

CANADA / JUDGMENT

Ghazgbi v. Bhamrah

2020 BCSC 496

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 496 Ghazgbi v. Bhamrah

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ghazgbi v. Bhamrah,

2020 BCSC 496

Date: 20200401

Docket: M194667

Registry: New Westminster

Between:

Ahmad Ghazgbi

Plaintiff

And

Gurchetan Singh Bhamrah, Jaskaran Singh Bhamrah,

Raminderjit Kaur Kahlon, Paramjeet Kaur Bhamra,

Noorkiran Bhamra and Harpreet Parmar

Defendants

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiff:

R. Pici

Counsel for the Defendants:

R. Nagel

Place and Dates of Trial:

New Westminster, B.C.

March 2-5, 2020

Place and Date of Judgment:

New Westminster, B.C.

April 1, 2020

Introduction

- [1] The plaintiff, Mr. Ahmad Ghazgbi, seeks damages arising from two motor vehicle accidents occurring in October and December 2015. Liability is admitted on behalf of all of the defendants save for the defendant Raminderjit Kaur Kahlon. The plaintiff agrees to the discontinuance of the proceeding as against her.
- [2] The plaintiff is currently 39, married with two children. At the time of the accident, he was employed as an automotive technician at Maple Ridge Volkswagen ("MRVW"). He took some three months off following the first accident and did not return to work until approximately February 2016. Thereafter, he worked until late October 2016 at which time he resigned his employment allegedly because of injuries stemming from the two accidents.
- [3] The plaintiff's admitted injuries are soft tissue in nature. The plaintiff testified that he still suffers from headaches, neck and shoulder pain, low back pain, pain in his right hip and leg, and pain in the former surgical site of a hernia repair.
- [4] He also says that his sleep has been disrupted by the injuries. The result, he says, has been a steady deterioration in his mood which is now being treated with psychotropic medications.
- [5] All of this, according to the plaintiff, leads to a substantial claim for general damages, loss of past earnings, loss of capacity to earn income in the future together with special damages (agreed), costs of future care and the loss of housekeeping capacity.
- [6] The defendants acknowledge that a serious injury has occurred but adopt a more optimistic position regarding the plaintiff's future based, in part, upon evidence from the plaintiff's own physician Dr. Riesling. The defendants, collectively, argue that the plaintiff's lost earning capacity is less than suggested by him and that he will continue to improve with treatment of his underlying mood disorder.

- [7] The parties agree the plaintiff's injuries stemming from each of the accidents are indivisible such that I need not apportion damages as between the individual defendants responsible for the plaintiff's current condition. This agreement on indivisibility is despite the fact a portion of the plaintiff's post-accident income loss is solely attributable to the first accident.

The Accidents

- [8] The first accident occurred on October 25, 2015 near the intersection of Fraser Highway and 152nd Street. The plaintiff was alone in his 2007 Volkswagen Passat when he was involved in a multi-car rear-end collision. The vehicle two vehicles behind the plaintiff struck the vehicle immediately behind the plaintiff, which in turn struck the plaintiff's vehicle. The force of the collisions was sufficient to drive the plaintiff's vehicle into the vehicle in front of him driven by Ms. Kahlon. It is acknowledged Ms. Kahlon bears no responsibility for the plaintiff's resultant injuries.
- [9] The force of the impacts were sufficient to throw the plaintiff forward in his vehicle and then pull him sharply when restrained by his three-point seat belt.
- [10] The plaintiff's vehicle was significantly damaged in both the front and back. The damage was extensive enough that it was not repaired.
- [11] In the second accident, on December 18, 2015, the plaintiff was at or near the intersection of 150th Street and 72nd Avenue in Surrey. He was driving a 2002 Ford Ranger pickup when struck from behind by the defendant Parmar who was driving a Ford 150. The plaintiff described a similar result; he was thrown forward then restrained by his lap and shoulder seatbelt and drawn forcefully back to his seat.
- [12] Both parties were westbound on 72nd Avenue at the time of the accident.
- [13] In both instances, police and emergency vehicles attended. In neither instance did the plaintiff request medical attention at the scene, although he stated in his evidence he felt dazed and injured.

The Plaintiff's Background

- [14] The plaintiff was approximately 34 years of age at the time of the accidents. He qualified as an automotive technician after graduating from BCIT. After graduating, he held various jobs prior to his employment as an automotive technician at MRVW in 2014. While employed there, he took additional training which I presume was specific to the Volkswagen models.
- [15] He was working there at the time of the first accident at a rate of \$32 per hour. He was a regular full-time employee of MRVW working four 10-hour shifts. He described the varied tasks he performed ranging from simple oil changes to transmission or engine overhauls.
- [16] Some of the work he described demands significant physical strength; some tasks do not.

- [17] The plaintiff described that the matter of compensation at MRVW was based, in part, on the hours worked but, as well, credit was given for efficiency. Repair manuals provided time estimates for the completion of certain work. If the plaintiff was able to complete the work in time faster than that, he moved on to his next assigned task but was paid as if he had worked the requisite number of hours as provided for in the manual.
- [18] His earnings from MRVW in 2015, up to the time of the first accident, were \$76,056.
- [19] According to the evidence, his last day of work at a MRVW in 2015 was October 25, 2015. He did not return to work until early February 2016.
- [20] In 2016, the plaintiff earned, in total, \$73,616. \$61,161 of that was from MRVW and the remainder, \$12,454, was from Kwantlen Polytechnic University ("KPU"). The KPU earnings were earned from two weeks of instruction performed by the plaintiff during the spring of 2016 and for instruction performed in November and December of 2016.
- [21] The plaintiff testified that in January 2016, an ad appeared seeking applications for automotive instructors at KPU. He applied and was accepted as a substitute instructor. When called to perform a two-week block of instruction in the spring of 2016, the plaintiff ceased working at MRVW for that two-week period.
- [22] His stated aspirations prior to the accident were to become a supervisor or service manager at MRVW. Those aspirations have now changed such that he hopes to obtain a full-time teaching position at KPU.
- [23] Given his stated aspiration to continue as an automotive technician as at the date of the first accident, it is unclear why he applied for a different job some month or so following the second accident. At the time he applied, his prognosis was unclear. His injuries were to soft tissue and he did not testify that he felt, in January 2016, he would not fully recover or, in any event, be unable to carry on as an automotive technician.
- [24] The contractual rate for on-demand teachers at KPU provided for 24 hours of instruction weekly at \$59 per hour; significantly higher than his compensation at MRVW, but with fewer hours weekly.
- [25] The plaintiff testified that when he returned to work he asked to be placed on lighter duties and was given lighter assignments than those of his co-workers. Rather than doing work which required more extensive bending or twisting to reach areas of the bottom automobile requirement repairs, or lifting and moving tires, the plaintiff testified that he did things like oil changes and diagnostics and other chores or assignments requiring less effort.
- [26] He also noted that apprentices were on scene to do some of the heavy lifting that he might otherwise have done but for his injuries.

- [27] By the end of October 2016, he found the demands upon him so great and causing such increase in him symptoms that he resigned voluntarily from MRVW with a view to pursuing a teaching career.
- [28] His earnings during the months he worked at MRVW in 2016 appear little different than what he earned during a similar period in 2015, considering he did not resume work until February and took two weeks away from his regular employment to teach at KPU in the spring.
- [29] To date he has carried on as a part-time instructor earning \$20,500 in 2017, \$29,250 in 2018 and \$13,860 in 2019. The plaintiff seeks economic damages premised upon what he says his potential earnings for full employment over the course of an entire year at MRVW would be. The plaintiff says these would be \$91,000; the defendant says \$72,000.
- [30] On a go-forward basis, the plaintiff seeks compensation for loss of his capacity to earn income based upon the difference between his expected earnings of \$91,000 annually and a reasonable allocation as to what he might expect when assigned full-time work at KPU. Depending on the difference in compensation and the extent to which it will carry forward, the plaintiff suggests a wage loss of between \$234,000 and \$800,000.

The Plaintiff Pre-Accidents

- [31] The plaintiff described himself as able-bodied and content with his marriage, home life and his work prior to the first accident. That sentiment was endorsed by his wife, his friend Mr. Lapsh and, to a lesser extent, his former co-worker at MRVW, Mr. Smith. I say lesser extent only because Mr. Smith did not socialize with the plaintiff outside of work and offered no commentary on the plaintiff's life away from work.
- [32] The plaintiff had previous surgery for a hernia, but the surgery was a success and caused no further problems once the plaintiff recovered from the effects of the operation. The surgery was performed by Dr. Wong, a general surgeon, and the result appears to have been a successful repair. I mention it only because the surgical site was a source of major complaint post-accidents.
- [33] The plaintiff assisted his wife, Hala, with household chores, co-parented their young son and enjoyed a number of leisure activities including duck hunting, hiking, cycling and playing pick-up soccer with friends. The plaintiff claims he and his wife split the household chores 50/50, but this assertion was not supported by the evidence. I find the plaintiff only performed a small portion of the household chores prior to the accidents.
- [34] He socialized regularly with friends at events such as bar-b-ques where his whole family would attend. He and his wife also had evenings out together.
- [35] He worked routinely four days a week and earned a comfortable living doing work he enjoyed.

[36] The accidents, he submits, changed all of that.

The Plaintiff Post-Accidents

[37] Following the first accident, the plaintiff felt sore all over. He was picked up at the accident scene by Hala and went home. He saw his family doctor, Dr. Riesling, either the following day or the day after that.

[38] He reported the following symptoms:

- Headaches;
- Neck and upper back pain;
- Stiffness in the neck and shoulder area;
- Pain in his groin and right leg;
- Low back pain; and
- Pain at the incision site of his hernia operation.

[39] His family doctor prescribed the usual modalities of treatment for soft tissue injuries; physiotherapy, medication for pain relief and rest.

[40] The plaintiff remained off work until the occurrence of the second accident. The second accident aggravated all of his symptoms and, according to the plaintiff, resulted in jaw pain and clicking of the jaw with pain radiating to behind his ears.

[41] The symptoms were significant enough immediately after the second accident that the plaintiff did little other than rest and attend appointments.

[42] He refrained from most social activities and all sporting activities such as cycling, hiking or soccer. He did little, if anything, around the house to assist his wife with the daily household chores.

[43] The pain he experienced affected his sleep as he was unable to remain lying on his side for extended periods without experiencing pain.

[44] Nonetheless, he returned to work at the beginning of February 2016. He requested, and apparently received, lighter duties than before the accidents. He testified that he was able to do light mechanical duties, oil changes, diagnostics and some other lighter tasks, but was unable to do work involving changing tires, or work that involved bending, lifting or extending his arms for too long.

[45] At the end of each workday he felt exhausted and did little by way of interacting with his wife and son or contributing to the household chores.

- [46] As mentioned, prior to his return to work, the plaintiff viewed an online ad seeking instructors at KPU. He successfully applied for a position as an on-demand instructor replacing permanent instructors when, for whatever reason, they were unable to teach a block of automotive mechanics. The courses are taught in two-week blocks with class work 24 hours weekly.
- [47] The plaintiff taught one block in the spring of 2016 while still employed at MRVW. The plaintiff was uncertain as to whether he took leave or time off to spend two weeks away from his job.
- [48] Frustrated by his lack of full recovery and the fatigue caused by the ten-hour days, the plaintiff resigned from MRVW in October 2016. He taught for much of November and December of 2016 as evidenced by his significant earnings. Counsel for the defendants suggested the plaintiff's T4 earnings equated to 211 hours of work at KPU in 2016.
- [49] It does not appear he sought his doctor's advice as to whether to discontinue working as an automotive mechanic, although Dr. Riesling later endorsed the vocational change, opining that the physicality of automotive mechanics was/is beyond the capacity of the plaintiff.
- [50] The plaintiff never underwent a functional capacity assessment. The requirements of his duties at MRVW were never fully described either to his doctor or in the plaintiff's evidence. I accept that there are heavier aspects to his work but note the plaintiff was able to seek and receive accommodations at work and his earnings, determined by his pace of work as well as hours worked, were unaffected by his ongoing physical symptoms.
- [51] From 2017 to 2019, the plaintiff's earnings have been significantly lower teaching at KPU. He is hoping for a full-time assignment, but such has not occurred in the four years since his initial hiring.
- [52] He has not been assessed by a vocational consultant to see the types of work he is best suited for if heavy physical work is beyond him. The plaintiff seems committed to pursuing instructing as his new vocational goal and says that he can perform the demands associated with the job despite the continuation of many of his symptoms.
- [53] In terms of his recovery, the headaches are less frequent and less acute than they originally were in the early months following the accident but he still experiences headaches two to four times weekly. They range in duration from twenty minutes to four hours.
- [54] He still has neck and shoulder stiffness but not much pain.
- [55] His major problems currently appear to be his low back and his leg and groin area. He still experiences ongoing pain in the groin near the area of the hernia repair. He was seen by Dr. Wong post-accidents for investigation of the surgery and to determine whether it had been adversely impacted by the accident. Dr. Wong determined nothing was out of the norm and did not recommend any intervention.

- [56] Investigation by a physiatrist, Dr. Waspe, resulted in no firm physiological findings.
- [57] The plaintiff did not take the recommended aquatic therapy suggested by Dr. Waspe. As an explanation, he offered that the smell of swimming pools, presumably public pools offering aqua therapy, made him nauseous. That said, there is no explanation as to why the smell affects him in such a manner.
- [58] After July 2018, the plaintiff underwent no treatment. He explained that Dr. Riesling had advised against continuing therapy but Dr. Riesling did not recall such advice.
- [59] When the plaintiff returned to a new physiotherapist in 2019, he reported improvement, noting to Dr. Riesling that the physiotherapist was employing different techniques that were supplying some relief.

The Medical Evidence

- [60] The plaintiff's family physician, Dr. Riesling, was the only expert called by the plaintiff. The plaintiff sought an adjournment of the trial to obtain a psychiatric assessment of the plaintiff but the application was opposed and subsequently denied.
- [61] Dr. Riesling attended the plaintiff from shortly following the first accident until trial. He moved his practice from Surrey to Chilliwack in 2018. Such explains, in my view, the limited attendances by the plaintiff following Dr. Riesling's relocation.
- [62] Dr. Riesling diagnosed the plaintiff with chronic ongoing soft tissue injuries to the neck, shoulders, lower back, groin and leg. He had ongoing headaches and, ultimately, those symptoms combined to create depressive mood, if not depression, insomnia and generalized anxiety.
- [63] There was also reported jaw pain, but Dr. Riesling was candid that given its onset well after the second accident, it might be unrelated to the accidents. The plaintiff has a history of bruxing; grinding of the teeth that provides an equally possible explanation for the jaw pain.
- [64] The diagnosis of mood change was supported by the three collateral witnesses who testified on the plaintiff's behalf. Each noticed a significant change to the plaintiff's demeanour.
- [65] All of the usual modalities of treatment--physiotherapy, massage, pain medications, chiropractic sessions and muscle relaxants--were prescribed, but none provided lasting relief.
- [66] The plaintiff was referred to the surgeon, Dr. Wong, who performed the earlier hernia surgery. Dr. Wong reported the surgical site remained intact and had no recommended treatment. Referral to Dr. Lee, an orthopedic surgeon, resulted in an MRI being conducted to the plaintiff's right hip. No abnormalities were discovered.

- [67] Finally, Dr. Riesling referred the plaintiff to Dr. Waspe, a physiatrist, for further investigation of the right hip. Dr. Waspe recommended further treatment by a kinesiologist to provide instruction in a home exercise routine.
- [68] In the latter part of 2019, Dr. Riesling began the plaintiff on a course of anti-depressive medications with some positive results. The plaintiff reported enhanced mood but still complained of many of the physical symptoms present since after the first accident. He acknowledged the interplay between physical and emotional pain and agreed that if the plaintiff further improved psychologically his physical symptoms would likely improve as well.
- [69] Regrettably, the plaintiff's progress is not so advanced as to be able to predict the eventual impact of improved mood on his overall recovery. The plaintiff acknowledged improvement to his mood but by no means agreed that his mood and sleep issues had resolved.
- [70] In cross-examination, Dr. Riesling acknowledged that the medications resulted in some improvement. He expressed more optimism on the stand for the plaintiff's ongoing recovery than was stated in his report.
- [71] He also retracted the recommendation for a vocational assessment given the plaintiff has already changed career paths as a result of his decision to resign from MRVW and commence part-time instructing at KPU.
- [72] Finally, Dr. Riesling agreed that aquatic therapy was recommended as a treatment modality by Dr. Waspe and that he never advised the plaintiff to stop treatments in 2018. Rather, he might have advised him to change the type of treatment given the failure of treatments to that date.
- [73] Dr. Gharsaa examined the plaintiff once in late 2019 at the behest of the defendant. Dr. Gharsaa's speciality is orthopedics.
- [74] On examination, Dr. Gharsaa reported that the plaintiff did not complain of pain on palpation of his neck, but reported pain on the extreme ranges of rotation. No pain was reported during examination of the low back.
- [75] A primary source of the plaintiff's reported pain was his right hip and groin. He noted the absence of any objective evidence through imaging of any disruption to the joint.
- [76] He opined:

As this point, I would strongly recommend that he continue working on a self- directed active exercise program to help with his overall conditioning, focusing on strengthening of his core muscle area, as well as his abductor muscles to help support his hip area. He should also be encouraged to continue resuming as much of his pre-accident activities as possible.

To prevent any further deconditioning, understanding that avoiding such activities will be more detrimental to his outcome. Based on the history obtained today and based on the documents available for my review today examination today, I could not really identify any structural damage that would prevent him from returning to all of his pre-accident activities. He should also be educated about pain that hurts versus pain that harms

[77] With regard to Dr. Gharsaa's diagnosis and prognosis, he notes at page 8, at number 2:

My diagnosis is soft tissue injuries to his neck WAD I to II at the most; sprain and strain of his lower back and shoulders; sprain and strain of his right groin with pain in his right groin, not yet diagnosed. I cannot really give a diagnosis of his ongoing right hip pain, especially with all of the investigations being negative.

The prognosis for these soft tissue injuries, in my opinion, is good, as long as he continues working on the above mentioned recommendations, understanding that avoiding such recommendations would negatively impact his prognosis.

[78] Dr. Gharsaa offered no opinion as to the interplay between the plaintiff's depressed mood, insomnia and his physical complaints, nor did he opine on the cumulative effect of those complaints on the plaintiff's capacity to continue as an automotive technician.

Discussion

[79] According to Dr. Gharsaa, whose evidence I accept, there are little by way of physical findings underpinning the plaintiff's ongoing physical complaints.

[80] The pain he complains of is subjective. Nonetheless, Dr. Gharsaa found no suggestion of pain embellishment or over-reacting to the physical examination. He simply could not explain the full extent of the plaintiff's symptoms based on physiological findings.

[81] He did not recommend any specific treatment.

[82] Dr. Riesling gave the plaintiff full credit for his complaints and accepted the symptoms as real. He treated them without great success through active therapy and then began using anti-depressants to combat the plaintiff's low mood and sleep issues.

[83] I found the plaintiff generally credible. His account of changes over an extended period of time are supported by the evidence of the three collateral witnesses called on his behalf.

[84] The defendant, although suggesting I assess the plaintiff's credibility given the subjective nature of his complaints, did not, in closing submissions, suggest the plaintiff was lying or embellishing his complaints.

[85] The defendant suggested the plaintiff was vague when answering questions but pointed to nothing in the evidence which, in my view, sustains that submission.

[86] With that said, I find the plaintiff has been significantly affected by the accidents and that his residual complaints, as noted herein, have affected his past and prospective ability to earn income.

General Damages

[87] The assessment of general or non-pecuniary damages will generally be unique to the specific facts of each individual case. *Stapley v. Helsjet*, 2006 BCCA 34, at para. 46, set out the following factors governing the consideration of the assessment of general damages:

- age of the plaintiff;
- nature of the injury;
- severity and duration of the pain;
- disability;
- emotional suffering;
- loss of impairment of life;
- impairment of family, marital and social relationships;
- impairment of physical and mental abilities; and
- the plaintiff's stoicism.

[88] The plaintiff argues that all of the considerations apply to Mr. Ghazghi.

[89] He is young and has a significant ongoing impairment affecting his everyday enjoyment of life. He has suffered emotionally as well as physically given the impact of his symptoms on his mood. His relationships with friends and family have been adversely affected and he endures significant ongoing pain and discomfort.

[90] In suggesting an award of \$140,000, the plaintiff referred me to *McMullin v. Trelenberg*, 2020 BCSC 49 [McMullin], where the plaintiff's diagnosed injuries were myofascial pain of the head and neck, possible cervical facet joint mediated pain, mechanical low back pain, persistent headaches and pain-related disability, including sleep interference secondary to pain together with mood disorder (depression) secondary to pain and low self efficacy.

[91] The symptoms impacted the plaintiff's recreational and social activities and were unabated despite extensive therapy.

[92] The plaintiff's symptoms in *McMullin* are, according to counsel, similar enough to those of the plaintiff here as to warrant an award similar to that in *McMullin*; \$150,000.

- [93] In *Day v. Roberts*, 2019 BCSC 1982 [Day], injuries were claimed arising from two motor vehicle accidents. The first accident resulted in pain in the plaintiff's neck, upper back, hip, and shoulder. In addition, the plaintiff had headaches and suffered from depression and anxiety. The second accident resulted in ongoing neck, upper back and lower back pain as well as left hip pain.
- [94] The plaintiff's injuries were chronic and had a significant impact on the plaintiff's day-to-day life, including interfering with her work as a hairstylist, her hip hop dancing and taking long hikes. She also suffered from depression as a result of her symptoms.
- [95] The award in *Day* was \$120,000.
- [96] Lastly, the plaintiff referred me to *Broomfield v Lof*, 2019 BCSC 1155 [Broomfield], where the 45-year-old plaintiff suffered injuries to the neck, right shoulder, right arm, lower back and hip, as well as headaches, dizziness and depression.
- [97] The plaintiff there missed 14 months of work but eventually returned to her prior occupation, albeit in a reduced capacity, as a special education assistant.
- [98] In *Broomfield*, as here, there was some improvement in the plaintiff's symptoms by the time of trial, almost five years post-accident. She had returned to some of her pre-accident activities such as cycling and walks. The award in *Broomfield* was \$130,000.
- [99] The defendant submits that an award of between \$75,000 and \$80,000 is warranted. I was referred to *Belos v. Michaels*, 2017 BCSC 1217, where a 37-year-old electrician suffered injuries to his hip, as well as to his lower, middle and upper back following a motorcycle accident. The hip pain was ongoing and soft-tissue in nature. He also suffered from chronic pain disorder and somatic symptom disorder. The court awarded \$75,000 in non-pecuniary damages.
- [100] In *Bramley v. Lee*, 2016 BCSC 1105, a 40-year-old cleaning equipment installer suffered injuries to his hip, neck and genital area following a T-bone type of motor vehicle collision in 2009. The court awarded \$80,000 in non-pecuniary damages.
- [101] While the authorities I have been referred to are helpful, none mirror the situation of Mr. Ghazghi. He is relatively young and, despite the optimism expressed by his family doctor, must be considered as having a guarded prognosis.
- [102] Intervention and treatment by a psychiatrist of pain management specialist seems warranted. Otherwise, I see little room for optimism expressed by defendant's counsel. His symptoms are long-standing and have not responded to traditional modalities of treatment.
- [103] I accept that, for the most part, his symptoms are real to him and have been disabling in many aspects of his life.

[104] Absent the prospect of improvement, I would consider the plaintiff to be in much the same condition as the plaintiff in Broomfield. Given his treatment with medications to elevate his mood appear to have had some success, I retain optimism the plaintiff will return to a much-improved state with further treatment.

[105] In my view, having compared the plaintiff's injuries and circumstances to those in the authorities I was referred to, an award of \$110,000 for non-pecuniary damages is appropriate.

Past Wage Loss

[106] The plaintiff's entitlement to past wage loss is not challenged by the defendants. They acknowledge, through submissions, his reduced income in the years 2016 onward was as a result of the injuries sustained in the two accidents.

[107] As I was not asked to parse out the loss attributable solely to the first of the two accidents, I have not done so.

[108] The plaintiff submits that the effective annual income of the plaintiff, based on the 10 months of work in 2015, was \$91,200 annually. Such is based on his income to the date of the first accident, approximately \$76,000, extrapolated to a full year at \$7,600 monthly.

[109] The plaintiff earned nothing for the remainder of 2015.

[110] His earnings post-accident, to the date of trial, were as follows:

2015:

\$76,000

2016:

\$73,616

2017:

\$20,448

2018:

\$29,253

2019

\$13,867

[111] According to the plaintiff, the loss of income from October 25, 2015 to date is \$237,760 based on the loss assessed as if each year post-2015 the plaintiff would have earned \$91,200.

[112] The defendants do not dispute the entitlement, but note the plaintiff's income in previous years was far less than what is claimed by the plaintiff.

- [113] They refer to the plaintiff's own evidence where he estimated his earnings as \$6,000 to \$7,000 monthly.
- [114] The defendant argues that allowing for contingencies, I should assess the plaintiff's post-accident loss of income at \$72,000 annually, resulting in a gross loss of approximately \$162,000 after consideration of his post-accident actual earnings as set out above.
- [115] Both agree the gross amount needs to be adjusted for the payment of tax. Neither provided other than a guess as to the tax consequences.
- [116] Including tax, the plaintiff suggested a discount of 30%; the defendants 20%. The results are \$166,432 according to the plaintiff and \$130,000 according to the defendants.
- [117] In January 2016, the plaintiff sought the employment he currently holds without knowing, in my view, the long-term effects of his injuries and their impact upon his capacity to remain employed as a hands-on automotive technician.
- [118] In my view, the most probable annual sustainable earnings of the plaintiff from MRVW was \$84,000 annually; something less than submitted by the plaintiff but substantially more than the defendant's estimation based on \$6,000 a month.
- [119] Some reduction ought to be allowed for a change to a less-lucrative career path regardless of his injuries given the timing of the plaintiff's career switch, as well as other contingencies. Accordingly, in my view the plaintiff's past income loss, net of tax, is \$140,000.

Capacity/Future Wage Loss

- [120] The test for establishing a loss of earning capacity has been set out in *Perren v. Lalari*, 2010 BCCA 140 [Perren], at para. 32. The threshold for a finding of a loss of earning capacity/future wage loss claim is that there be a real and substantial possibility that the plaintiff will suffer a loss of income moving forward.
- [121] Once that threshold has been met, the court is to engage in an assessment of damages. It is not, strictly speaking, a calculation, although mathematical calculations can be useful tool in order to assess those damages.
- [122] In *Perren* the Court of Appeal outlined two methods for assessing this head of damage: the capital asset approach and the earnings or loss of stream of income approach. The former will be best suited to circumstances where there is no clear annual loss of income whereas the latter will be suited to circumstances where there is some identifiable loss.

- [123] Here, the plaintiff submits that the evidence in this case meets the "real and substantial possibility" test in that he is currently not working in his intended career as an automotive technician and his income tax returns and T4 slips confirm that he is in fact earning substantially less than what he had earned in the year leading up to the first accident. The loss remains ongoing and the evidence clearly indicates that there is more than a substantial possibility that he will continue to incur an income loss into the future.
- [124] The defendant acknowledges the evidence supports such a conclusion but argues the plaintiff's prospects are far brighter than the scenario suggested by the plaintiff. Counsel notes the positive response to anti-depressive medications and the plaintiff's seemingly positive response to a different approach taken to physiotherapy in the summer of 2019.
- [125] The plaintiff argues the best measure of his future loss is the earnings approach; calculating the difference in his expected earnings from MRVW as against the earning he can expect from a full time (eventually) career as an instructor at KPU via the use of a multiplier.
- [126] In submissions, the plaintiff suggested a range, dependent upon the expected date upon which the plaintiff would gain full-time employment at KPU, from \$235,000 to \$800,000 based upon a 1.5% multiplier as set out in the Law and Equity Act, R.S.B.C. 1996, c. 253. The figures proposed allow for no contingency other than survival.
- [127] Recognizing that there is no allowance for marketplace contingencies, the lack of any vocational assessment or functional capacity report, the plaintiff suggests \$400,000 as an appropriate award for loss of future earning capacity.
- [128] Part of the problem with that submission is that I was not provided with clear evidence of the anticipated earnings of the plaintiff upon obtaining full-time employment as an instructor, nor was I provided any evidence as to when, reasonably, that might happen. It is all speculative at this point in time.
- [129] Without evidence from a vocational assessor, it is also difficult to determine what residual earning capacity the plaintiff has outside of a teaching role.
- [130] Further, the plaintiff's pre-accident earnings were not immediately diminished by virtue of his impairment. He was provided with lighter duties that allowed him to mirror his 2015 income given the months he worked. There was no evidence that ongoing accommodations from his employer were not available.
- [131] Finally, the capital asset approach is appropriate because of the plaintiff's choosing to apply for the KPU position well before the chronicity of his accident-related symptoms were apparent.
- [132] His career shift might have happened in any event given the timing of his application.

- [133] The defendants' suggested award, having conceded a substantial possibility of future earning impairment is proven, suggests one year of income replacement quantified at \$75,000.
- [134] Such, in my opinion, underestimates the loss.
- [135] While I have no evidence of the current rate of pay for an automotive technician at MRVW, the last information before me is four years old. In addition to his T4 income, the plaintiff received a benefit package of unknown value. Those benefits may or may not be replaced in their entirety with full-time employment at KPU.
- [136] There remains the possibility the plaintiff will recover sufficiently to resume his career as an automotive technician. Some accommodations may be required to facilitate a return, but the plaintiff's former employer seemed willing to offer such accommodations over a considerable duration.
- [137] Having determined his past wage loss ought to be assessed as if he would have earned \$84,000, I look to that figure, plus some allowance for increments over time plus benefits associated with his employment to assess his future impairment at \$200,000.

Special Damages

- [138] Special damages of \$4,562.13 are agreed to.

Cost of Future Care

- [139] The test for future care costs has been set out in *Milina v. Bartsch*, [1985] B.C.J. No. 2762 (S.C.), at 51. The cost must be reasonable and medically justified.
- [140] The plaintiff submits, based on the evidence of Dr. Riesling, that aggressive active therapy and the ongoing use of medications are warranted. The plaintiff testified that he will continue to follow Dr. Riesling's advice. It was conceded by the plaintiff that based on the evidence, further vocational training may not be necessary.
- [141] The plaintiff claims \$2,500 in future care costs.
- [142] The defendant accepted this as a reasonable assessment of the plaintiff's future requirements.
- [143] Accordingly, I award \$2,500 for future care.

Loss of Housekeeping Capacity

- [144] Both the plaintiff and his wife gave evidence that prior to the accidents in question, the household chores and responsibilities were divided between the two of them.

- [145] Given his full-time employment and the fact his spouse was a stay-at-home mother, I have doubts such was the case. Nonetheless, I accept the fact the plaintiff actively participated in the household chores prior to the accidents and that his involvement dramatically fell off following his injuries.
- [146] Following the accidents, he testified that he could not perform most of his usual household chores and that only recently he has begun to try and perform some of the tasks. He estimated that prior to the accident he was spending 4-5 hours per week performing household chores while currently he spends 2-3 hours weekly.
- [147] The plaintiff's wife, Ms. Shishani, testified that she has performed a majority of the household chores since the accidents, although the plaintiff does try to help out with certain activities from time to time such as the dishes or looking after the children.
- [148] Loss of housekeeping capacity has long been recognized as a compensable head of damage. The court in *McTavish v. MacGillivray*, 2000 BCCA 164, confirmed the performance of household chores does have an economic value, and the inability to perform those chores can sound in damages.
- [149] Here, the plaintiff did not engage someone to perform those chores that his wife performed. There is no actual expense incurred.
- [150] The plaintiff suggests utilization of a replacement cost in the assessment of damages. The plaintiff submits that \$25/hour is the appropriate figure to use to assess the cost of hiring someone to perform the chores that were previously performed by the plaintiff.
- [151] Based on the evidence, the plaintiff suggests the replacement cost of the present day value of the plaintiff's household work, both past and future, would be \$41,600. That said, the plaintiff seeks an award of \$30,000 to take into account contingencies and the fact no actual costs have been incurred or likely will be incurred once funding is provided.
- [152] The defendants argue replacement costs must be a guide only where they are not actually being incurred or likely to be incurred in the future. I was referred to *Brooks v. Habib*, 2019 BCSC 1398, where the following was stated:
- [337] In *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28 [Dykeman], Newbury J.A. summarized the governing principles with respect to awarding damages for the loss or impairment of housekeeping capacity. She affirmed that where housekeeping services were gratuitously replaced by a family member, damages for the loss of housekeeping capacity may be awarded even though the plaintiff has not incurred any expense. Recovery may be allowed for both the future loss of the ability to perform household tasks as well as for the loss of such abilities prior to trial. The amount of compensation awarded must be commensurate with the plaintiff's loss: *Dykeman* at para. 29; *X. v. Y.*, 2011 BCSC 944 at para. 246.

- [338] In *O'Connell v. Yung*, 2012 BCCA 57 at para. 67 [O'Connell], the Court clarified that an award for loss of housekeeping capacity is intended to compensate the plaintiff for the loss of an asset: the ability to perform household tasks. Accordingly, whether replacement costs for housekeeping were actually incurred or whether a plaintiff is likely to hire such assistance in the future does not inform the analysis. Loss of capacity claims are doctrinally distinct from future costs of care claims. Damages for cost of future care serve a different purpose and are directly related to expenses that may reasonably be expected to be required to be rendered to the plaintiff.
- [339] The cost of replacement services may inform the assessment of the appropriate quantum of an award for loss of capacity. However, the appellate authorities endorse a cautious and restrained approach to awards for loss of housekeeping capacity. The ultimate reasonableness of the award is the overarching consideration: *Westbroek v. Brizuela*, 2014 BCCA 48; *Chappell* at paras. 254-262; *Liu v. Bains*, 2016 BCCA 374 at paras. 28-29.
- [153] The case of *Bystedt v. Hay*, 2001 BCSC 1735, informs me that in claims for in-trust services by family members, the assistance rendered must be over and above what would be expected from the family relationship (para. 180).
- [154] Here, the work performed by the plaintiff's spouse, in addition to the duties performed by her prior to the accidents, does not, in my view, reach that level.
- [155] In this case, I conclude the plaintiff is only restricted from performing tasks which require significant physical effort. Hence, the parameters for the award in this case should be restricted to an allowance for annual heavy cleaning, not the day-to-day chores that predominantly were the focus of the plaintiff's pre-accidents contribution.
- [156] In the result, I award \$10,000 for loss of housekeeping capacity.

Failure to Mitigate

- [157] The defendant submits that the plaintiff's failure to follow the instructions of Dr. Waspe to pursue aquatic therapy should result in a 10-15% reduction in the total award to reflect his failure to mitigate.
- [158] According to the defendants, the plaintiff has a positive duty to mitigate or ameliorate his losses through the pursuit of reasonable treatments. The law with regards to mitigation was succinctly stated in *Gilbert v. Bottle*, 2011 BCSC 1389:
- [201] The plaintiff has a positive duty to mitigate by taking all reasonable measures to reduce loss and damages caused by the defendant's negligence. This duty includes an obligation to undertake reasonably available treatment that would assist in alleviating or curing his or her injuries. The principle of mitigation is based on the general proposition that a defendant should not be held liable for loss and damages the plaintiff could have reasonably avoided: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111.

- [1202] Once a plaintiff has established that the defendant is liable for causing his or her injuries, the burden of proof shifts to the defendant. To succeed on a mitigation defence, the defence must prove that the plaintiff acted unreasonably and reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question. Its answer depends on consideration of all of the surrounding circumstances: *Byron v. Larson*, 2004 ABCA 398.
- [159] The defendant argues that Dr. Riesling acknowledged that had Mr. Ghazgbi continued with his treatments between July of 2018 and July of 2019, and had not taken a year-long break, he may well have experienced more improvements to his various conditions. Dr. Riesling also made it clear that he did not order Mr. Ghazgbi to take a break from treatments; rather, he suggested in 2018 that Mr. Ghazgbi try the treatments suggested by Dr. Waspe.
- [160] The plaintiff did not take aquatic therapy, noting the smell of chlorine in public pools made him nauseous. He did not follow the recommended plan of treatment.
- [161] The plaintiff said he was told to stop treatment for a time, but Dr. Riesling did not recall telling him to stop; rather, he recommended a change in treatment.
- [162] While those are valid observations, there is no evidence the recommended treatment would have cured or even alleviated the plaintiff's symptoms. This is not a case where a patient declines to follow a known cure or symptom-relieving course of treatment such as surgery for a herniated disc. The aquatic therapy was but one more offering by a specialist of a form of treatment that might assist. The plaintiff offered a legitimate reason for declining.
- [163] I find the defendants have not discharged their burden to show the untaken treatments would have assisted and lessened the symptoms and/or monetary loss the plaintiff has suffered.

Summary of Damages

[164] I award the plaintiff the following damages:

Non-Pecuniary Damages:

\$110,000.00

Past Wage Loss:

\$140,000.00

Future Wage Loss:

\$200,000.00

Special Damages:

\$4,562.13

Cost of Future Care:

\$2,500.00

Loss of Housekeeping Capacity:

\$10,000.00

TOTAL

\$467,062.13

[165] The plaintiff is also entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

Costs

[166] Unless there were offers to settle which impact the question of costs, the plaintiff will have cost of the action at Scale B. If there is a need to make submissions on costs, the parties should arrange an appearance before me through Trial Scheduling.

"Harvey J."

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