
CANADA / JUDGMENT

Goguen v. Di Maddalena

2018 BCSC 106

COURT

Supreme Court of British Columbia

DECIDED

24 January 2018

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2018 BCSC 106 Goguen v. Di Maddalena

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Goguen v. Di Maddalena,

2018 BCSC 106

Date: 20180124

Docket: M065512

Registry: Victoria

Between:

Eric Giuseppe Goguen

Plaintiff

And

Anthony Joseph Di Maddalena

Defendant

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiff:

Michael J. O'Connor, QC

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Richard K. Hornquist

Place and Dates of Trial:

Victoria, B.C.

November 20, 21, 22,

24 and 30, 2017

Place and Date of Judgment:

Victoria, B.C.

January 24, 2018

Introduction

- [1] The plaintiff, Eric Goguen, was injured in a motor vehicle accident that occurred on April 22, 2005 near Coombs, British Columbia. Mr. Goguen was a seven-year-old boy riding as a passenger in a car driven and owned by Gina Land. He was sitting in the rear seat behind the front passenger seat. The vehicle he was riding in was struck by a vehicle driven by the defendant, Anthony Joseph Di Maddalena. The defendant has admitted liability for the accident.
- [2] The defendant concedes that Mr. Goguen was injured in the accident and suffered serious physical and some psychological symptoms as a result. However, the defendant disagrees with the plaintiff about the likely occurrence of any future complications and surgeries and the resulting losses he claims were caused by the accident.
- [3] The parties have agreed on the quantum of special damages in the amount of \$4,083.82.

Issues

- [4] The issues raised by the pleadings, evidence and submissions are:
1. What are the nature, extent and duration of the injuries suffered by Mr. Goguen?
 2. What is the appropriate award for general damages for pain and suffering?
 3. What is the risk of long-term graft-related complications?
 4. What is the appropriate award for future wage loss or loss of earning capacity?
 5. What is the appropriate award for future care costs?
 6. What is the appropriate award for an in trust claim on behalf of Ms. Hembling?

Background

- [5] Mr. Goguen was born on November 7, 1997 in Nanaimo, BC. He was in Grade 1 when the accident occurred. He completed his education in Nanaimo, graduating from Grade 12 in June 2016.
- [6] He started at Vancouver Island University in September 2017 and is attending full-time. He is studying currently in a two-year diploma program in forest resource technology. After completion of his diploma he is planning on obtaining further post-secondary education at either BCIT or the University of British Columbia in the fields of forestry and engineering.
- [7] Mr. Goguen first started working part-time in high school at London Drugs and then at Broco Auto Glass in February 2017. He continues to work part-time at Broco while attending school on a full-time basis.
- [8] He will be working full-time this summer with Timberland as a summer student.
- [9] Mr. Goguen was a healthy young boy prior to the accident. He had no bowel or abdominal issues. He did suffer from some anxiety related to minor injuries such as scrapes and insect bites.
- [10] On April 22, 2005, he was a back-seat passenger wearing only a lap-type seatbelt. The vehicle he was travelling in was T-boned by the defendant's vehicle, and as a result, the vehicle's front end was extensively demolished. The plaintiff submits that the defendant's vehicle was travelling at 70 to 80 km/hour. The extent of the vehicle's damage as photographed, as well as the RCMP accident report, reasonably support this characterization of the accident.
- [11] Mr. Goguen had to be extracted from the vehicle and was taken by ambulance to the Nanaimo Regional General Hospital. He was diagnosed as suffering from blunt abdominal trauma with clinical evidence of peritonitis, an inflammation of the lining of the abdominal cavity. His situation was so dire that he required immediate surgery at Nanaimo Regional General Hospital to repair internal damage (the "First Surgery"). He was then transferred to Victoria General Hospital.
- [12] In the fall of 2008, he was diagnosed with having an abdominal aortic aneurysm that required surgical repair. That repair was carried out at the BC Children's Hospital on November 20, 2009 (the "Second Surgery").
- [13] Mr. Goguen testified in a forthright, honest and straightforward manner. There were a number of questions he could not answer but that was understandable due to the age he was at the time of the accident and the passage of time. Mr. Goguen presents as a hardworking and ambitious young man, a son that his parents should be very proud of.

What are the Nature, Extent and Duration of the Injuries Suffered in the Accident?

Plaintiff's Position

- [14] Mr. Goguen suffered multiple life-threatening injuries that required two major surgeries. In addition, he suffered from some vision issues that have resolved and some anxiety relating to being a passenger in a vehicle, around large crowds, and with needles. He understandably is anxious about his future and the potential need for further surgery.
- [15] The major issue in this case is the future risk of further surgical intervention and the impact such surgery or surgeries will have on Mr. Goguen's life and career.

Defendant's Position

- [16] The defendant does not largely dispute the nature and extent of the plaintiff's injuries, but the central issue is whether or not the plaintiff will be subject to a surgical intervention with respect to his aortic repair in the future. The defendant submits that the plaintiff's physical injuries and their psychological consequences have resolved, that they pose only a low risk of future complication, and that they have not altered the plaintiff's recreational or vocational pursuits, beyond what occurred at the initial acute phase.

Applicable Law

- [17] In order to establish that the accident caused his injuries, Mr. Goguen must prove on a balance of probabilities that but for the accident he would not have suffered the injuries of which he complains.
- [18] The Supreme Court of Canada considered causation in *Clements v. Clements*, 2012 SCC 32, and confirmed that the basic test for determining causation remains the "but-for" test articulated in *Snell v. Farrell*, [1990] 2 S.C.R. 311 [Snell], and *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey]. The plaintiff bears the burden of proving that but for the negligent act or omission of the defendant, the injury would not have occurred. The "but-for" test recognizes that the compensation for the negligent conduct should only be made where a substantial connection between the injury and the defendant's negligent conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [19] The plaintiff is not required to establish that the defendant's negligence was the sole cause of his or her injuries. Tortfeasors must take their victims as they find them, and they are liable even if other causal factors, for which the defendants are not responsible, result in the victim's losses being more severe than they would be for the average person. At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in before the accident, and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event: *Snell*; *Athey* at paras. 32-35.

Application of the Law to the Facts

- [20] As a result of the accident, Mr. Goguen suffered blunt abdominal trauma including a laceration of his small bowel, a tear of the serosa of the cecum, and an abdominal aortic aneurysm. He further suffered from some double vision and increased anxiety symptoms.
- [21] The First Surgery required the repair of the lacerations and a removal of a portion of the small bowel that was necrotic and non-viable.
- [22] Immediately after the First Surgery, Mr. Goguen was intubated and ventilated overnight. He was transferred to Victoria General Hospital because of the need for a higher level of care at a tertiary-level care centre. He was hospitalized for two weeks at Victoria General Hospital. During that admission, he developed a clostridium difficile (C-difficile) infection and was in a lot of discomfort. His older sister testified as to the extent of her brother's pain while in the hospital.
- [23] After his discharge, he remained home from school for about a month while in a great deal of discomfort. Mr. Goguen testified that it took a few months for him to regain energy and participate in gym class and sports. In August 2005, he was able to attend a summer camp for about two weeks.
- [24] Following the First Surgery, Mr. Goguen also reported double vision. He testified that he was cross-eyed. He was assessed by two ophthalmologists and diagnosed with having a 6th nerve palsy of his left eye due to a whiplash-type injury. He had to wear an eye patch for some weeks. He recovered his vision and has not had any complications from this condition since. He testified that his vision is good but he does require glasses or contact lenses.
- [25] In the fall of 2008, he had an abdominal ultrasound that revealed a distal abdominal aortic aneurysm. After referrals to specialists, the decision was made that he required a further surgery. The Second Surgery took place at BC Children's Hospital on November 30, 2009 when Mr. Goguen was 12 years old. The surgeon was able to go through the same incision area as the First Surgery, and a graft was put in.
- [26] There was a period of a few weeks' recovery from the Second Surgery. After the Second Surgery he stopped karate classes.
- [27] In addition to the physical injuries, Mr. Goguen developed some increased anxiety after the accident. In particular, he was more anxious when riding in vehicles as a passenger, being out in crowded spaces, and with needles. It appears that for the most part this anxiety has reduced. He has gone on and obtained a driver's licence and is comfortable as a driver. However, he remains anxious about his future and the possibility that he may need further surgeries. He worries about the impact that this will have on his future family and career.

- [28] His older sister and his father testified as to the change in Mr. Goguen from an outgoing, carefree, and rambunctious boy to a more anxious, guarded individual. However, they both testified that recently he appears to be more confident and less guarded. He currently participates in a number of activities, such as hiking, walking, snowboarding, and wakeboarding. He is not aware of any activities that he cannot perform as a result of the accident and resulting injuries.
- [29] Mr. Goguen has been left with a vertical scar on his abdomen. He testified that the scar is very ugly but has not stopped him from engaging in swimming or taking his shirt off at the beach.
- [30] The last time he experienced any abdominal pain was approximately one year ago. The pain would come up randomly and last for a few hours. Mr. Goguen would not take any medication for the pain. He is required to take an antibiotic before attending the dentist for any treatment.
- [31] He does not require any other ongoing treatments.
- [32] Dr. Kurt Alscher, his treating general surgeon at Nanaimo Regional General Hospital, prepared a report dated September 25, 2006. He was not required to attend for cross-examination. His report confirms that Mr. Goguen suffered blunt seatbelt trauma as a result of the sudden deceleration from the motor vehicle crash. During the surgery, he found a small bowel rupture and mesenteric tears which had to be repaired. He opines that the injuries were life-threatening, and without immediate surgery Mr. Goguen was at risk of dying. Mr. Goguen would be prevented from engaging in recreational activities for at least six to eight weeks following his accident. Dr. Alscher did not anticipate any long-term sequela except for the approximate 4% lifetime risk that he will develop a bowel obstruction and need further surgery.
- [33] Dr. Alscher prepared further reports dated October 19, 2015 and March 30, 2016 in which he opines on the risk of Mr. Goguen developing a ventral incisional hernia at the site of the two incisions. That risk is placed in the range of 1-5%. If a hernia does develop, he would need to have it repaired with mesh under general anesthetic. He would need approximately four to six weeks to recover to full activities after such a surgery.
- [34] Dr. Morag Atherstone, treating family doctor, prepared a report dated February 3, 2006. She was not required to attend for cross-examination. She provided medical care to Mr. Goguen from his date of birth to the date of her report. Her report confirms that Mr. Goguen sustained considerable physical and mental trauma as a result of the motor vehicle accident. She noted that he was going through an anxious phase at the time of the accident and it exacerbated his problems for at least six months. She also noted that Mr. Goguen saw a counsellor once and the counsellor felt he was doing fine psychologically.

- [35] Dr. Natalie Aird, a pediatrician, prepared a report dated September 13, 2006. She was not required to attend for cross-examination. In that report she noted that the accident had heightened Mr. Goguen's degree of anxiety and she felt he likely had post-traumatic stress disorder. She recommended that he receive counselling through Youth and Mental Health Services. She did not feel that he needed any pharmacotherapy. In her consult report dated September 30, 2005, she noted that Mr. Goguen's mother described him as a fearful and over-reactive child before the accident.
- [36] Dr. Hendrik Reems, treating family doctor, prepared a report dated May 30, 2007. He was not required to attend for cross-examination. Dr. Reems took over the care of Mr. Goguen in September 2006, since Dr. Atherstone retired. At the time Dr. Reems was treating Mr. Goguen, his physical injuries had all resolved.
- [37] Dr. Lorne Goodall, treating family doctor, prepared a number of reports. He was not required to attend for cross-examination. He took over the care of Mr. Goguen in October 2008. In his report dated October 16, 2009, Dr. Goodall noted during an examination on June 16, 2009 that Mr. Goguen had a very loud abdominal bruit. He referred him for investigations and he was diagnosed with a 2 cm distal abdominal aortic aneurysm. His view was that this was due to the compression of the seatbelt and was a late complication from the accident. He referred Mr. Goguen to Dr. Sonia Butterworth, a pediatric general surgeon. In a letter dated December 4, 2012, Dr. Goodall noted that a referral was made for psychological counselling and that Mr. Goguen attended once. It was felt that Mr. Goguen had improved psychologically and no further psychological assessment or treatments were necessary.
- [38] Dr. Butterworth prepared a report dated July 16, 2009. She was not required to attend for cross-examination. Her report confirms the existence of a 2 cm abdominal aortic aneurysm. Mr. Goguen was referred to Dr. Joel Gagnon, vascular and endovascular surgeon, in Vancouver.
- [39] Dr. Gagnon prepared a number of reports and testified at trial. In his report dated August 11, 2009, Dr. Gagnon concluded that Mr. Goguen had a traumatic 2 cm aneurysm of the distal aorta. Because there was a risk of rupture, he recommended aortic repair.
- [40] Dr. Gagnon performed the aortic repair on November 30, 2009 at BC Children's Hospital. The surgery went well with no complications. During the surgery, he took a series of photographs of the injury and the repair he performed. The recovery following the surgery was uneventful.
- [41] The experts disagree as to the risk of future complications that Mr. Goguen will face. That issue will be discussed in detail later in these reasons.

[42] The plaintiff also submits that he has suffered whiplash, long-term soft tissue injuries, and ongoing abdominal pain. Dr. Alscher noted intermittent abdominal pain in his report dated March 25, 2015. However I note that Mr. Goguen has not experienced such pain for over a year, and when he did previously, he did not require medical attention or rehabilitation. Moreover, he currently is able to participate in several physically demanding activities.

What is the Appropriate Award for General Damages for Pain and Suffering?

[43] Mr. Goguen seeks an award of \$235,000 for general damages for pain and suffering. The defendant submits that the appropriate award for general damages is \$125,000.

Applicable Law

[44] A plaintiff is entitled to reasonable damages for his pain and suffering. The plaintiff should be placed in the same position he would have been if the accident had not occurred, but not in a better position: *Parypa v. Wickware*, 1999 BCCA 88 at para. 29.

[45] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[46] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd [v. Harris]*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

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

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and

- (i) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).
- [47] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.
- [48] Mr. Goguen relies on *Zollinger v. Kong and Kong*, 2003 BCSC 1932, *Herbison v. Wolfe*, [2002] O.J. No. 569, *Kweon v. Roy*, 2016 BCSC 2305, *Carmichael v. Kwon*, 2016 BCSC 265, *Padfield v. Martin* (2003), 64 O.R. (3d) 577 (C.A.), and *Ellis v. Duong*, 2017 BCSC 459, in support of the general damages award. A review of each of these cases supports that the extent of the damages suffered by these plaintiffs exceeded those suffered by Mr. Goguen. For example, many of these plaintiffs were suffering from ongoing physical pain; other plaintiffs suffered moderate to mild brain injuries which prevented them from pursuing or continuing vocational pursuits.
- [49] An award of \$235,000 is a very substantial non-pecuniary award and normally would be applied when the plaintiff remains significantly impacted by the injuries on an ongoing basis. This is not the situation faced by Mr. Goguen.
- [50] The defendant relies on *Morris v. Gentry & ICBC*, 2005 BCSC 670, *Hutton v. Breitreutz*, 2015 BCSC 1164, and *Boparai v. Boparai Estate*, 2014 BCSC 1539. These cases provide some assistance since the first two involved similar internal injuries sustained in motor vehicles accidents. That said, the ongoing sequelae that these plaintiffs had were more significant than Mr. Goguen's.
- [51] Both counsel agree that it was challenging to find a case equivalent to Mr. Goguen's unique situation.

Application of the Law to the Facts

- [52] Mr. Goguen suffered serious life-threatening injuries. He received excellent emergency medical care and the initial injuries were surgically repaired.
- [53] Following the First Surgery, Mr. Goguen went through a period of inactivity. He missed school at the end of Grade 1, and he was fearful of a number of sports and activities on the chance that they would cause a further injury. He also reported having a panic attack after looking at his scar and getting very nervous when thinking about his surgery and the possibility of re-intervention. He was able to start learning karate in the summer of 2006, and he participated in competitive swimming for a few years after.

- [54] At the age of 12, it was determined that Mr. Goguen had suffered a further injury to his aorta. He required further surgery at the BC Children's Hospital to repair this injury. Following this Second Surgery, he went through another period of inactivity. He missed some school, withdrew from karate, and ceased long-boarding after a fall. His post-accident anxiety also persisted.
- [55] There is a remaining possibility that Mr. Goguen may need future surgery. This is an issue that will be specifically addressed later in these reasons.
- [56] I have reviewed the various cases provided and in assessing the particular circumstances of Mr. Goguen and the extent and severity of his injuries, I am of the view that the appropriate award for non-pecuniary damages is \$140,000.

What is the Long-Term Graft-Related Complications Risk?

- [57] There was one general surgeon, Dr. Aschler, who provided reports for this trial, and three vascular surgeons who provided reports and testified at trial. The vascular surgeons were:
1. Dr. Gagnon (on behalf of the plaintiff) - obtained his Doctor of Medicine from Université de Sherbrooke in July 1995. He completed his residency in general surgery and vascular surgery in July 1999 and July 2004. He completed fellowship training in The Netherlands, Germany and Australia in endovascular surgery in April 2007. He has been practicing as a vascular and endovascular surgeon at Vancouver General Hospital and University of British Columbia Hospital since 2007. He has been involved in some teaching and supervision of students as a visiting lecturer.
 2. Dr. Keith Baxter (on behalf of the plaintiff) - obtained his Doctor of Medicine from UBC in May 1999. He completed his residency in general surgery and vascular surgery in June 2005 and June 2007. He completed a fellowship training in Australia in 2008 in advanced endovascular interventions. He has practiced as a vascular surgeon at Vancouver General Hospital since July 2008. He is a Clinical Instructor at the University of British Columbia.
 3. Dr. Anthony Salvian (on behalf of the defendant) - obtained his Doctor of Medicine in 1976. He completed his fellowships in general surgery and vascular surgery in 1980 and 1981. He practices mainly at Vancouver Hospital and Health Sciences Centre in the Division of Vascular Surgery. He also practices at St. Paul's Hospital with privileges at Children's Hospital and the Cancer Agency. He is a Clinical Professor of Surgery at the University of British Columbia. He has published in the area of abdominal aortic aneurysm.
- [58] All of the experts testified in a credible straightforward fashion, however, they have divergent opinions on the risk of future complications and which literature best supports their conclusions.
- [59] I will provide a general overview of the reports, the key opinions, and any relevant testimony.

- [60] Dr. Alscher, who performed the First Surgery, did not expect any long-term sequela to the intra-abdominal injuries themselves in terms of nutrition, growth, development, and enjoyment of recreational activities, except for the approximate 4% lifetime risk of Mr. Goguen developing a bowel obstruction and a need for further surgery. In his March 2015 examination report, Dr. Alscher estimated the chance that Mr. Goguen would develop an incisional hernia in the future to be in the range of 1-5%.
- [61] All of the vascular surgeons who testified confirm that the type of aortic repair that Mr. Goguen required was an extremely rare form of surgery for a young person. Dr. Gagnon had only performed this surgery on a pediatric patient once, being Mr. Goguen's surgery, although he has done over 1,000 such surgeries overall. Dr. Salvian has only performed this type of procedure on a pediatric patient twice in his 36 years of practice. Dr. Baxter has never performed this type of surgery on a pediatric patient. As such, all of the vascular surgeons had to turn to literature to see if there were any medical articles that would assist. All experts agreed that there lacked a large cohort study that would provide reliable data on pediatric patients, and as such, adult studies had to be reviewed to derive some insight from them.
- [62] Dr. Salvian in his report dated August 11, 2010 (the "Salvian August 2010 Report") commented on the future potential complications for Mr. Goguen as follows:
- a risk of outgrowing the graft at less than 5%;
 - a small risk of late graft infection of 1% over a lifetime;
 - risk of re-operation for adhesion or potential bowel obstruction of 4%;
 - risk for abdominal hernia in the range of 3-4%;
 - risk of having impotence that is very unlikely;
 - risk of retrograde ejaculation is 10%; and
 - risk to have or need aortic re-intervention less than 5% and probably in the range of 1%.
- [63] The risks relating to impotence and retrograde ejaculation have not materialized and Mr. Goguen has normal function in that regard.
- [64] Dr. Gagnon in his letter dated November 9, 2010, in which he is commenting on the Salvian August 2010 Report, agrees with Dr. Salvian that the cause of the abdominal aortic aneurysm was the accident and agrees with the future potential complication percentages set out in the Salvian August 2010 Report. Dr. Gagnon testified that he did not do any research prior to the preparation of this response letter. The plaintiff's counsel pointed out in argument that this was not a medical legal report but simply a letter commenting on Dr. Salvian's views.
- [65] Dr. Gagnon in his report dated December 16, 2010 (the "Gagnon December 2010 Report"), refers to an article by Xavier Barral (Surgery of the abdominal aorta and its branches in children: Late follow-up, 2006) (the "Barral 2006 Article") in which the re-intervention rate

was as high as 37%. He opines that it is likely that Mr. Goguen will have one or multiple re-interventions and that the recovery period from an aortic re-intervention would be around three months off work. Dr. Gagnon testified that the Barral 2006 article was limited because of the small sample size. He testified that an article by Dr. Edwards (Intraabdominal paraanastomotic aneurysms after aortic bypass grafting, JVS, 1992) (the "Edwards 1992 Article") was a statistically better study.

[66] Dr. Salvian in his report dated February 10, 2011 (the "Salvian February 2011 Report") refers to Dr. Gagnon's opinion that Mr. Goguen's re-intervention rate for his abdominal aorta will be 37%, and disagrees. He points out there is a distinction between patients who have undergone an emergency aortic repair and patients, like Mr. Goguen, who have elective repair by a highly-skilled vascular surgeon. Since the data is so lacking for the pediatric situation, Dr. Salvian's view is that one should look at the data for an elective abdominal aortic aneurysm repair in an adult. He notes two distinctions: first, a young person will live longer, and second, most aneurysms in adults are due to degenerative diseases of the blood vessel wall. He notes that the late complication rate from an aortic graft placed electively in the adult age group is around 1-2%. His opinion is that the likelihood of late "graft related" complications in Mr. Goguen would be in the range of perhaps 1-2%.

[67] Dr. Salvian in his report dated March 30, 2011 (the "Salvian March 2011 Report") provides further comments on the Barral 2006 Article that was referenced in the Gagnon December 2010 Report and opines on the applicability of this article:

This article does not represent the same patient population as Mr. Goguen. Virtually all of these patients have severe congenital aortic and visceral abnormalities involving the celiac artery, superior mesenteric artery and renal arteries with primary degenerative diseases of the aorta.

Mr. Goguen, on the other hand, is a healthy young man with a normal aorta.

[68] Dr. Salvian reiterates his view that it would be more reasonable to compare Mr. Goguen with the longer-term complication rates of patients undergoing elective aortic repair, and in that group of thousands of patients, the late operation rate for an aortic tube graft is about 1-2% over the patient's lifetime. He concedes that Mr. Goguen is younger and is going to live longer so he has a lightly increased risk, and concludes that the risk of Mr. Goguen requiring re-operative surgery for his aortic graft is probably in the range of 2-3% and that if a further operation is necessary, it can be treated with an endovascular procedure.

[69] Dr. Gagnon in his report dated May 29, 2011 (the "Gagnon May 2011 Report"), in which he is commenting on the Salvian March 2011 Report, comments as follows:

it becomes even more clear to me after further Medline research that the real long-term graft-related complications rate is in the range of 37-38%.

[70] Dr. Salvian in his report dated August 23, 2011 (the "Salvian August 2011 Report") opines that in all likelihood the risk of long-term problems from the aortic repair is very low, and if the surgery is required, he does not anticipate that Mr. Goguen's long-term employment,

vocation or recreational activities will be affected apart from normal peri-operative recovery time of an endovascular procedure. Dr. Salvian relies on an article by Jorg L. De Bruin (Long-Term Outline of Open or Endovascular Repair of Abdominal Aortic Aneurysm, N. Eng. J. Med, 2010) (the "De Bruin Article") in support of a percentage risk of graft-related complications of 2.2% and only 0.6% in a patient comparable to Mr. Goguen.

- [71] Dr. Salvian comments further that he would expect significant in-growth of the surrounding tissues into the graft, giving it better long-term "seating". His opinion was that if Mr. Goguen did develop a perianastomotic aneurysm, it could be repaired with an endovascular procedure which would require two to three days in hospital and one-month recovery to full, unrestricted activities. Dr. Salvian concludes with:

In summary, then, I think the likelihood of Mr. Goguen ever having a significant complication related to his aortic repair is about 2% in his lifetime and these can be dealt with and certainly is not something he should be "frightened of" and should they occur the treatments are fairly straight forward. I would not anticipate them affecting his long term employment or vocation or recreational activities apart from the normal perioperative recovery time should they occur.

- [72] Dr. Salvian in his report dated September 1, 2011 (the "Salvian September 2011 Report") notes his concern that Dr. Gagnon in the Gagnon May 2011 Report tends to lump post-operative graft complications together with femoral aneurysms, iliac aneurysms, and aortic para-anastomotic aneurysms. He points out that Mr. Goguen did not have a femoral aneurysm and that the graft is barely onto the iliac artery.
- [73] Dr. Salvian reviews a number of articles and concludes that Mr. Goguen is at some increased risk of some degeneration of the aorta. His view is that the likelihood of Mr. Goguen requiring any surgery in the future is very low. The risk of an incisional hernia or bowel obstruction is also unlikely to occur in the future. This was Dr. Salvian's last report.
- [74] Dr. Salvian testified that he has never examined or treated Mr. Goguen and that his opinions are primarily guided by his review of the literature, which is based on cases of limited comparison to Mr. Goguen. However, as an expert witness I found Dr. Salvian to be especially impressive and knowledgeable of the type of procedure at issue, and his testimony was of great assistance to the Court.
- [75] The defence submits that if the re-intervention rate were as high as the estimate of Dr. Gagnon, it would be unusual for the reported cases to be as rare as they appear based on the literature.
- [76] Dr. Gagnon in his report dated November 23, 2011, in which he is commenting on the Salvian August 2011 Report, discounts the De Bruin 2010 Article on the basis that the methodology used did not provide information on the long-term complication rate. His view is that there is no supporting data in the literature about this clinical finding that "seating" is protective against false aneurysm formation. He further disagrees with Dr. Salvian that an endovascular repair is a durable option. His view is that the recovery period from a repair

would be in the range of eight to 12 weeks. He testified that the recovery period for a non-endovascular repair could be two to four weeks depending on whether lifting or long walks were required. If so, the recovery time may be a bit longer.

- [77] Dr. Gagnon relies on an article by Dr. Marc Schermerhorn (Endovascular vs. Open Repair of Abdominal Aortic Aneurysm in Medicare Population, N. Eng. J. Med, 2008) which found that 9.7% of patients needed an intervention secondary to a laparotomy-related complication and another 4.2% of patients were admitted to hospital for laparotomy-related complication without need for intervention. Dr. Gagnon concludes that in his opinion the risk is moderate to high that Mr. Goguen will require future surgery to treat complication secondary to his repair.
- [78] Dr. Gagnon in his report dated July 24, 2014 opines on the ultrasound result of December 13, 2013 and on the possibility of more than one re-intervention over Mr. Goguen's lifespan. He notes that the increase in size of the Diacron Graft (from 12 mm at time of insertion in 2009 to 15 mm at time of ultrasound in 2013) is normal and not a concern. In respect to the risk of re-intervention, he affirms his previous opinion that percentage risk will be in the range of 37-38% based on the Edwards 1992 Article. Based on his review of two different articles, he opines that the risk of multiple re-interventions is in the range of 10% as a conservative estimate.
- [79] Dr. Gagnon in his report dated January 31, 2016 comments on the Salvian September 2011 Report and notes that the Locati article (Para-anastomotic aneurysms of the abdominal aorta: a 15 year experience review, Cardiovascular Surgery, Vol. 8, Issue 4, June 2000) was not designed to answer the real incidence of para-anastomotic aneurysms. He again references the Edwards 1992 Article in support for the 27% risk at 15 years of para-anastomotic aortic aneurysm. He points out that in his operative report, 50% of the anastomosis was done on the iliac artery. He agrees with Dr. Salvian that the risk of graft infection over time is low. He concedes that the real risk of long-term complications after the aortic procedure on Mr. Goguen is totally unknown. He remains of the opinion that the incidence of long-term graft-related complications is in the range of 38%. Finally, he agrees that Mr. Goguen needs to be followed lifelong to make sure he does not develop any aortic complications. Dr. Gagnon testified that the future risk was speculative as there was no level 1 evidence, and that the real risk was totally unknown as there were no long-term analyses of aortic procedures.
- [80] Dr. Gagnon testified that Mr. Goguen needs ongoing follow-ups every five years with an ultrasound and reviews of those ultrasounds by a vascular surgeon for the rest of his life.
- [81] Dr. Baxter in his report dated August 17, 2017 opines that Mr. Goguen is at a significant risk of developing complications related to his abdominal aorta repair over his lifetime. He breaks down the risks into two: those related to the aortic graft and those related to the open, trans-peritoneal exposure of the abdomen. Dr. Baxter identifies the following risks:

- a. a 10-20% chance that Mr. Goguen will develop an anastomotic breakdown requiring operative intervention in his lifetime, including the risk of Mr. Goguen "out-growing" his aortic repair since it was done when he was 12 years old;
- b. a risk of graft infection for Mr. Goguen over his lifetime at 2%;
- c. a risk of graft occluding at less than 1%;
- d. a 10% lifetime risk that Mr. Goguen will at some stage require intervention to repair a ventral incisional hernia;
- e. a significant lifetime chance of requiring hospitalization for adhesion-related bowel obstruction in the range of 10-20%, half of which might require surgical intervention.

[82] Dr. Baxter concludes as follows:

Mr. Goguen has had a major arterial procedure at a very young age to repair a trauma-induced injury to his abdominal aorta. Predicting the risk of future complications is difficult, to my knowledge, there are no large cohort studies in the literature that help to accurately estimate Mr. Goguen's risk of laparotomy and aorta-related intervention following traumatic aortic aneurysm repair. My best estimation of the risk is a summation of the individual occurrences outlined previously. As such, I would estimate Mr. Goguen's lifetime risk of requiring future surgery as a consequence of his aortic aneurysm resection and repair at 28 to 42%. [Emphasis in original report.]

Discussion

[83] It is my view that the Barral 2006 Article is of little assistance. It only involved eight children, one of whom died after surgery, so only seven. Of the seven, only one had a similar type of condition as Mr. Goguen, and that patient did not require any re-intervention. All of the other patients had some type of congenital abnormality and some had high blood pressure, conditions that Mr. Goguen did not have. Dr. Gagnon, who initially placed reliance on this study, testified that the Edwards 1992 Article was a better designed study and statistically better. Dr. Salvian was of the opinion that the Barral 2006 Article should not be relied upon. Dr. Baxter did not reference the Barral 2006 Article in his report. Dr. Baxter testified that his view was that the Barral 2006 Article was not of sufficient quality to assist in assessing Mr. Goguen's future risk and as such he did not refer to it.

[84] Based on the reports and testimony of the three vascular surgeons, it is my view that it is not possible to provide a precise percentage risk on the future likelihood of some type of complication. That said, there remains some risk that Mr. Goguen will experience some type of complication during his lifetime. The magnitude of that risk is difficult to quantify but it is small. I assess that risk as between 10-15%. The impact of that risk is most significant on the claim for future care costs and for loss of future earnings.

What is the Appropriate Award for Future Wage Loss or Loss of Earning Capacity?

Applicable Law

- [85] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by his injuries; and, if so (2) what compensation should be awarded for the resulting harm that will accrue over time?
- [86] In advancing a claim for the loss of income-earning capacity, the plaintiff must prove a real and substantial possibility of such loss, as opposed to a theoretical one. In other words, the award cannot be based merely on speculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 9 [Rosvold]; *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [Perren]. As observed by the Court of Appeal in *Kim v. Morier*, 2014 BCCA 63 at para. 7, the onus on the plaintiff is not a heavy one but must nonetheless be met in order to justify a pecuniary award. Where a real and substantial possibility of loss has been established, compensation is awarded based on an estimation of the chance that the event leading to such loss will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17 [Steward].
- [87] Quantification of loss is an assessment meant to reflect the non-speculative positive and negative contingencies at play in the particular case. As quantification is not a strict mathematical calculation, there is no particular formula or methodology to be employed, however, the court must base its decision on what is reasonable in all the circumstances: *Rosvold* at para. 11; *Jurczak v. Mauro*, 2013 BCCA 507 at para. 36.
- [88] Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185. The essential task of the court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.
- [89] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) [Pallos], and the "capital asset approach" in *Brown v. Golaiy* (1995), 26 B.C.L.R. (3d) 353 (S.C.) [Brown]. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren* at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.
- [90] The earnings approach involves a form of math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: *Pallos* at para. 43; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233 [Gilbert].

- [91] The capital asset approach involves considering factors such as: (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: Brown; Gilbert at para. 233; Morgan v. Galbraith, 2013 BCCA 305 at paras. 53, 56 [Morgan].
- [92] Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: Morgan at para. 56.

Application of Law to the Facts

- [93] The plaintiff submits that he has suffered a loss of earning capacity in that:
- he has been rendered less capable overall from earning income from all types of employment;
 - he is less marketable or attractive as an employee to potential employers from all types of employment than he would have been;
 - he has lost the ability to take advantage of all job opportunities which might otherwise have been open to him; and
 - he is less valuable to himself as a person capable of earning income in a competitive labour market.
- [94] The evidence in this trial does not support that any of these assertions are sustained. Both Dr. Gagnon and Dr. Baxter testified that Mr. Goguen could resume a normal life and that he should be encouraged to pursue any type of vocation he would like. Dr. Salvian in his October 2011 report noted the same. Furthermore, Dr. Alscher opined in his examination report of October 19, 2015, that:

the gastrointestinal injury sustained in the motor vehicle crash is not limiting Mr. Gogu[e]n's vocational options, his ability to perform tasks around the home, or his ability to participate [in] recreational activities on a sustained basis.

- [95] Therefore I am not persuaded that Mr. Goguen's injuries and the risk of re-intervention affect the pursuit of his future employment and vocations in the ways alleged.
- [96] However, the issue remains of whether there is a real and substantial risk that Mr. Goguen will require a re-intervention that will require him to take time off work, which would entitle him to a future wage loss claim.

- [97] The plaintiff relies on *Parker v. Davies*, 2013 BCSC 758 [Parker], to support that a "real and substantial possibility" need not require absolute certainty. In that case, an expert witness estimated that there was a 25-30% chance that the plaintiff would require future surgery that would result in time away from work. Mr. Justice Meiklem, at para. 31, held that this qualified as a real and substantial possibility, and His Lordship factored this possibility into the loss of future earning capacity.
- [98] Based on the expert evidence before me, I have assessed the risk of future complications in this case to be 10-15%. Although this is lower than the estimation in *Parker*, I am satisfied that it constitutes a real and substantial possibility. Further, I am satisfied that in the event of a surgery, the plaintiff would miss work. The experts agree that Mr. Goguen would require between two and eight weeks to fully recover depending on the nature of the surgery and the type of occupation he is in.
- [99] The plaintiff seeks an award of \$100,000, which is equivalent to the plaintiff's estimate of his future annual salary. In my view, the plaintiff's submission is too high as it does not adequately account for the 10-15% chance of the future complications: see generally *Steward* at para. 17. The defendant submits that an award of \$5,000 is appropriate. In my view this amount is too low, as it does not sufficiently account for the effects of future complications, such as the increased need for follow-up visits and monitoring post-recovery.
- [100] Applying the applicable case law, and taking into account the possibility of income loss due to complications, surgery, and recovery, I am of the view that an award of \$20,000 is appropriate in the circumstances.

What is the Appropriate Award for Future Care Costs?

- [101] Mr. Goguen advances a claim for costs of future care in the amount of approximately \$28,000. This is comprised of costs relating to rehabilitation (kinesiology and an exercise pass), transportation to medical appointments for the ongoing monitoring needed, and for two possible re-interventions.
- [102] The defendant submits that Mr. Goguen is entitled to a future care costs award of \$3,160: for travel (\$2,200), antibiotics (\$723), and personal care and housekeeping (\$237).

Applicable Law

- [103] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 83 (S.C.) [Milina]; *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

[104] Cost of future care is established if there is a medical justification for the claim, and the claim is reasonable: *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 42. *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

[105] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be (able to be) rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, and 68-70.

Analysis

[106] There were two reports from Carol Talley, occupational therapist. The first report, dated April 13, 2012, made recommendations based on the medical evidence reviewed. The second report, dated June 20, 2016, updated her estimates, which set out the following future care claims:

a. Rehabilitation costs:

- Kinesiology: \$2,835 current lump sum;
- Fitness centre pass: \$423.06 per year ongoing;

b. Transportation costs:

- Cost of attendance in Vancouver for an ultrasound and visit with a vascular surgeon every five years: \$211.70 per visit;

c. Future care considerations:

- Hourly rates for post-surgical care for future surgery, depending on which expert medical opinion scenarios are used.

[107] With respect to the rehabilitation costs, I am not persuaded that the full amount should be awarded. The evidence does not support a sufficient connection between the accident and the need for an annual fitness pass to preserve and promote the plaintiff's mental and physical health. However, I am satisfied from Mr. Goguen's testimony and Ms. Talley's reports that some sessions with a kinesiologist will benefit his overall fitness and mental health, especially in light of the severity of the accident and surgeries that the plaintiff has endured. I award ten sessions for a GST-inclusive amount of \$787.50.

[108] The defendant concedes that the amount of \$2,200 should be awarded for transportation costs since all of the experts agree that the plaintiff needs to be monitored.

- [109] The experts also agree that the plaintiff will need to take antibiotics when having any dental work. The defendant concedes that a lifetime cost for antibiotics in the amount of \$723 is appropriate.
- [110] The defendant took no issue with the cost for after-surgery care but submits that it should only be provided on the basis of a 10% risk that a re-intervention surgery will occur. Ms. Talley opines that for each required surgery, the plaintiff would need 30 hours of personal care at \$41.95/hour and 30 hours of housekeeping at \$31.50/hour, which amount to \$2,203.50. The defendant concedes to an amount of \$237. The defendant did not allocate any additional costs for the plaintiff to see his surgeon post-surgeries.
- [111] Based on the expert medical evidence and the statistical uncertainty in this case, in my view an award of \$1,000 for the future care considerations is a reasonable and justifiable amount.
- [112] Overall, the total awarded for future care costs is \$4,710.50

What is the Appropriate Award for an In Trust Claim on behalf of Ms. Hembling?

- [113] The plaintiff submits an in trust claim on behalf of the plaintiff's mother, Ms. Hembling, for the past care she has given and the economic loss she has incurred as a result. An award of \$15,000 is sought. Both parties rely on the factors outlined in *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180 [Bystedt] for the determination of this claim:
- [180] From a review of these authorities one can construct a summary of the factors to be considered in the assessment of "in trust" claims:
- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
 - (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
 - (c) the maximum value of such services is the cost of obtaining the services outside the family;
 - (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
 - (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
 - (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.
- [114] The defendant also relies on the decision in *Land v. Di Maddalena*, 2014 BCSC 810, to support that \$5,000 is an appropriate award amount based on the evidence of the current case.

[115] The evidence supports that Ms. Hembling has acted as a devoted caregiver to her son. She missed work to take him to appointments and travel with him for extended periods for his surgeries. I note, however, that there lacks precise documentation for the amount of lost wages resulting from these absences. Given the factors in Bystedt and the evidence before me, I find that an award of \$5,000 is appropriate in the circumstances.

Special Damages

[116] Special damages are agreed to in the amount of \$4,083.82.

Conclusion

[117] In summary, Mr. Goguen is entitled to the following damages:

a.

Non-pecuniary damages:

\$140,000.00

b.

Future income/earning capacity loss:

\$ 20,000.00

c.

Cost of future care:

\$ 4,710.50

d.

In trust claim:

\$ 5,000.00

e.

Special damages:

\$ 4,083.82

TOTAL:

\$173,794.32

[118] With respect to the special damages, Mr. Goguen is entitled to pre-judgment interest.

[119] If the parties are unable to agree on costs, plaintiff's counsel is at liberty to file a written submission within 60 days from the date of this judgment. Counsel for the defendant is to file written submissions in response within 15 days of receipt of the plaintiff's submissions. Any reply submissions must be filed within 10 days.

"The Honourable Madam Justice Forth"

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Prepared on 29 October 2026 · Esheria