

CANADA / JUDGMENT

Gajoum v. Keenan

2020 BCSC 360

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Supreme Court of British Columbia

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2020 BCSC 360 Gajoum v. Keenan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gajoum v. Keenan,

2020 BCSC 360

Date: 20200312

Docket: M106380

Registry: Vancouver

Between:

Kamiar Gajoum

Plaintiff

And

James Keenan, Star Limousine Service Ltd.,

Brown Bros. Motor Lease Canada Ltd. and Sharon Dernovshek

Defendants

Before: The Honourable Madam Justice Francis

Reasons for Judgment

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Brown Bros. Motor Lease Canada Ltd.:

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Place and Date of Trial:

Vancouver, B.C.

July 15-19, 22-26, 2019,

December 11-12, 2019 and

January 20, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 12, 2020

Table of Contents

I. Introduction.. 4

II. background facts. 4

A. Prior to the Accident 4

B. The Accident 5

C. After the Accident 5

D. Surveillance Evidence. 11

III. Expert evidence. 12

A. Dr. Colin Horricks. 12

B. Dr. Rosemary Nairn Stewart 13

C. Dr. John Fuller 13

D. Min Trevor Kyi 14

E. Kathryn Minard. 15

F. Peter van den Berg. 15

G. Darren Benning. 16

IV. credibility. 16

A. Credibility issues arising from Dr. Horricks' evidence. 18

1. Left side v. right side neck pain. 18
2. Late emergence of lower back pain. 18
3. Gap in visits to family doctor 19

B. Plaintiff's testimony. 20

C. Inconsistencies between discovery evidence and trial 20

V. causation.. 22

VI. mitigation.. 22

VII. damages. 23

A. Non-Pecuniary Damages. 24

B. Loss of Earning Capacity. 25

1. Legal framework. 25
2. Past loss of income earning capacity. 26
3. Loss of Future Earning Capacity. 29

C. Cost of Future Care. 34

D. Special damages. 36

VIII. conclusion.. 37

IX. costs. 37

I. Introduction

- [1] This proceeding arises from a motor vehicle accident that occurred on December 29, 2008 (the "Accident"). Liability has been admitted by the defendants and the matter proceeded to trial on the issue of damages only.
- [2] The plaintiff, Kamiar Gajoum, was 13 years of age at the time of the Accident. He suffered injuries to his neck, back, shoulder and knee. He claims that he is partially disabled as a result of the defendant's negligence, and specifically that his capacity to pursue his career as an artistic painter has been diminished from the injuries he suffers as a result of the Accident.
- [3] The defence to the plaintiff's claim is focussed almost entirely on credibility. The defendants argue that the only evidence in support of causation or damages is the subjective evidence of the plaintiff. On the basis of their submission that the plaintiff is not a credible witness, the defendants argue that the plaintiff's subjective evidence is insufficient to make out his case.

They also take the position that, to the extent that the plaintiff suffered any loss, he failed to mitigate. Other than consenting to a modest award for non-pecuniary damages, the defendants resist all elements of the plaintiff's claim.

II. background facts

A. Prior to the Accident

- [4] At the time of the Accident the plaintiff was a grade 8 high school student and had started taking steps towards working as a professional artistic painter. He was trained by his stepfather Kal Gajoum, who is himself a successful artist, and at the time of the Accident he was working as an apprentice as well as selling some of his own paintings. When the Accident occurred, the plaintiff, unlike most other thirteen year olds, had both a defined career path and some measure of career success.
- [5] There is no evidence of the plaintiff having any injuries or disabilities prior to the Accident. He appears to have been an active and athletic teenager.

B. The Accident

- [6] The Accident took place on the Whistler highway. The plaintiff, the plaintiff's mother, Baymisal Parvanta, and Kal Gajoum were travelling in a limousine back to Vancouver after attending an art show at the Plaza Gallery in Whistler in which Kal Gajoum was featured. The Accident happened just outside of Squamish, where the driver, James Keenan, had pulled over to remove chains from the tires on the limousine. Just before pulling back on the highway, the limousine collided with another vehicle.
- [7] There is very little evidence about the specific circumstances of the Accident, such as the speed at which the limousine was driving or the force of the impact. The plaintiff testified that he was sitting in a backwards facing seat in the back of the limousine. On impact, he braced himself with his right leg and his upper body jerked forward.
- [8] Mr. Keenan testified at trial. He had difficulty recalling details of the Accident. At discovery he testified that he believed there were only two passengers in the car; at trial he testified that "apparently there were three people" although it was clear that he could not remember any specifics about the passengers in his vehicle including how many there were. He could not remember any interactions he had with the passengers that day.
- [9] While the evidence given by each of Kal Gajoum, Ms. Parvanta, the plaintiff and Mr. Keenan about the precise events of the Accident is somewhat different, these differences do not impact my assessment of any of the witness' credibility. The Accident happened more than ten years ago. It is not the least bit surprising that memories have faded. In any event, the details of the Accident are not particularly material to the plaintiff's claim as none of the medical experts relied on facts about the nature of the collision to form their views about the diagnosis or prognosis of the plaintiff's injuries.

C. After the Accident

- [10] The plaintiff testified that he started to feel pain in the days after the Accident. He described the pain as situated in his neck and upper back, his lower back and his right knee and ankle. He also testified that in the early months after the Accident he had recurring headaches. He was able to continue with his normal life of going to school and painting but he was no longer able to remain in a single posture for an extended period of time.
- [11] In 2009, the plaintiff went to physiotherapy 24 times. He found these sessions to be helpful. While the plaintiff also attended four sessions with a chiropractor, these sessions did not alleviate his pain symptoms.
- [12] The plaintiff has a fairly active lifestyle that he has maintained since the Accident. In 2009, shortly after the Accident, Ms. Parvanta arranged for the plaintiff to see a personal trainer. From 2009 to 2017, the plaintiff worked out 3-4 times a week in a gym in the building that the plaintiff lived in with Kal Gajoum and Ms. Parvanta. Additionally, the plaintiff swam at the Terminal City Club on weekends. Because he does not drive a car, and walking is his preferred means of transportation, the plaintiff estimates that he walks for a minimum of an hour a day. Every morning he does a set of stretches and a set of 25 push ups and 25 sit ups.
- [13] The plaintiff finished high school in 2013 and immediately started working full time as an artist. Along with his mother and, until recently, Kal Gajoum, the plaintiff spends approximately half of each year travelling. This is because both Kal Gajoum and the plaintiff are painters of cityscapes and their artistic method involves visiting cities for a period of weeks or months, making sketches, and then returning home to their studios in Canada to use those sketches as the subject of paintings.
- [14] In 2017, the relationship between Kal Gajoum and Ms. Parvanta came to an end. By all accounts it was an unhappy breakup and the plaintiff is now estranged from Kal Gajoum.
- [15] Until the breakdown of the relationship between Kal Gajoum and Ms. Parvanta, the plaintiff and Kal Gajoum worked together closely. They had co-exhibitions of their work at the Plaza Gallery in Whistler, Gainsborough Gallery in Calgary and the Eclectic Gallery on Maui. The plaintiff worked as Kal Gajoum's apprentice from 2008 to 2017, taking care of his studio and doing restoration work on his paintings.
- [16] Since his mother and stepfather split up, the plaintiff has been financially supporting himself and his mother, who acts as his manager, from his painting sales.
- [17] At birth, and at the time of Accident, the plaintiff's last name was Arziab. In 2014, he legally changed his last name to Gajoum. The circumstances of this, and whether Kal Gajoum approved of his stepson taking his name, are matters of some dispute that were canvassed at trial but are not relevant to the circumstances before me.

- [18] In terms of his current complaints, the plaintiff says he wakes up sore every day but that his pain is minor in the morning and gets worse throughout the day. The main areas of discomfort that continue to trouble the plaintiff are his neck, shoulder and lower back. He also testified that he continues to have some pain in his right knee but it is really only exacerbated by running, which he has mostly stopped doing, and by working on large paintings, which requires him to sit on his knees for periods of time. His sleep is disturbed once or twice a night due to pain in his neck and back.
- [19] The plaintiff testified about the physical nature of his work as a painter. His work can be broadly categorized into two different activities: sketching and painting. When he is sketching he is on location, drawing streetscapes using a graphite pencil. It takes him two to three hours to make a sketch. Often sketches must be made standing up, since the desirable perspective can be elusive and is not necessarily in a place where there is anywhere to sit. This means keeping his pencil box on the ground and regularly bending to sharpen his pencil. When the plaintiff is travelling, he sketches most days. The sketches are then brought home and used to create paintings.
- [20] When the plaintiff is painting, he starts by mixing oil paint, which takes the first 45 minutes to an hour of every daily painting session. He testified that this work strains his shoulders as the paint is hard and takes time to break down by using a pallet knife in a figure eight motion. He testified that this activity causes him pain in his shoulder and neck. After mixing he takes a break to stretch his neck and then begins applying paint to his canvass with a pallet knife. The pallet knife is the plaintiff's preferred painting implement. He described the "wet on wet" technique that he uses when working with a pallet knife and the time constraints entailed with this technique. In short, a pallet knife painting must be completed in one day, as the paint becomes tacky overnight and more paint cannot be added on top with a pallet knife. If a pallet knife painting is not finished on the first day, it can only be completed with a brush, which takes more time to layer and makes the process for completing a painting take approximately three times longer than it would if the entire painting was done with a pallet knife.
- [21] The plaintiff testified that his injuries require him to work shorter days. He estimates that in a full day, he is only able to productively work for 5 to 6 hours. This is because he needs to take regular breaks of 10 to 15 minutes to stretch his neck, shoulders and back. He also testified that his pallet knife and brush work require him to hold a very static position. He takes frequent "micro-breaks" of a few seconds that allow him to ease up the tension before going back into position for painting. He testified that the 5 to 6 productive hours he has in a day are not enough time to complete even a relatively small pallet knife painting. It takes him three to four days to do a small painting and a larger painting takes three weeks or more.

- [22] The plaintiff testified that, if he were not in pain, he would be able to finish a large painting in a single day because more of the painting could be done with a pallet knife which is much faster than a brush. He also testified that he would be able to produce a higher number of large paintings if he did not have pain because his pain would not be exacerbated by the considerable reaching and bending that is required to produce large paintings.
- [23] The plaintiff's financial circumstances are difficult to discern. This is partially due to the breakdown of the relationship between Ms. Parvanta and Kal Gajoum in 2017, which has caused a significant change in the way the plaintiff's business affairs are handled, as well as the fact that the income and business affairs of this family were never recorded or reported in a particularly clear way.
- [24] The three family members were, until 2017, a single economic unit supported mostly through Kal Gajoum's company, Gajoum D'Art Studios. The plaintiff received his income (both employment income from working for Kal Gajoum and income from art sales) via T4 employment income from Gajoum D'Art Studios. Sales of the plaintiff's paintings were sometimes invoiced by Gajoum D'Art Studios and sometimes invoiced by Gajoum & Gajoum Expositions (the plaintiff's sole proprietorship). It is not clear how much income the plaintiff received from the sale of his paintings prior to 2018. Nor is it clear what relationship his T4 income bears to painting sales. To further complicate matters, in the years 2014 - 2017, it appears that a T4 was issued to the plaintiff from Gajoum D'Art Studios, but the plaintiff testified that he did not receive any income in these years directly from Gajoum D'Art Studios. Instead his income was invested in a property in Nice, France, where the family spent a portion of every year.
- [25] It is therefore not possible to determine the plaintiff's income from the sale of art during the period 2014 - 2017 by reviewing his tax returns.
- [26] In December 2017, the plaintiff entered into a consignment agreement with Le Soleil Gallery in Vancouver. The agreement stipulates that the plaintiff shall exclusively sell his artwork through Le Soleil, although both the plaintiff and Dror Darel, the proprietor of Le Soleil, testified that the parties collaterally agreed that the plaintiff could sell his art through other galleries that are outside the lower mainland.
- [27] The best source of information with respect to the plaintiff's income from the sale of art in 2018 and 2019 is the invoices from his sole proprietorship, Gajoum and Gajoum Expositions, to Le Soleil. Based on those invoices it appears that the plaintiff's gross income from art sales was \$30,550 in 2018 and \$18,900 in the first half of 2019.
- [28] The plaintiff testified that he pays his mother a salary every month to act as his manager, but he also testified that he paid his mother by way of covering their rent and other expenses, as they reside together. It appears that the financial arrangement between the plaintiff and his mother is not formalized in any way, adding a further challenge to determining his net income as an artist.

- [29] At the time of trial, Le Soleil had 64 pieces of art by the plaintiff in its inventory. This consisted of a combination of paintings and prints. Mr. Darel testified that the plaintiff is his number one selling artist and that his paintings sell five to eight times better than any other artist in his gallery. Notwithstanding the healthy number of the plaintiff's paintings already in inventory at Le Soleil, Mr. Darel testified that he would like more paintings from the plaintiff, particularly in large sizes. He noted that Le Soleil only has three large paintings made by the plaintiff and he would like to have 6 to 10 large paintings in his gallery. Unfortunately, the plaintiff is only able to produce 1 to 2 large paintings per year. Mr. Darel was asked whether it was unusual to have 50 or more unsold paintings in inventory for a specific artist. He testified that this is not unusual and he characterized the plaintiff as an artist in high demand from whom he would like to receive much more in the way of inventory.
- [30] When the parties appeared for final argument in January 2020, the defendant sought leave to introduce new evidence about the recent closure of Le Soleil Gallery in August 2019. The plaintiff produced an affidavit from Mr. Darel that was entered into evidence on consent. The affidavit states that Mr. Darel is in the process of opening a new gallery on south Granville Street and that the plaintiff will continue to be one of his featured artists.
- [31] Le Soleil is not the only gallery through which the plaintiff displayed his work in recent years. In the fall of 2018, negotiations took place between Ms. Parvanta on behalf of the plaintiff and Mountain Galleries in Whistler. While four of the plaintiff's paintings were displayed at Mountain Galleries over the 2018/2019 winter season, they did not sell. In April 2019, the relationship between the plaintiff and Mountain Galleries came to an end. Wendy Wacko, the executive director of Mountain Galleries at Whistler, testified about the unsuccessful relationship between the plaintiff and Mountain Galleries. Neither party seems to have felt there was a good fit between the artist and the gallery, and they each ultimately went their separate way.
- [32] Both Ms. Parvanta and Kal Gajoum testified at trial. There appear to be many facts in dispute between the two of them. Kal Gajoum gave evidence which was for the most part extraneous to the matters I must determine. He appeared focussed on portraying Ms. Parvanta and the plaintiff as opportunists who exploited their association with him for their own financial ends. There can be no question that Ms. Parvanta, Kal Gajoum and the plaintiff were once a family unit (although Kal Gajoum now denies this) and that their financial, personal and artistic lives were intertwined for a number of years. The breakdown of the family relationship has no doubt been difficult for all of them. However, very little of the evidence the defendants elicited from Kal Gajoum about personal matters relating to this family was relevant to the matters before me.

D. Surveillance Evidence

[33] The defendants took surveillance video of the plaintiff on two occasions: May 5, 2019 and June 29, 2019. Both videos were taken while the plaintiff was participating in a live painting demonstration at Le Soleil Art Gallery. There was a contested application mid-trial about the admissibility of the surveillance videos and I ruled that they were admissible.

[34] The videos suffer from a number of deficiencies. They were tendered by the defendants to support the proposition that the plaintiff is fully capable of engaging in his chosen profession of artistic painting. From the videos I am asked to infer that the plaintiff was capable, on two very recent occasions, of engaging in public painting sessions that were five hours or longer. However, the videos are not by any means continuous. Each video shows only portions of time during the painting demonstration, with lengthy breaks between. Further, for the vast majority of both videos, the viewer does not have a full body view of the plaintiff. Much of both videos appears to have been shot from across the street from the gallery, and the image of the plaintiff painting is mostly obscured by posters on the window of the gallery. I cannot form any conclusion from the videos about the length of time the plaintiff is able to work continuously.

[35] There are some facts that can be taken from the videos, however:

- The plaintiff moves almost constantly when he paints. He frequently shifts his weight, stretches and bends when he is painting. This is consistent with his evidence that he feels the most pain when he is static for a period of time;
- The plaintiff takes "micro breaks" regularly when he is painting, which consist of him stepping back and shifting his weight. On cross-examination he explained that this eases the tension that builds up in his neck and back from the stillness and control required to make strokes with a brush or pallet knife;
- At the second painting demonstration on June 29, 2019, the plaintiff took at least two breaks where he went outside to smoke cannabis. On cross-examination he testified that he did this as a way to help with his pain symptoms; and
- At the end of the second painting demonstration on June 29, 2019, the plaintiff went to a medical marijuana dispensary that had a vaping bar and vaped CBD as a way to alleviate his pain from the day's work.

III. Expert evidence

[36] The plaintiff called a number of experts at trial, including three medical doctors, an occupational therapist, a vocational rehabilitation expert and an art advisory expert. The defendants did not tender any expert evidence.

A. Dr. Colin Horricks

- [37] Dr. Horricks was the plaintiff's family doctor until his retirement in August 2018. He first treated the plaintiff for his injuries approximately three weeks after the Accident and most recently examined him in July 2018. Dr. Horricks was qualified as an expert in family medicine.
- [38] Dr. Horricks first assessed the plaintiff on January 20, 2009, approximately three weeks after the Accident. At the time, the primary symptoms reported by the plaintiff were in his neck. Some weeks later, the plaintiff reported to Dr. Horricks that he was also suffering pain in his lower back.
- [39] In January 2009, Dr. Horricks requisitioned an x-ray of the plaintiff's neck. The x-ray revealed a loss of lordosis, which is a straightening of the natural curvature of the spine. Dr. Horricks opined that the loss of lordosis was the result of muscle spasm resulting from the injury.
- [40] Dr. Horricks reported a visit from the plaintiff on October 20, 2011, at which the plaintiff reported he had been struck in the shoulder by a garage door. He complained of left lower paracervical pain and bruising with strain of his left acromioclavicular joint.
- [41] In late July 2018, Dr. Horricks ordered a second x-ray of the plaintiff's neck, low back and right knee. The x-ray of the plaintiff's neck found continued straightening of the plaintiff's neck curvature arising from muscle spasm.

B. Dr. Rosemary Nairn Stewart

- [42] Dr. Stewart was qualified as an expert in the field of physical medicine and rehabilitation. She examined the plaintiff on October 25, 2017.
- [43] Dr. Stewart's physical examination of the plaintiff was unremarkable. She found that he was generally flexible and there was no tenderness over his neck or back. He experienced a decreased range of motion in his neck when turning and tilting his head to the left by a few degrees as compared to the right, but other neck movements were full. He had full rotation in his back and was able to bend well.
- [44] Dr. Stewart opined that the plaintiff suffered soft tissue injuries to his neck and back in the Accident. She noted in her testimony that most soft tissue injuries do not have physical symptoms on examination. Based on her examination, Dr. Horricks' notes and the plaintiff's reporting of his symptoms, she concluded that the plaintiff's symptoms were ongoing and unlikely to improve.
- [45] Dr. Stewart recommended that the plaintiff review and update his exercise program and that he continue with his daily stretching exercises and attend the gym. She also recommended massage 12 times a year.

- [46] On cross-examination, Dr. Stewart was asked whether the October 20, 2011 incident, in which the plaintiff's shoulder collided with a garage door, could be the cause of the plaintiff's ongoing pain symptoms. She opined that it could not. She explained that the garage door struck the plaintiff in the shoulder joint, and this would not cause pain in the plaintiff's trapezius muscle, which is the primary location of his ongoing pain.

C. Dr. John Fuller

- [47] Dr. Fuller was qualified as an orthopedic specialist. He examined the plaintiff on April 10, 2019. He found that the plaintiff presented with a degree of residual dysfunction through the sacroiliac level of the back. He opined that it is more probable than not that the Accident caused the plaintiff's ongoing symptoms with reference to headache, neck pain and low back pain. He further opined that the combination of these symptoms has led to a significant level of functional compromise.
- [48] Dr. Fuller's physical examination found some spasm in the back and trapezius muscles. He found compromised range of motion in the neck and shoulder and a slight reduction of range of movement in the right knee. He testified that the results of his examination of the plaintiff were consistent with the finding that the plaintiff suffered an overload to the axial skeleton in the Accident.
- [49] On cross-examination, Dr. Fuller opined that the Accident caused ligamentous injury to the plaintiff's neck, causing muscle spasm in his neck which caused the loss of lordosis. Additionally, Dr. Fuller was asked whether the ligamentous injuries suffered by the plaintiff could have been caused by the plaintiff's shoulder colliding with a garage door in 2011. He opined that this was unlikely.

D. Min Trevor Kyi

- [50] Mr. Kyi was qualified as an expert in occupational therapy with a speciality in functional capacity evaluations. He performed a functional capacity analysis on the plaintiff on April 2, 2019. Mr. Kyi undertook a number of tests on the plaintiff over the course of one day.
- [51] Mr. Kyi found that the plaintiff's scores on many tests declined between early morning testing and late in the day, consistent with the plaintiff's evidence that he tends to start each day with little pain, and that his symptoms progress throughout the day. Mr. Kyi found that the plaintiff had limited neck flexion, rotation and tilt. His lower back flexion was normal early in the day and limited at the end of the day. In tests designed to stimulate the plaintiff's vocation of artistic painting, Mr. Kyi observed that the plaintiff took a number of small breaks to shrug or rub his shoulders or neck and repeat tests showed a slowing of productivity over the course of the day.

[52] Mr. Kyi noted that while the plaintiff was highly functional when working at the correct heights and being ergonomically supported, he had functional limitations, particularly with respect to bending and stretching, that would limit his ability to do larger paintings. Ultimately, Mr. Kyi concluded that the plaintiff had consistent physical limitations that impact his work and productivity levels.

[53] Mr. Kyi made a number of future care recommendations that are dealt with below.

E. Kathryn Minard

[54] Ms. Minard was qualified as an expert in the field of art advisory, art appraising and the business of art. She opined that the plaintiff's physical limitations due to his injuries have impeded and will continue to impede his commercial success. She opined that he is likely to make less money over his career because his physical limitations reduce the number and size of paintings he can produce, interfere with his creative process, limit the number of exhibitions he can mount and compromise his ability to participate in live painting demonstrations to promote his work. She opined that the plaintiff's success as a painter was considerable for an artist of his age. Unfortunately, Ms. Minard's report does not contain much in the way of opinion about the extent to which the plaintiff's career success will be impeded by his injuries or information that this Court could use to quantify his loss.

F. Peter van den Berg

[55] Mr. van den Berg was qualified as an expert in vocational rehabilitation. He prepared a vocational rehabilitation report in April 2019, in which he opined that the plaintiff has likely sustained a mild to moderate reduction in his vocational capacity as an artistic painter as a result of his functional limitations. He found that the plaintiff retains the capacity for full time employment as an artist, but his productivity and ability to compete with other artists at the same level is reduced with a likely impact on his earning capacity. Like Ms. Minard, Mr. van den Berg did not quantify the likely impact of the plaintiff's functional limitations on his future income capacity, although his characterization of the reduction in the plaintiff's vocational capacity as "mild to moderate" provides some guidance in this regard. Mr. van den Berg defines "mild" and "moderate" vocational disabilities as follows:

Mild. An individual has sustained a mild vocational impact when the injury occasionally impacts their performance, however, they are able to significantly mitigate this through compensatory strategies, and that are still able to perform their crucial job duties.

Moderate. An individual has sustained moderate vocational impact when they are still able to work, however they are not able to perform a significant portion of their job demands, they may require reduced hours, they may require an alternate occupation, they are significantly less competitively employable, they may require job accommodations, their range of job options have been significantly reduced, and they are at increased risk for periods of vocational instability.

[56] Some of Mr. van den Berg's conclusions appear to be informed by the assumption that the plaintiff's income as stated on his tax returns was all income from the sale of his art. This is not a correct assumption. It appears that, up until 2017, the bulk of the plaintiff's income came from the salary he drew from Gajoum D'Art Studios, which consisted of compensation for the work he did as an apprentice to Kal Gajoum and some painting sales. As such, I approach Mr. van den Berg's report with some caution but I accept his overall conclusion that the plaintiff's vocational capacity is impacted by his injuries by a mild to moderate degree. This is because the tax returns are not central to his conclusion about the plaintiff's vocational capacity. Mr. van den Berg's conclusions about decreased productivity instead appear to derive from the self reporting of the plaintiff and Mr. van den Berg's own expertise about the vocational demands of an artistic painter.

G. Darren Benning

[57] Mr. Benning is an economist who authored an expert report on future income loss multipliers and present value of future costs of care.

[58] Mr. Benning's report provides a calculation for determining the plaintiff's future income loss on the basis of full labour force participation until the plaintiff is 67, as well as the present value of his cost of future care.

IV. credibility

[59] The defendants' case primarily rests upon this Court making an adverse credibility finding against the plaintiff. The defendants tendered no expert evidence, and they sought to undermine the conclusions in all three medical expert reports on the basis that the experts relied on the subjective reporting of the plaintiff, whom the defendants submit is not credible.

[60] None of the expert medical reports relied solely on the subjective reporting of the plaintiff and so I would not dismiss the conclusions of the experts on that basis in any event. However, since credibility is so central to the defendants' case, I must give careful consideration to the defendants' argument that the plaintiff is simply not credible in any of his evidence about his symptoms or his injuries.

[61] In order to find that none of the plaintiff's subjective reporting to the experts is reliable, which is the defendants' position, I would have to find that the plaintiff was fabricating or significantly exaggerating his symptoms when he reported them to Dr. Horricks, Dr. Fuller, Dr. Stewart and Mr. Kyi. This would go beyond simply applying scrutiny to the plaintiff's evidence, or preferring another witness' testimony over his. The defendants are asking me to find that the plaintiff has been engaged in a long term pattern of deceit with respect to his symptoms.

[62] In considering an allegation of deliberate deceit on the part of the plaintiff in *Midgley v. Nguyen*, 2013 BCSC 693, Dardi J. held as follows:

When a plaintiff is accused of deliberate deceit, more than mere speculation and innuendo is required. As the court aptly observed in *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 9, "[a] charge of deliberate deceit under oath is a serious attack on an individual's integrity which should not be lightly treated or lightly made".

[63] In this case, the defence has built its case on the plaintiff's complete lack of credibility. The defendants ask the Court to find that the plaintiff has been deliberately deceitful with the medical practitioners and with the Court.

[64] I do not accept the defendants' characterization of the plaintiff's evidence and I do not find that the plaintiff has been deliberately deceitful with the medical practitioners and with the Court. However, I have some concerns about the reliability of some of the plaintiff's evidence.

[65] I will endeavour to discuss below some aspects of the plaintiff's evidence that were highlighted by the defendants. I do not propose to address each of the deficiencies alleged by the defendants, only those that I find to be the most pertinent.

[66] The defendants' primary challenges to the plaintiff's credibility can be broadly arranged into three categories:

- a) inconsistencies between the notes and records of Dr. Horricks and the plaintiff's evidence;
- b) evasive and non-responsive answers given by the plaintiff in cross-examination; and
- c) inconsistencies between the discovery evidence and the evidence given by the plaintiff at trial.

A. Credibility issues arising from Dr. Horricks' evidence

1. Left side v. right side neck pain

[67] Dr. Horricks' notes from his first assessment of the plaintiff on January 20, 2009, indicate that the plaintiff expressed "left paracervical discomfort and left suprascapular discomfort". On the ICBC injury form Dr. Horricks completed, he wrote that the plaintiff exhibited "bilateral suprascapular tenderness". The plaintiff testified that his primary complaint has always been the right, not the left, side of his neck. The defendants ask me to conclude from this apparent conflict between the evidence of Dr. Horricks and the plaintiff that the plaintiff's evidence about his neck pain is not credible.

[68] I find the most likely explanation for this apparent inconsistency is either that Dr. Horricks' notes of his first assessment contain an error, or that the plaintiff, an adolescent at the time, did not describe his injuries very well to his doctor on the first visit. It is extremely unlikely, in my view, that the plaintiff has been fabricating an injury to the right side of his neck for the last 11 years. Given the overwhelming preponderance of evidence to support that the plaintiff did indeed injure the right side of his neck, I decline to make any adverse credibility finding against the plaintiff on the basis of Dr. Horricks' reference to left paracervical and

suprascapular discomfort in his notes.

2. Late emergence of lower back pain

[69] The defendants submit that it is not credible that the plaintiff's lower back pain arose from the Accident because the plaintiff did not report back pain to Dr. Horricks until February 24, 2009, almost two months after the Accident. Dr. Fuller, the orthopedic specialist, was asked about this on cross-examination. He noted that the sequencing of patient symptoms is "not black and white" but rather is a nebulous process, in part because the brain tends to focus on only one problem at a time. As such, he opined that pain symptoms in one part of the body could emerge two months or more after an injury. I therefore decline to draw the inference sought by the defendants.

3. Gap in visits to family doctor

[70] Dr. Horricks' report does not make any reference to the plaintiff seeing him for his Accident related injuries between September 2009 and June 2016. The defendants argue that the plaintiff's evidence about the ongoing pain he has suffered since the Accident is undermined by the relatively few times he appears to have seen his family doctor to complain of his injuries related to the Accident.

[71] I am unable to make the inference sought by the defendants with respect to the gap in medical records. As Mr. Justice Smith noted in *Edmondson v. Payer*, 2011 BCSC 118 at para. 36, *aff'd* 2012 BCCA 114:

While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.

[72] I cannot infer that if Dr. Horricks did not make a note of something, it was not observed. Nor can I infer that if the plaintiff did not visit Dr. Horricks, he was not suffering pain from his injuries. Dr. Fuller and Dr. Stewart were both cross-examined on the issue of the plaintiff's lack of visits to his family doctor for accident related pain and neither agreed with the defendants' proposition that large gaps in the records of the family doctor were indicative that the plaintiff was not suffering pain.

[73] The plaintiff testified that over time he adapted to his pain, and did not see any point in visiting Dr. Horricks. Over the years, Dr. Horricks had repeatedly given the plaintiff the same advice, which was to keep up the physical activity he was already doing. I accept this as a reasonable explanation for the plaintiff not continuing to see his family doctor for his injuries related to the Accident. I decline to draw any inferences about the plaintiff's injuries from his infrequent visits to Dr. Horricks or the relatively few times Dr. Horricks' notes refer to injuries from the Accident.

B. Plaintiff's testimony

- [74] While the plaintiff was easily distractible when giving evidence, there was nothing in his testimony that caused me to be concerned about his credibility. Indeed there were a number of times in his evidence where it appeared that he found the whole process of talking about his injuries to be quite tiresome and on at least two occasions he apologized to his lawyer for not taking the court case seriously enough over the last few years. Far from being a malingerer, the plaintiff appeared to be someone who is singularly focussed on his work rather than his injuries, and who would not be pursuing his claim were it not for the fact that his injuries impede his ability to fully realize his artistic vision.
- [75] There were numerous points in his direct and cross-examination in which the plaintiff struggled to stay on point and to express himself clearly. The plaintiff is a young adult who is clearly unaccustomed to expressing himself verbally in a public forum. However, in my view, neither his failure to be succinct in his answers nor his tendency to offer irrelevant evidence speak in any meaningful way to the credibility of his evidence.

C. Inconsistencies between discovery evidence and trial

- [76] The defendants raise the following inconsistencies between the plaintiff's evidence on examination for discovery and trial:
- a) At discovery, the plaintiff said he had pain in his neck on most days (not every day) and that the frequency of his pain was decreasing over time. At trial, he said that evidence was incorrect, and that at the discovery he wanted to make himself believe his symptoms were better, so he minimized them. He testified at trial that in fact he has pain in his neck every day.
 - b) At discovery, the plaintiff said there were no activities that aggravated the symptoms in his right shoulder, at trial he said that his right shoulder hurt every day at the end of a day of painting.
 - c) At discovery the plaintiff said that the quality of his paintings was not diminished by his injuries, only the speed at which he could produce them. At trial he testified that both quality and productivity were diminished as a result of his injuries.
- [77] The plaintiff testified that his memory now is more accurate than it was at the discovery, in part because he has thought more about his injuries and his pain and this made him better able to describe his pain at trial than at discovery. The discovery took place four years prior to the trial, on July 15, 2015.
- [78] I do not accept the plaintiff's evidence that he was better able to describe his symptoms in 2019 than he was in 2015 because he has thought about them more. The discovery took place six and a half years after the Accident. The trial took place ten and a half years after the Accident. The plaintiff's recollection of events and the progress of his symptoms would have been better at discovery than at trial. At discovery the plaintiff reported current pain

symptoms that were on the whole less dramatic than the current pain symptoms he reported at trial. I find that the evidence given by the plaintiff on examination for discovery on these points is more reliable than the evidence he gave at trial.

- [79] However, I do not find that the variations between the evidence given at examination for discovery and trial are significant enough to call into question the credibility of the entirety of the plaintiff's evidence as the defendants have asked me to do.
- [80] The objective evidence, which includes the x-ray imaging, the results of physical examinations done by the doctors and the vocational testing done by Mr. Kyi, overwhelmingly supports the conclusion that the plaintiff suffers from chronic pain in his neck, lower back and knee. I therefore find that any doubts about the plaintiff's credibility more generally with respect to his claims of chronic pain and diminished function must be resolved in his favour.
- [81] While the plaintiff was mostly credible in his evidence, this is not to say his evidence was always reliable. His lack of interest in the business side of his occupation was evident in the confused answers he gave when asked to testify about his income and expenses. In this regard, I agree with the defendants that his evidence was vague, confusing, and ultimately unhelpful to the Court in ascertaining his prior income. I have not relied on any of the plaintiff's evidence about his income or business affairs in assessing damages in this case.

V. causation

- [82] The plaintiff must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to an injury. The defendants' negligence need not be the sole cause of the injury. As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [Athey].
- [83] I am satisfied that the Accident caused or materially contributed to the plaintiff's ongoing neck and back pain. The plaintiff was credible when he testified that he has suffered pain in his neck, back and knee for the last ten years. No evidence was tendered to suggest that he had a pre-existing injury prior to the Accident.
- [84] The only evidence of any possible intervening event was the notation in Dr. Horricks' report that the plaintiff saw him in October 2011 after he ran into a garage door and struck his shoulder. The defendants ask me to infer that the October 2011 garage door event is the causative factor in the plaintiff's ongoing symptoms. This proposition was put to each of Dr. Horricks, Dr. Fuller and Dr. Stewart and none agreed. The defendants tendered no medical expert who advanced this opinion. Therefore there is no basis on which I could conclude that the October 2011 garage door event caused or contributed to the plaintiff's injuries.
- [85] Therefore, I conclude that the plaintiff has established that the defendants' negligence caused or materially contributed to his injuries.

VI. mitigation

- [86] A plaintiff has an obligation to take all reasonable measures to reduce his damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111, at para. 234.
- [87] The duty to mitigate is a positive duty but if a defendant's position is that the plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on that issue: *Graham v. Rogers*, 2001 BCCA 432, at para. 35.
- [88] A defendant who wishes to establish that a plaintiff has failed to mitigate her loss must prove two things:
- a) that the plaintiff acted unreasonably in eschewing the recommended treatment; and
 - b) the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 [Chiu], at para. 57.
- [89] I am satisfied that the plaintiff took reasonable measures to reduce his injuries. Between February 5, 2009, and September 1, 2009, he attended physiotherapy on 24 occasions. He engaged in active rehabilitation by working with a personal trainer. He has continued a regular exercise program since the Accident. There was no treatment recommended by his family doctor, Dr. Horricks, which the plaintiff did not partake in. Dr. Stewart confirmed that the plaintiff had obtained an appropriate amount of rehabilitation for his injuries.
- [90] Therefore, I find that the plaintiff took all reasonable steps to mitigate damages in this case.

VII. damages

- [91] I will now address the plaintiff's claim for damages under the following headings:
- a) non-pecuniary damages;
 - b) loss of earning capacity;
 - c) cost of future care; and
 - d) special damages.

A. Non-Pecuniary Damages

- [92] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. In assessing non-pecuniary damages, the court may look to awards made in analogous cases. However, each case must turn on its own unique facts. No two personal injury claims are identical and awarding damages involves an exercise of judgment: *Kapelus v. Hu*, 2013 BCCA 86 at para. 16.

- [93] In *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley], at para. 46, the Court of Appeal enumerated the factors to be considered in assessing non-pecuniary damages. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism.
- [94] The plaintiff put a number of cases before the Court in support of a claim for \$125,000 in non-pecuniary damages: *Giczi v. Kandola*, 2014 BCSC 508 (\$120,000), *Morlan v. Barrett*, 2012 BCCA 66 (\$125,000); *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2014 BCSC 212 (\$120,000).
- [95] The Defendant relies on the following cases to support non-pecuniary damages of \$25,000 - \$35,000: *Eng v. Titov*, 2012 BCSC 300 (\$40,000), *St. Germain v. Jemmot*, 2012 BCSC 1041 (\$35,000), *Wilkinson v. Whitlock*, 2011 BCSC 1781 (\$40,000), *Sharma v. Didiuk*, 2010 BCSC 280 (\$30,000), *Gonzales v. Voskakis*, 2013 BCSC 215 (\$20,000).
- [96] The cases relied on by the defendants in support of a modest award are distinguishable. None involved a young plaintiff who was injured as a child. In a chronic pain case such as this one, the age of the plaintiff and consequent long duration of his suffering is a relevant factor in determining non-pecuniary damages.
- [97] The cases relied on by the plaintiff are also of limited assistance insofar as they involved plaintiffs whose day to day lives were far more impacted by their injuries than the plaintiff in this case.
- [98] The Accident caused the plaintiff's neck, back and knee injuries. The resultant pain reduces his functionality. For the last ten years he has experienced pain or discomfort on a regular basis and he can expect to experience pain or discomfort for the rest of his life.
- [99] Notwithstanding the long term nature of his injuries, the evidence shows that the plaintiff has mostly been able to carry on with his life unimpeded. The main ongoing concern is that he has difficulty sitting and standing in one position for extended periods, which primarily impacts his ability to work as an artistic painter. His personal life has not been significantly curtailed. He continues to travel and to exercise regularly, although his knee pain impedes his ability to run recreationally. He is in a serious romantic relationship and has made long term plans for the future. He has been able to continue to pursue his passion, which is artistic painting, although his productive output and to a certain extent his ability to realize his artistic vision are impeded to a modest degree by his injuries.
- [100] It is relevant that the plaintiff has been suffering pain and discomfort since he was 13 and at trial he was only 24. He has the majority of his adult life ahead of him and it is clear that his pain and discomfort are unlikely to improve.

[101] In all the circumstances, I find that an award of \$75,000 for non-pecuniary damages is appropriate in this case. It reflects the fact that, while the injuries suffered by the plaintiff are not severe, he is likely to suffer from them for a very long time.

B. Loss of Earning Capacity

[102] This head of damages constitutes the most significant and complex aspect of the plaintiff's claim.

[103] The plaintiff seeks an award of \$200,000 for past loss of earning capacity and \$750,000 for future loss of earning capacity. The defendants argue that there should be no award for past or future income loss.

1. Legal framework

[104] The legal principle that governs the assessment for loss of earning capacity is that, insofar as it is possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendants' negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185 [Lines]. An award for loss of earning capacity represents compensation for a pecuniary loss: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32. Compensation must be made for the loss of the plaintiff's earning capacity over the duration of their working life -- including factors such as reduced promotion opportunities (or pace of career advancement) and adjustment in retirement age -- as opposed to a simple analysis of the plaintiff's raw loss of earnings prior to and post impairment: *X. v. Y*, 2011 BCSC 944 at paras. 188-193.

[105] In *Falati v. Smith*, 2010 BCSC 465 at paras. 40-41, aff'd 2011 BCCA 45 [Falati], the Court set out certain principles which inform the assessment of loss of earning capacity:

1. The amount of damages for loss of earning capacity may involve a consideration of hypothetical events;
2. The standard of proof is not the balance of probabilities. The plaintiff need only establish a real and substantial possibility of loss;
3. The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong; and
4. The court must assess damages for loss of earning capacity, rather than calculating those damages with mathematical precision.

2. Past loss of income earning capacity

[106] Although a claim for "past loss of income" is often characterized as a separate head of damages, it is properly characterized as a component of loss of earning capacity: *Falati* at para. 39.

- [107] While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27.
- [108] A plaintiff is entitled to recover damages only for past net income loss. In other words, the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62.
- [109] It is extremely challenging to determine the plaintiff's past and future loss of earning capacity given the nature of his work, his young age at the time the Accident occurred and the fact that his income has been and will continue to be dependent on the vagaries of the art market. That said, the evidence is abundantly clear that irrespective of the Accident, the plaintiff's passion and chosen career path is artistic painting. It is therefore unnecessary for me to consider other hypothetical scenarios as to what career path he would choose had the Accident not occurred.
- [110] In terms of quantifying past loss of earning capacity, I am aided by the expert reports of Ms. Minard and Mr. van den Berg, which suggest that the plaintiff's income earning prospects, past and future, have been modestly diminished by his injuries.
- [111] The only evidence about the differential between the plaintiff's current artistic output and his likely output if he were injury free is the plaintiff's testimony that he would be able to generate paintings at a rate that is three times faster than at present if he were uninjured. The primary reason for this is his inability to work for a sustained enough period of time to finish a pallet knife painting in a single day, requiring him to complete his paintings using a brush which takes a longer amount of time.
- [112] The plaintiff was in the eighth grade when the Accident occurred. While he did earn some income from painting that year and in the ensuing years of high school, I am not satisfied that, given his age and full time schooling, his income would have been different in high school had the Accident not occurred. Both the plaintiff and Ms. Parvanta testified that the plaintiff only started pursuing art as a career after high school and as such, I find that the only years for which past income loss should be considered are the years after the plaintiff graduated from high school in 2013.
- [113] I have further determined that I must only consider past income loss in relation to the sale of paintings, not the employment income the plaintiff earned from Gajoum D'Art Studios between 2014 and 2017. There are two reasons for this. First, there is insufficient evidence for me to find that the plaintiff's work performance as an apprentice to Kal Gajoum was impacted by his injuries. Both the plaintiff and Kal Gajoum testified that the plaintiff never told his stepfather about the extent of his injuries nor was Kal Gajoum aware of them. Second, it is not clear to me that the salary the plaintiff received from Gajoum D'Art Studio ever had any relationship to the amount of work he actually did. The plaintiff was not paid hourly, nor did he have a set salary, and the T4 income he received was not paid directly to him but rather went to pay expenses on his behalf, such as the cost of the family's property

in Nice.

- [114] It is possible that the plaintiff's salary was determined more on the basis of income splitting opportunities than actual work done; it is impossible on the record for me to determine one way or another. What is clear is that his salary during that period bears no clear relationship to work done. Thus, I am unable to find that the plaintiff would have made more money as an apprentice had he been uninjured.
- [115] With respect to painting sales, the plaintiff's income appears to have varied quite dramatically between 2014, the first year he worked full time as an artist, and the trial in 2019. The invoices in evidence suggest that his painting sales in 2015 were over \$27,000, in 2016 were \$12,652, and in 2018 were \$30,550.
- [116] While the plaintiff estimates that he could paint three times faster if he were uninjured, this does not mean he would sell three times as many paintings. Particularly in the early years, when the plaintiff was exhibiting jointly with Kal Gajoum and establishing his own reputation as an artist, I find that absent his injuries it is unlikely that the plaintiff would have sold many more paintings than he actually sold during this period. He was, at the time, an extremely young and inexperienced artist, albeit one who clearly had a great deal of talent (something that even Kal Gajoum has admitted).
- [117] Both Ms. Minard and Mr. van den Berg remarked on the plaintiff's unusual success for an artist his age. Even with his injuries, the plaintiff has been able to make a living selling paintings since graduating from high school; something most artists are not able to do. However, I find it unlikely that, assuming he could produce more art, the plaintiff's career selling art would have accelerated faster than it already did during the period between 2014 when he started working full time as an artist and 2017, when his working relationship with Kal Gajoum came to an end. Therefore, I would not award any past wage loss for that period.
- [118] The plaintiff's circumstances changed in 2017 when the relationship between his mother and stepfather broke down and he was no longer producing and exhibiting art in conjunction with Kal Gajoum. After the December 2017 consignment agreement with Le Soleil, the plaintiff only sold his art through a single gallery (the short lived consignment agreement with Mountain Galleries having resulted in no painting sales). Mr. Darel testified that he would like to receive more paintings from the plaintiff and he believed he could sell them, particularly if they were larger paintings. Thus, I find that for the years 2018 and 2019, the plaintiff has experienced some modest income loss because, but for the Accident, he likely would have produced more large paintings, some of which likely would have sold.

[119] The plaintiff sells his large paintings, which are about 40x60 in size, for an artist's price of \$5,000 to \$9,000. If he sold one or two additional large paintings in each of 2018 and 2019, his income from those sales would be reduced by his business expenses and tax. Recognizing that loss of earning capacity cannot be a mathematical exercise, and in all the circumstances, I award the plaintiff \$10,000 to reflect past loss of earning capacity for the years 2018 and 2019.

3. Loss of Future Earning Capacity

[120] A plaintiff may prove the quantification of loss of future earning capacity on an earnings approach or a capital asset approach. Both are correct. The capital asset approach is often more appropriate where the pecuniary loss is not easily measured: *Perren v. Lalari*, 2010 BCCA 140 at paras. 27, 32. Either way, this Court must endeavour to quantify the financial harm accruing to the plaintiff from his injuries over the course of his working career, taking into account relevant and realistic negative and positive contingencies.

[121] With respect to an award for loss of future income earning capacity, the court must consider overall fairness and reasonableness, taking all the evidence into account. The process of assessing damages on the basis of hypothetical future events may be characterized as an art, as opposed to an exact science: *Shapiro v. Dailey*, 2012 BCCA 128 at para. 40.

[122] A plaintiff is entitled to be compensated for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring. The valuation of loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the Accident with what he will probably earn in his injured condition. Since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.

[123] The plaintiff submits that the capital asset approach is appropriate in this case to determine the plaintiff's future loss of income earning capacity. The capital asset approach requires the court to consider the four factors set out in *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353, in the context of the particular facts of the case. The court must make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56 [Morgan].

[124] The four factors are:

- a) whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
- b) whether the plaintiff is less marketable or attractive as an employee to potential employers;
- c) whether the plaintiff has lost the ability to take advantage of job opportunities which might otherwise have been open to him, had he not been injured; and

- d) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive market.

[Morgan at para. 53]

[125] The plaintiff has been on a singular career trajectory since he was a child. He has no formal education beyond grade 12 and he has never done any kind of paid work other than apprenticing and artistic painting. His income earning potential outside the world of artistic painting, even absent injury, would not have been promising. However, based on the expert evidence of Ms. Minard and Mr. van den Berg, I find that future income earning capacity of the plaintiff, with or without injury, is such that it is probable that his income will steadily rise as he matures as a painter and becomes better known. I do not have sufficient evidence before me to determine the likely rate of that increase in his income over the course of his career.

[126] I am also satisfied that the injuries suffered in the Accident and the resulting symptoms somewhat impair the plaintiff's ability to earn income in his chosen profession and that there is a real and substantial possibility that his diminished earning capacity has resulted and will result in a pecuniary loss. While the plaintiff still has a bright future ahead of him as a painter, the future is not quite as bright as it would be had he not been injured.

[127] In terms of quantifying future loss of income capacity, the plaintiff submits that the Court should follow the approach taken in *Giczi v. Kandola*, 2014 BCSC 508 [Giczi]. That case involved a singer who performed a Bette Midler tribute show and, as a result of an injury from a motor vehicle accident, was no longer able to sing professionally. Part of the court's task in determining income loss was to determine the likelihood that the plaintiff's show would have been financially successful had the Accident not occurred. Mr. Justice Sigurdson approached the issue by assigning a percentage possibility (15%) to the plaintiff achieving some long term financial success as a Bette Midler tribute performer. The likelihood of success was factored into the \$175,000 award made for impairment of future earning capacity.

[128] The plaintiff asks me to take a similar approach to the one taken by Sigurdson J. in *Giczi*, but to find that his likelihood of success had he not been injured is 100%, as opposed to the 15% possibility assigned by Sigurdson J. The plaintiff asks the Court to find that the plaintiff would sell twice as many paintings if he were not injured than he presently sells. As a result, his income would be twice what it presently is based on painting sales. On this basis, the Court is asked to quantify the plaintiff's future income loss at \$33,960 per year for a present value of \$750,000 if the plaintiff works until age 65.

- [129] There are two problems with the suggested approach of the plaintiff. First, I cannot reasonably make a finding of fact about the probable future average painting sales of the plaintiff. At trial, the plaintiff had only been producing and marketing his work on his own for a period of less than two years. This is an insufficient amount of time for me to assign an average income to him that has a reasonable possibility of being correct.
- [130] The second problem is that the Court was provided with almost no evidence of the plaintiff's business expenses. The plaintiff testified that he pays his mother to act as his manager, although it was unclear from his evidence whether he simply covers their joint living expenses or whether he actually pays her a salary. Any salary paid by the plaintiff to Ms. Parvanta, as well as any expenses of the business, would have to be deducted from the plaintiff's gross painting sales in order to determine his income.
- [131] Because of these shortcomings in the evidence, I cannot adopt the methodology proposed by the plaintiff, which would require me to make a finding about the plaintiff's current income from painting and then add a percentage increase to his productivity to determine his loss of income potential. As a result, I have taken a different approach to quantifying the plaintiff's likely future income loss.
- [132] The plaintiff has credibly testified that his ability to work long hours at his craft is impaired by his injury. All the medical experts - Dr. Stewart, Dr. Horricks and Dr. Fuller - opined that the plaintiff continues to suffer from injuries that impair his ability to work long hours. Mr. Kyi's report demonstrated the extent to which the plaintiff's injuries functionally impact his ability to work continuous hours, and how his abilities deteriorate throughout the day. The plaintiff's own evidence about how pallet knife paintings are made, and must be completed in one day, was corroborated by Ms. Minard on cross-examination.
- [133] It appears that the plaintiff has a successful career ahead of him. However, the weight of evidence suggests that he would likely be able to produce more paintings, and particularly more large paintings, were it not for his injuries. Mr. Darel has testified that the plaintiff's larger paintings are marketable and he would like to have more of them to sell.
- [134] Evidence was given about the plaintiff's ability to participate in live painting demonstrations. He has testified that live painting demonstrations are difficult for him and, while he did manage to get through two live painting events in the spring and summer of 2019, he suffered considerable pain as a result. While I accept this evidence, there is nothing in the expert evidence before the Court that would allow me to quantify the impact of not participating in live painting demonstrations on the plaintiff's future earning capacity. I accept that it is likely that live painting events have a salutary effect on paintings sales. However, the value of that benefit is not known.

- [135] As such, I have focussed my analysis of loss of future income earning capacity on the plaintiff's inability to generate the volume and size of paintings that he would produce but for his injuries, and the additional income he would likely receive if he were fully functional.
- [136] Mr. Darrel testified that he presently receives one to two large paintings from the plaintiff per year and he would like to receive 6 to 10. This rate of production, based on the plaintiff's testimony, would be possible if the plaintiff were not injured. The plaintiff testified that if he were not injured he could produce a large pallet knife painting in a day (it presently takes him three weeks to a month).
- [137] The plaintiff testified that paintings generally take three times longer to complete than they would if he were not injured.
- [138] However, a threefold increase in production would not necessarily result in a threefold increase in sales. Le Soleil presently has over 40 original paintings by the plaintiff in its inventory. Even the most successful artists do not sell every painting.
- [139] As was admitted by a number of witnesses at the trial, the art market is fickle. The plaintiff could develop into a major Canadian artist. He could also find that in a few years his paintings are not consistent with the tastes of the art buying public. No expert opined on the likelihood of either of these possibilities. I consider that both of these opposing contingencies cancel one another out in the future income loss analysis.
- [140] From the December 2017 consignment agreement with Le Soleil, until the commencement of trial in July 2019, the plaintiff sold 45 paintings through Le Soleil. There are an additional 47 paintings that have been supplied by the plaintiff to Le Soleil that are not yet sold. An increase in production of smaller paintings appears to be unlikely to significantly increase the plaintiff's income. However, it would likely result in some increase, as the more paintings he can generate the more likely he is to produce paintings of different subject matters and styles that may appeal to different tastes. The more significant factor in terms of loss of future income earning capacity appears to be the plaintiff's ability to produce large paintings, which Mr. Darel testifies are highly marketable and, due to the plaintiff's injuries, difficult and very time consuming to produce.
- [141] Acknowledging that the determination of loss of future earning capacity cannot be a precise calculation, I find that if the plaintiff were not injured, he would likely sell an additional one or two large paintings per year, and there would be a modest increase in the number of smaller paintings sold.
- [142] Net of expenses, I find that the annual future income loss of the plaintiff is \$7,000.

[143] Mr. Benning prepared an economic future income loss multiplier wherein the lump sum present value of the plaintiff's future income loss stream, assuming that he works until age 67, would be \$22,076 for every \$1,000 of annual lost income. Assuming an annual income loss of \$7,000, this would result in a present value of \$154,532.

C. Cost of Future Care

[144] The purpose of an award for future care is to compensate a plaintiff for costs which reasonably may be expected to be incurred to preserve and promote the plaintiff's mental and physical health: *Gigmac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30.

[145] The test for assessing future care costs is well settled: the test is whether the costs are reasonable and whether the items are medically necessary: *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 62.

[146] In assessing what is reasonably necessary to promote the plaintiff's health, the court should also consider whether the plaintiff would likely use the items or services in the future: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at paras. 12-14.

[147] The quantification of damages for the cost of future care is an assessment and not a precise accounting exercise. Adjustments must be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Prempeh v. Boisvert*, 2012 BCSC 304 at para. 108.

[148] Where there is an evidentiary link between a physician's assessment of a plaintiff's level of pain and injury incurred and the treatment and care recommended by an occupational therapist, the evidence of an occupational therapist may be used to establish the future care needs of a plaintiff without the need for a physician testifying to the necessity of every item of care claimed: *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.), quoted with approval in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 36-39.

[149] In this case, Mr. Kyi and Dr. Stewart made a number of rehabilitative and ergonomic recommendations in their reports. Mr. Kyi's recommendations, which the plaintiff asks the Court to find are reasonable and medically necessary include:

- a) Gym membership: \$340-600 per year.
- b) Personal trainer: \$60/hour.
- c) High back Obusforme back support: \$89.95 + tax every 3-5 years.
- d) Orthopedic pillow: \$50-\$200, every 2-3 years.
- e) Ergo Level Work Chair: \$195, replaced once.

- f) Ergonomic sit-stand stool: \$199-\$309 + tax, replaced once.
- g) Cyro-Cuff lower extremity icing device: \$245 + tax, every 5-7 years.
- h) Custom orthotics: \$500-4550, every 2 years.

[150] The defendants resist the cost of future care claim on the following basis:

The care recommendations provided by the plaintiff's experts are based on the subjective reporting of the plaintiff. As a result of the plethora of issues with the plaintiff's reliability and credibility, the foundation of the opinion for the future care recommendations is unreliable, leaving no support for the recommendations.

[151] The defendants are incorrect when they say that the care recommendations provided by the plaintiff's experts are based only on the subjective reporting of the plaintiff. As discussed above, Mr. Kyi's recommendations result from an entire day of conducting functional capacity tests on the plaintiff. By no means were Mr. Kyi's recommendations based entirely on subjective information from the plaintiff. In any event, I have found the plaintiff to be, for the most part, a credible witness with respect to his symptoms and his injuries.

[152] There were no specific submissions made by the defendants that any particular item was medically unnecessary or unreasonable. I find that, with respect to Mr. Kyi's recommendations, they are reasonable and medically necessary. Mr. Benning's report calculates the present value of the cost of care recommendations, with the applicable 2% discount rate, to be \$32,616. I order that this amount is payable for cost of future care.

D. Special damages

[153] The plaintiff is permitted recovery of the out-of-pocket expenses he reasonably incurred as a result of his injuries. His entitlement is derived from the fundamental principle that an injured person is to be restored to the position she would have been in had the negligence not happened: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 22 (S.C.) at 78, *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).

[154] The plaintiff's special damages claim is \$2,876.26. This includes a number of physiotherapy sessions, chiropractor sessions and massages. I find that the plaintiff has proven on a balance of probabilities that these costs were incurred and that they were for the treatment of his accident related injuries. On this basis, I award the plaintiff the full amount claimed.

VIII. conclusion

[155] The defendants are liable to the plaintiff for damages in the following amounts:

1)

Non-pecuniary

\$ 75,000

2)

Past loss of earning capacity

\$ 10,000

3)

Future loss of earning capacity

\$154,532

4)

Cost of future care

\$ 32,616

6)

Special damages

\$ 2,876

IX. costs

[156] The plaintiff should have his costs against the defendants at Scale B, unless there are matters relating to costs about which I am unaware. If that is the case, the parties may make arrangements with Supreme Court Scheduling to appear before me to speak to costs, but they must make such arrangements within 30 days of the date of this judgment.

"Francis, J."

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