and marked facet joint arthropathy seen, on the right greater than the left. No central canal stenosis was seen. No significant neuroforaminal narrowing was noted. Existing L5 nerve roots did not appear to be displaced. Impression was degenerative changes predominantly at L3-4 as described.

[81] Dr. N. Heran M.D. was qualified to give expert evidence as a neurosurgeon and in particular with respect to the diagnosis and treatment of musculoskeletal injuries including injuries to the lumbar spine.

[82] On January 21, 2014, Dr. Richards referred G.P. to Dr. Heran for consultation. On February 12, 2015, Dr. Heran first saw G.P.

[83] Dr. Heran's first medical-legal report is dated May 30, 2015. In preparing these reasons, it appears that this date is in error. In the report, Dr. Heran refers to Dr. Richards's July 20, 2015 report and the invoice-related information shows a September 24, 2015 invoice. I am satisfied that there was a clerical error with respect to the date of the report. The report should have a date sometime after July 20, 2015 and before September 24, 2015. Other than some confusion, nothing arises from the incorrect date.

[84] In his first medical-legal report, Dr. Heran states (in part):

[G.P.'s] imaging demonstrated L3-4 moderate stenosis. There was no significant stenosis at other levels. The only nerve roots that were potentially impinged were the traversing L4 nerve roots at L3-4. This was from an MRI scan from the year prior and a CT scan from 2012.

[G.P.] presented with overall improved symptoms. With time he definitely had had a symptomatic disc herniation with radiculopathy. His distribution was somewhat between L4 and L5. Obviously since there was overlap in distributions it was probably L4. Management was to be conservative. He was getting better. Time itself usually would heal most disc problems. He understood this. If things did worsen in the future I would reevaluate him.

and further:

Fortunately, it appears that all areas of injury following the subject motor vehicle accident other than involving the low back and lumbar spine resolved early following the accident. It does appear that his back injuries have impaired his ability to heal a previous work related foot injury. Dr. [Richards's] remarks are reasonable in this regard. If further information is required, I defer to an orthopedic specialist as this area is outside my area of expertise.

Most disc herniations do get better with time, which is the path he has followed. The natural history of disc herniations is the same with or without surgery ten years after the initial onset. Roughly around 95% of people end up in a clinical course where improvements have been established such that they are back to their usual course of living. This still means that 5% of people will not get back to their normal course of living either from deficits incurred or from persisting symptoms from active nerve root compression. Therefore, at the time I saw him, surgery nor injection therapies were required. His low back myofascial injuries are now plateaued given that it has been over three years since the accident and healing or plateauing is expected by two to three years following injury.

Given the traumatic origin of his symptoms, it is expected that he would be at increased risk for future exacerbations and aggravations given the persistence of his symptoms, albeit improved with time. This would particularly apply to the myofascial sources of symptoms and the mechanical and radicular sources of symptoms in his lower extremities. He has a 10-15% chance of recurrence of his disc herniation in the future and further considerations for management must be made then.

[85] On October 6, 2016, Dr. Heran met again with G.P. and conducted a further examination. On October 14, 2016, another MRI of G.P.'s lumbar spine was taken. Dr. Heran's second medical-legal report is dated October 19, 2016.

[86] In his October 19, 2016 report, Dr. Heran states (in part):

MRI scan from October 14, 2016:

This demonstrates progression of the stenosis at the L3-4 level. This is now moderate to severe. Black disc phenomenon is evident at L3-4 and L4-5. There is mild left lateral recess stenosis at L4-5. His facet joints are markedly arthritic and enlarged at L3-4. There is no significant subluxation though.

OPINION

The previously outlined opinion as established in my report from May 30, 2015 remains unchanged except that the additional psychiatric worsening as outlined by Dr. Gopinath must be considered and integrated. The psychological issues are outside of my area of expertise but are probable given the longstanding problems that [G.P.] has had and the nature of his injuries and limitations imposed upon him thereafter. It is well-known that chronic pain can have significant adverse impact upon psychological wellbeing, particularly for those symptoms arising from depressive and anxiety features.

It has now been just over a year since I last saw him. No substantial improvements have been established over that year. His problems remain chronic and are likely to persist. If anything, he reports increased sensory dysfunction in his perineal region suggestive of involvement of lower lumbosacral nerves. In addition, the sensory reduction that he has in his legs is likely reflective of such problems. The imaging from October 14, 2016 demonstrates progression of the stenotic changes.

An L3-4 interlaminar decompression plus/minus discectomy and probable addition of L4-5 interlaminar decompression is recommended. I have not discussed the surgical options with him as the scan was done after I saw him. The risk of surgery are including, but not limited to infection, bleeding complications [csf bleed, neurological injury, failure to resolve his problem, need for subsequent procedures, and risk of anesthesia]. The success rate with surgery of markedly improving his low back and lower extremity symptoms is about 90 to 95%. The surgery waitlist in the public system is about one year. If he were to have the surgery done in a private setting, it would be done in typically 2 to 3 weeks at a cost of approximately \$12,000.

[87] In a supplemental letter dated October 24, 2016, Dr. Heran addressed the typical recovery time for the surgery he was then proposing. Dr. Heran stated:

The typical recovery time after the surgery I proposed is between six weeks and three months for the majority of patients in his line of work as a truck driver. This recovery time would be inclusive of physiotherapy and a gradual return to work program after the initial four to six weeks of recovery. Even after successful surgery, [G.P.] still would have limitations in his activities and I would recommend not doing anything more than 50 pounds of [carrying] and particularly repetitive loads. He will likely still have residual symptoms albeit he would be better than he was before the surgery in most circumstances.

[88] From Dr. Heran's reports and testimony, it is apparent that there is a mechanical cause for G.P.'s pain arising from the L3-4 and L4-5 levels of G.P.'s lumbar spine.

[89] Dr. Heran testified that he expected that the chance of successful surgery is 90-95%. He defined success for this purpose as a 70% reduction in pain. G.P. would still not have a normal back and would never be pain free. Dr. Heran said the reduction in pain he expected would remove the need for narcotic medication and the remaining pain could be addressed using "anti-inflammatories and acetaminophen".

[90] In cross-examination, Dr. Heran described that G.P. had severe bilateral facet joint degeneration at L3-4 which was more than would be expected in a man in his early forties. Dr. Heran stated that G.P. would have already had significant degeneration prior to the May 11, 2012 accident.

[91] Dr. Heran stated that joint degeneration is progressive. Despite this fact, absent the May 11, 2012 accident, Dr. Heran was of the opinion that G.P. would probably have remained asymptomatic in a job with lifting of "one sort or another". Dr. Heran stated that the assumption that the further degeneration that would be expected in cases like that of G.P. (without the trauma of accident) would result in symptoms was not valid (although a possibility, it was not a probability).

[92] Dr. Heran testified that the October 14, 2016 imaging revealed significant progression of the degeneration in the L3-4 area. He stated that the injury to the site accelerated the deterioration to the discs. He would not have expected the degree of degeneration absent the initial trauma from the May 11, 2012 accident. The degeneration which could be seen from the previous imaging to the October 14, 2016 imaging led Dr. Heran to recommend surgery.

[93] In cross-examination, Dr. Heran also stated that he had modified his surgery recommendation to include the insertion of a dynamic stabilizer at the L3-4 level (and possibly a second device at L4-5). A dynamic stabilizer is a medical device that would help stiffen the back but without the rigidity of a fusion. The dynamic stabilizer is an "H-shape" device made of silicon and acts as a shock absorber. As a result, the recovery period would be six months: the first three months to facilitate healing and the second three months for

physiotherapy and a rehabilitation program. The actual surgery time would be extended by ten to fifteen minutes.

- [94] The surgery would be a day surgery with G.P. able to walk within hours. During the recovery period, he would be able to attend to his basic needs and day-to-day activities but would have to avoid lifting objects and excessive bending.
- [95] The cost of the dynamic stabilizer device is approximately \$3,100.
- [96] After surgery, in the longer term, G.P. would not be suited for a job that requires heavy lifting or repetitive lifting. Dr. Heran stated that G.P. could continue with his current job.
- [97] Dr. Heran testified that the current wait time for the proposed back surgery is approximately 13 months in the public system. He also stated that the Fraser Health Authority would not pay for the dynamic stabilizer. He stated that he has been told by the hospital administrator that fusion with screws and rods is the equivalent. In Dr. Heran's opinion, the dynamic stabilizer is the best way to treat G.P. He stated that the procedure is well-recognized but is apparently used more for stability than for pain. Dr. Heran's view is that the dynamic stabilizer is particularly suitable for a patient such as G.P. with low back pain and predominant leg symptoms.
- [98] Dr. Heran stated that Lions Gate Hospital (where Dr. Heran has also worked) recognizes the dynamic stabilizer device and will fund its cost. If G.P. wished to use a surgeon at Lions Gate Hospital, Dr. Heran estimated that the total time for referral, consultation, and surgery would be approximately two years.
- [99] Dr. Heran testified that if the surgery were to be done privately, the wait time would be two to three weeks. The cost would be approximately \$15,100: \$12,000 for the surgery and \$3,100 for the dynamic stabilizer.
- [100] Dr. Heran was of the opinion that the quality of surgery done privately would be no less than that of our public health care system. He observed that in a private clinic, the personnel supporting the surgeon are selected as a team, making the surgery co-ordination more "fine-tuned" than may be the case in the public system.
- [101] Dr. Heran was not qualified as an expert with respect to public and private medical care in our Province. Accordingly, I will not make a finding as to the attributes of surgical teams in a public versus private setting. I am however satisfied for the purpose of the case at bar that the quality of surgery if done privately would be no less than the quality of surgery if done in our public system.
- [102] I also find that the wait time for G.P.'s surgery is considerably less if the surgery were to be done privately. I also accept in conjunction with Dr. Gopinath's opinion described below that a lengthy wait for surgery may be very detrimental to G.P.'s well-being.

[103] I also accept Dr. Heran's opinion as to the appropriate surgical approach, including the use of the dynamic stabilizer device(s).

[104] As noted, Dr. Gopinath has been G.P.'s treating psychiatrist since 2003. He was qualified as an expert in psychiatry with the ability to give expert opinion evidence on the diagnosis and treatment of individuals with bipolar and obsessive compulsive disorders and the effect that chronic pain may have on these conditions.

[105] In his June 9, 2015 medical-legal report, Dr. Gopinath opines:

In the last 5 years prior to the current motor vehicle accident of May 11, 2012 he was well stable. Though he had a mild form of obsessions he was able to manage his day to day life without these obsessions interfering either his work or relationship. He had remained reasonably well without any mood episodes for nearly 4 years except for a very brief episode in May 2011 that was precipitated by an injury at work from which he fully recovered. Prior to the index motor vehicle accident [G.P.] was doing very well for 1½ - 2 years though he required his regular follow up visits.

Obviously the pain and some of the restrictions posed by the dislocation of the disc at L3-4 causing nerve root compression has affected [G.P.'s] psychological stability, also affecting his sleep which indirectly has caused some exacerbation of his discomfoting multiple obsessional doubts requiring further increment in the dose of medication for stabilization. Prior to the accident he was beginning to reduce his medication significantly including mood stabilizers and anti-obsessional medication which had to be increased causing further side effects of weight gain and anxiety. His multiple obsessions which were coming under control prior to the accident unfortunately has remained significantly active affecting his interaction with his wife, the rest of his family members and also his son. This also has caused some irritability and anger issues requiring further psychological therapies in the future. He needs to continue with the higher dose of medication indefinitely. Currently he is on Cipralex 25 mg at night, Abilify 30 mg at night, Carbamazepine CR, a mood stabilizer which also controls his irritability and anger, 400 mg in the morning and 600 mg at night, Clomipramine, which is an anti-obsessional antidepressant, at 100 mg at night, Ativan 1 mg a day when necessary, Epival, a mood stabilizer, 500 mg in the morning and 1000 mg at night, injection Ris-Consta, an atypical antipsychotic mood stabilizer, 50 mg once every two weeks.

Currently [G.P.] continues to have a significant degree of chronic backache with intermittent shooting radiating pain and hip pain with significantly improved multiple obsessions and also mood disorder. He requires the above mentioned medication for an indefinite period of time.

It is well known that adverse life situations and motor vehicle accidents like what [G.P.] has experienced are known to exacerbate pre-existing psychological conditions. [G.P.] has a longstanding history of mood disorder which was quite stable with improved obsessions prior to the road traffic accident of May 11, 2012. His stable mood had enabled him to function in his job quite effectively, leading a normal stable life. This accident of May 11, 2012 has caused a significant degree of pain and stress of the trauma affecting his mood disorder adversely with

relapse and exacerbation of the obsessions requiring him to have higher doses of medication for stabilization. His chronic pain continues even 3 years after the motor vehicle accident. I will defer the opinion regarding the persistence of pain and disability related to the pain to the experts in this field. Pain and stress of the trauma has affected his mood disorder significantly with exacerbation of his multiple obsessions requiring higher doses of medication to stabilize his mood and obsessions. This accident leaves him with vulnerability to have future exacerbations of his mood symptoms and obsessions with any major adverse life events though unrelated to the original incident of the motor vehicle accident.

[106] In his November 22, 2016 letter addressing the effect of delay in proceeding with surgery, Dr. Gopinath opines (in part):

Though [G.P.] has not suffered from Post Traumatic Stress Disorder in the form of flashbacks, nightmares or reminders of the accident causing feelings of horror and severe anxiety it has destabilized his previously well controlled mood disorder and also his multiple obsessions. As stated in the earlier medical-legal letter of June 9, 2015 he has had several relapses of his mood with exacerbation of the obsessions requiring higher doses of medication for stabilization and also time away from work. When already this patient has suffered the psychological consequences of the injury from the motor vehicle accident, a further delay of the surgery in the public system by one to one and a half years will cause prolonged chronic pain which may lead to many more relapse of episodes of mood affecting his functioning significantly.

I am of the opinion that he be allowed to have earlier surgical treatment to reduce the burden of disability to a certain extent.

[107] Dr. Gopinath testified that he viewed G.P. as a "poster boy for bipolar disorder". He described G.P.'s progress from the unhealthy use of alcohol and marihuana in G.P.'s teenage years and twenties to maintaining employment, developing a relationship, marrying, buying a house, and becoming a father, as acts of responsibility that very few with G.P.'s types of disorders can do. He testified that G.P. was a compliant patient and followed prescribed treatment.

[108] In cross-examination, it was suggested that G.P. was not doing as poorly as portrayed because there had been no recent hospitalizations, he was still working full-time, and he was not seeing Dr. Gopinath as frequently as in years prior to the May 11, 2012 accident. It was also suggested that finances, family relationships, ear problems his son experienced which in turn required surgery, and similar life events, were all stressors which could explain G.P.'s current mental symptoms. I accept Dr. Gopinath's explanation that any abnormal degree of reaction to such stressors is "completely out of proportion" and that such is attributable to the pain resulting from the May 11, 2012 accident. He testified that pain "always increases the depression, the irritability, and obsessional behaviour".

- [109] I am also satisfied based on Dr. Gopinath's, G.P.'s and G.P.'s spouse's testimony that G.P.'s mental health has declined significantly since the May 11, 2012 accident. With the support of his spouse, his family, and Dr. Gopinath, and G.P.'s own resolve, further hospitalizations have, to date, been avoided.
- [110] In sum, I find that the May 11, 2012 accident caused G.P.'s whiplash type injuries, including injury to his lower back which has not resolved. The soreness to G.P.'s neck, shoulders, and wrists resolved within six months of the May 11, 2012 accident. The injury to G.P.'s lower back also affects his hips, groin, buttocks, and legs.
- [111] The back surgery Dr. Heran recommends will, if successful, significantly ameliorate G.P.'s pain but will not eliminate the pain. G.P. will have some pain for the rest of his life. Dr. Heran views the success rate of the proposed surgery is in the 90 to 95% range. With successful surgery, G.P. will be restricted from repetitive lifting and lifting over 50 pounds.
- [112] Especially having regard to G.P.'s spouse's testimony that "she can't take it anymore", I find that a lengthy wait for surgery may be detrimental to G.P.'s well-being.
- [113] The physical injuries have affected his pre-existing bipolar and obsessive compulsive disorders. The characteristics of each disorder have been significantly accentuated harming his mental well-being and his relationships with his spouse and son. Successful surgery with a short wait time will help in returning G.P. towards his mental state prior to the May 11, 2012 accident.

damages

a) Non-pecuniary

[114] In *Stapley v. Hejslet*, 2006 BCCA 34, our Court of Appeal set forth some of the factors which may be considered in determining an award of non-pecuniary damages:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;

- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[115] The jurisprudence with respect to awards of non-pecuniary damages is particularly fact-specific: *Trites v. Penner*, 2010 BCSC 882 at para. 194.

[116] Based on the following authorities, the plaintiff submitted that a non-pecuniary damage award should fall within \$100,000 to \$150,000:

- *Arletto v. Kin*, 2016 BCSC 77
- *Bellaisac v. Mara*, 2015 BCSC 1247
- *Fox v. Danis*, 2005 BCSC 102
- *Fox v. Danis*, 2006 BCCA 324
- *Karim v. Li*, 2015 BCSC 498
- *McLeod v. Goodman*, 2014 BCSC 839
- *Muhammedi v. Ogloff*, 2013 BCSC 496
- *Severud v. Smit*, 2016 BCSC 1021
- *Stoneson v. Testa Estate*, 2015 BCSC 1549

[117] With respect to quantum, the defendants argued that the range of the award for non-pecuniary damages should be \$45,000 to \$70,000 based on the following authorities:

- *Gilmour v. Machibroda*, 2008 BCSC 260
- *Leung v. Foo*, 2009 BCSC 747
- *Morrison v. Gauthier*, 2009 BCSC 1271
- *Lamont v. Stead*, 2010 BCSC 432
- *Baxter v. Jamal*, 2010 BCSC 289
- *Coutakis v. Lean*, 2012 BCSC 970
- *Maltese v. Pratap*, 2014 BCSC 18
- *Sahota v. Choongh*, 2014 BCSC 2415

[118] I have reviewed the cited authorities and I find an award of \$150,000 for G.P. for non-pecuniary damages appropriate. With respect, the defendants' authorities address injuries considerably less severe than those that I have found G.P. to have suffered, especially in the context of G.P.'s pre-existing bipolar and obsessive compulsive disorders.

[119] As noted, with help, G.P. before the May 11, 2012 accident quite successfully tackled his bipolar and obsessive compulsive disorders. Even with successful surgery, G.P. will have ongoing pain, although significantly reduced. This will be a further hurdle for him in maintaining his mental well-being. Ongoing pain wears the soul.

[120] G.P. is a determined person. However, I accept that the May 11, 2012 accident has had and will continue to have a significant detrimental effect on his life. His injuries have impacted the type of work he is able to pursue, have exacerbated his mental illnesses, and have negatively impacted his family life. It is hoped that with successful back surgery, he may return to the relative mental well-being and the family life he enjoyed prior to the May 11, 2012 accident. That said, even with successful surgery, G.P. will need to address the remaining pain and its effects.

[121] In determining the award, I have been guided, in particular, by Bellaisac, McLeod, and Severud while considering G.P.'s age, relationships, and pre-existing mental disorders.

b) Diminished Future Earning Capacity

[122] In *Perren v. Lalari*, 2010 BCCA 140, our Court of Appeal set forth, at para. 32, the rule that there must be a "real and substantial possibility of a future event leading to an income loss" before assessing the loss. The loss may be quantified using the earnings approach or the capital asset approach. As submitted by plaintiff's counsel, the earnings approach is the more suitable approach in the case at bar.

[123] In *Rosvold v. Dunlop*, 2001 BCCA 1, our Court of Appeal stated:

[9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

[124] Here, there are various hypothetical future events which engage the "real and substantial possibility" test. These include:

- a) loss of income as G.P. recovers from back surgery;
- b) the back surgery is not successful with the risk that it makes matters worse;

- c) G.P.'s spouse may seek a divorce which would adversely affect G.P.'s mental well-being and, in turn, his income earning abilities;
- d) with ongoing pain, although reduced by successful surgery, G.P. may need to retire sooner than he otherwise would;
- e) G.P. may have become a sheet metal fabricator earning a significantly greater income; and
- f) with successful surgery, G.P. will still be restricted from lifting over 50 pounds objects and will need to avoid repetitive lifting.

[125] Before considering the foregoing factors, I will note that I have not included any possibility that the joint degeneration in G.P.'s back would have become symptomatic without the May 11, 2012 accident. Based on Dr. Heran's testimony, I find that there was not a "measurable risk" that G.P.'s back would have become symptomatic without the accident: *Athey v. Lenoati*, [1996] 3 S.C.R. 458 at para. 35.

[126] G.P. earns approximately \$58,000 per year. The surgery recovery period for the proposed surgery is three to six months. Having regard to the physical aspect of G.P.'s job, I will use the six month recovery period. In G.P.'s job, he does lift and move items of significant size and weight. I wish to be conservative by allowing the time for the back to heal as fully as possible. Accordingly, an award of \$29,000 is appropriate ($\$58,000 \times 6 / 12$) for this period.

[127] With respect to G.P. becoming a sheet metal fabricator, his counsel, in written submission, stated:

There is also the real possibility that, but for the accident, [G.P.] would have become a journeyman sheet metal fabricator. According to the evidence he would have been able to earn between \$38.00 and \$41.00 per hour as a sheet metal worker. This amounts to \$14.00 to \$19.00 per hour more than he currently makes. Annually, not including overtime, benefits, contributions to the pension fund, or the 12% vacation pay he would be entitled to, the difference in income amounts to \$29,120.00 to \$39,520.00 per year more than he currently makes. Including the 12% for vacation pay, the amounts would be \$32,614.00 and \$44,262.00. Assuming a retirement age of 65, the net present value of this figure can be calculated as follows:

$$17.2864 \times \$32,614.00 = \$563,778.00$$

$$17.2864 \times \$44,262.00 = \$765,130.00$$

Even if there was only a 50% chance [G.P.] would have become a sheet metal worker absent the motor vehicle accident, the loss ranges from a low of \$281,889.00 to a high of \$382,565.00.

[128] The calculation found in plaintiff's counsel's written submissions represents the plaintiff's net present value calculation of future income loss without adjustment for mortality, economic exigencies, or other factors. The calculation is based on when the plaintiff turns 45 years old (approximately four years after the plaintiff had been working for his current employer), until an assumed retirement age of 65.

- [129] Defendants' counsel argued that there was no evidence that G.P. would pursue the career of a journeyman sheet metal fabricator or had the "physical, scholastic and mental requirements" to undertake successfully the apprenticeship program.
- [130] G.P. testified that he had, with his spouse, seriously considered the program after he obtained his current job. G.P.'s spouse in her testimony was very supportive of G.P. pursuing the program of becoming a journeyman sheet metal fabricator once he had healed from his injuries. G.P. and his spouse were each interested in G.P. making greater income for the family.
- [131] As noted, the defendants called G.P.'s supervisor as a witness. In cross-examination, he stated that he was a sheet metal worker and had worked in the industry for many years. He thought G.P. had the qualities to meet the requirements of the journeyman program. As noted, other drivers at G.P.'s employer had become journeymen and G.P. was viewed by his supervisor as the "perfect employee".
- [132] The defendant, W.B., is also nearing the completion of the journeyman program. He had a similar educational background and is roughly the same age as G.P.
- [133] The Court will award G.P. \$200,000 with respect to G.P.'s loss of the opportunity to become a journeyman sheet metal fabricator. I will be conservative recognizing that the journeyman program is a difficult one and like most apprenticeship programs, it gets more challenging the older one gets, and more challenging for a person with bipolar and obsessive compulsive disorders (while recognizing that G.P. has proved himself exceptional in addressing his disorders). I recognize that G.P. may not have applied for the journeyman program even if he were not injured. That said, G.P., with the support of his spouse, has a favourable record of trying to advance his career despite challenges. I also take into account economic uncertainties and the physical demands associated with those of a journeyman sheet metal fabricator which could lead to retirement before age 65.
- [134] With respect to the remaining risks, there is futurity although I am satisfied that each is a "real and substantial possibility". There is a possibility that the back surgery will not be successful with the risk that it makes matters worse (Dr. Heran estimated the risk to be about 5%), which could lead to a loss of wages in the future. Also, even if the surgery is successful, Dr. Heran testified that G.P. will still be in some pain. Despite G.P.'s resilience, such pain may affect his ability to sustain the level of income he now generates. Finally, with respect to G.P.'s family life, I am satisfied that prior to the accident, there was not a real and substantial possibility of a divorce. Such possibility now exists, which could adversely affect G.P.'s mental well-being and, in turn, his income earning abilities. In the end, the matter is one of assessment and not precise calculation: Rosvold at para. 18. Accordingly, I will award \$70,000 for the remaining risks
- [135] In sum, the total is \$299,000 (\$29,000 + \$200,000 + \$70,000), which I will round up to \$300,000.

[136] As a check, I have also considered the capital asset approach. In this regard, I note that the four key factors listed by Justice Finch (as he then was) in *Brown v. Golaiy*, [1985] B.C.J. No. 31, and cited with approval in *Perren*, are all readily met and would also be generally consistent with the award. The four factors are:

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

[137] In cross-examination, G.P.'s supervisor agreed that if there were two applicants with the same qualifications for the same job and that job involved moderate physical duties but one of the applicants had a history of back problems and the other did not, the one without back problems would "most likely" get the job.

[138] A healthy and functional back is key to most jobs requiring physical duties. If the plaintiff were to lose his job (say, his employer encountered financial difficulties), it would very likely be much harder for the plaintiff to find a new job, including one similar to the one he currently holds.

[139] I am satisfied that the capital asset approach would also support a \$300,000 award.

c) Cost of Future Care

[140] Chief Justice Dickson writing for the Supreme Court of Canada with respect to the cost of future care in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241 stated:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum* is not possible. Money is a barren substitute for health and personal happiness, but to the extent within reason that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

[141] Justice McLachlin, as then sitting in this Court, in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) stated at 78:

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

[142] Our Court of Appeal in *Johal v. Meyede*, 2014 BCCA 509 noted at para. 44 that in considering costs of future care, the trial judge should ensure:

- a) an "evidentiary link between the caregiver's assessment of pain or disability and the recommended care";
- b) "regard for the real and substantial possibility that the expense will be incurred" and that "an allowance for the contingency that the cost may not be incurred"; and
- c) "the specific amount awarded for each item claimed" is identified.

[143] Under this head, G.P. claims \$20,000. It is readily apparent from Dr. Heran's testimony and the fact that G.P. understands he needs surgery and has told his supervisor that he will need time off after the surgery that the Johal criteria are met with respect to the cost of the proposed surgery. The medical evidence also supports early surgery to avoid a lengthy wait which could be very detrimental to G.P.'s health. Accordingly, Dr. Heran's \$15,100 estimate for private surgery (which includes one dynamic stabilizer device) is justified.

[144] Awards for private health care have been granted by this Court in the past: see *Moussa v. Awwad*, 2010 BCSC 512 at paras. 257-273; *Engqvist v. Doyle*, 2011 BCSC 1585 at paras. 44-55; and *Villing v. Husseni*, 2015 BCSC 1604 at paras. 27 and 47. As in those cases, the case at bar does not raise concerns about "queue jumping" by a "well-resourced patient" and does not engage "a philosophical discussion of the pros and cons of a general public health insurance scheme": *Engqvist* at para. 45.

[145] Dr. Heran also recommends that G.P. have physiotherapy after the surgery. From the list of special damages, I can see that G.P. had out of pocket expense for each of his past physiotherapy sessions (his contribution after insurance or government assistance and mileage). For the most recent physiotherapy, he paid \$25 per session. His average mileage cost was \$10.92 (\$622.45 / 57). The total is approximately \$36 per session (\$25 + \$10.92).

[146] The number of physiotherapy sessions that may be required was not stated. For the six month recovery after surgery, I will assume that one session per week will be required (with most in the last three months). The cost will be \$936 (\$36 per session x 26 sessions) which I will round down to \$900.

[147] Plaintiff's counsel also sought the future cost of a gym pass and counselling. With respect to gym pass, I am satisfied that G.P. can use a local public recreational facility, such as a community centre. With respect to counselling, Dr. Gopinath provides such service. Accordingly, no award will be made for these two items.

[148] In sum, the total award for cost of future care is \$16,000 (\$15,100 + \$900). However, the award will be varied to the extent that the cost of the surgery is recoverable from the Province's Medical Service Plan. At trial, this aspect was not argued. If there is need for argument, there is liberty to apply.

d) Past Loss of Housekeeping Capacity

[149] The loss of housekeeping capacity is a loss of an asset that is compensable: O'Connell v. Yung, 2012 BCCA 57 at paras. 66-67.

[150] Counsel for G.P. argued that based on two and a one-half hours of housekeeping per week at an hourly rate of \$40 would result in an annual cost of \$200. Over a period of four and a one-half years, this would be \$23,400. G.P. claims \$20,000 under this head.

[151] The two and a one-half hours per week housekeeping is likely conservative. The \$40 hourly rate appears high relative to our Province's minimum hourly wage of \$10.85.

[152] I will use an hourly rate of \$15. The total past loss of housekeeping is \$8,775 (2½ hours x \$15/hour x 52 weeks x 4½ years) which I will round up to \$8,800.

e) Future Loss of Housekeeping Capacity

[153] With successful surgery, after six months, G.P. will be able to undertake most chores and activities around the house. He should only be limited to matters where heavy lifting is required. For example, G.P. will probably not be able to undertake chores such as power-washing.

[154] Again, there is a degree of futurity. I am satisfied that there will be few chores requiring heavy lifting. I have also considered and have given weight to the fact that G.P.'s son is currently seven and in seven or so years, he will be able to help with many of the heavier chores (as any son physically able should). I will award \$3,000 under this head.

f) Special Damages

[155] The parties agreed that the special damages were \$1,812.45.

conclusion

[156] G.P. is awarded \$479,612.

[157] The various heads of damages are:

Non-pecuniary:

\$150,000

Diminished earning capacity:

\$300,000

Cost of future care:

\$16,000

Past loss of housekeeping capacity:

\$8,800

Future loss of housekeeping capacity:

\$3,000

Special damages:

\$1,812

Total:

\$479,612

[158] G.P. is awarded his costs at Schedule B.

"Funt J."

Schedule A

Chronology

Date

G.P.

June 1972

date of birth

1991

graduates from high school

1993

diagnosed with bipolar disorder

1993 to 2006

approximately 38 hospitalizations (ranging from 1 to 39 days) because of his mental illness

1999 to May 2009

works for a landscaping company including laying sod, constructing brick patios and retaining walls

December 2001

obtains certificate in Community Mental Health and Psychological Rehabilitation

May 2003

becomes a patient of Dr. Gopinath, psychiatrist (from 1993 to May 2003, he was under the care of other psychiatrists and doctors)

2004 (approximately)

meets his future spouse

September 17, 2006

marries his spouse

May 6, 2009

starts working at a paper mill

July 12, 2009

his son is born

October 29, 2010

injures his right foot at work (a repetitive foot injury) and continues to work in an aircast

May 16, 2011

first surgery on his right foot

May 23, 2011

brief hospitalization because of deterioration in his mood

October 13, 2011

returns to work at the paper mill but is laid off 2 weeks later

December (late), 2011

returns to work at the paper mill

January 12, 2012

starts attending physiotherapy for rehabilitation for his right foot

February 13, 2012

second surgery on foot to remove screws

April 23, 2012

starts a graduated return to work program

May 7, 2012

returns to full duties at the paper mill

May 11, 2012

date of the motor vehicle accident

May 14, 2012

attends a local medical clinic complaining of low back pain, pain in his hips and in his shoulders arising from the MVA

May 16, 2012

attends again the local medical clinic with MVA related complaints

May 17, 2012

attends a local hospital because of pain related to his MVA injuries and is given an injection of Toradol

May 28, 2012

first sees his general practitioner, Dr. W. Richards, for his MVA injuries

May 30, 2012 to

March 13, 2013

attends physiotherapy (37 treatments)

June 7, 2012

ATF Canada conducts a Permanent Functional Impairment Evaluation of G.P. related to his WorkSafe B.C. foot injury claim

June 29, 2012

stops working at the paper mill

July 3, 2012

starts working at a local plumbing, drainage & heating company at \$23.00 per hour

December 25, 2012

last paid day with the local plumbing, heating & drainage company

December 31, 2012

CT scan of lumbar spine

January 7, 2013

starts working at a local sheet metal company at \$23.00 per hour

September 9, 2013

hourly rate is increased to \$24.00 per hour

January 21, 2014

Dr. Richards refers G.P. to a neurosurgeon, Dr. N. Heran

February 5, 2014 to November 17, 2014

attends physiotherapy treatments (20 treatments)

March 15, 2014

MRI of lumbar spine

February 12, 2015

sees Dr. Heran, neurosurgeon, for the first time. Dr. Heran recommends continued conservative treatment

September 20, 2016

attends a defence medical examination with Dr. Zarkadas, an orthopaedic surgeon

October 6, 2016

sees Dr. Heran for the second time. Dr. Heran recommends surgery

October 14, 2016

MRI of lumbar spine

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