

CANADA / JUDGMENT

Grant v. Ditmarsia Holdings Ltd.

2020 BCSC 1705

COURT

Supreme Court of British Columbia

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2020 BCSC 1705 Grant v. Ditmarsia Holdings Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Grant v. Ditmarsia Holdings Ltd.,

2020 BCSC 1705

Date: 20201112

Docket: M171077

Registry: Vancouver

Between:

Glen Charles Grant

Plaintiff

And

Ditmarsia Holdings Ltd., Ruben Gremmelt, and John Doe

Defendants

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

Counsel for the Plaintiff:

T. F. Dennis

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Place and Dates of Trial:

Vancouver, B.C.

July 27-31, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 12, 2020

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Introduction

- [1] This is a motor vehicle personal injury claim where liability is admitted by the defendant. These reasons reflect my decision on the appropriate quantum of damages. The plaintiff was involved in a motor vehicle collision on February 10, 2015 (the "Accident").
- [2] The plaintiff was 49 years old at the time of the Accident. It was morning, and he was taking his sons to an elk hunt in northern British Columbia. He was driving a 1994 Chevy Silverado pickup truck along Highway 29 when the defendant's commercial truck and trailer drove down a hill toward Farrell Creek Bridge. The plaintiff, after crossing the bridge from the other side and seeing the fast approaching truck, tried to avoid being struck by steering his truck into the roadside snowbank. The defendants' truck and trailer crossed into the plaintiff's lane and the trailer collided with the plaintiff's truck. The plaintiff was wearing his seatbelt at the time of the collision.
- [3] The plaintiff's vehicle was damaged all along its left side, and its rear cab window was smashed. The glass from the window covered the plaintiff's youngest child who had been sleeping in the back seat.
- [4] Due to the cost of repairs, the plaintiff's vehicle was written off.
- [5] The plaintiff claims he suffered neck, back and right elbow injuries, depression, anxiety, and post-traumatic stress disorder as a result of the Accident. He says his neck and back pain resolved prior to trial and that they were starting to ease shortly after the collision. He claims he continues to suffer from soft tissue injuries, aggravation of previously asymptomatic osteoarthritis, hand numbness, and wrist and shoulder pain related to his elbow injury. The defendants dispute the causation with regard to the plaintiff's ongoing symptoms in his upper right extremity and his psychological symptoms.
- [6] The plaintiff claims losses under the following heads of damages:
- a) non-pecuniary damages;
 - b) cost of future care;
 - c) future loss of earning capacity;
 - d) special damages; and
 - e) loss of housekeeping capacity.

- [7] The defendants argue that I should draw an adverse inference from the fact that the plaintiff did not call his wife or eldest son to testify about the plaintiff's injuries. The plaintiff argues that I should draw an adverse inference against the defendants for not calling one of their experts who conducted an independent medical examination of the plaintiff and who was listed as an expert witness for the defendants.
- [8] The plaintiff seeks a total award under all heads of damages of approximately \$900,000. The defendants submit the plaintiff is entitled to a modest sum in non-pecuniary damages and a small amount of special damages but disagree that the plaintiff is entitled to awards under the heads of future wage loss, cost of future care, or loss of housekeeping capacity. For the reasons that follow, I find that the plaintiff is entitled to compensation under all heads of damages and order a total award of \$477,550.

Background

- [9] The plaintiff spent his early youth growing up in the Maple Ridge area of British Columbia with his parents and younger brother. His father was a mill worker performing maintenance on equipment and was a welder and millwright. His mother was a homemaker and took care of the children. At the age of nine, the plaintiff's father set the plaintiff up with a lawn mowing job in the neighbourhood. He helped his father build a cabin up north. He enjoyed riding his bike, fishing and playing unorganized soccer and baseball. He attended the local school.
- [10] When he was 12 years old, his family moved up north to the interior of the province. His father was employed at the local mill. When he was approximately 13 years old, the plaintiff obtained part-time work at the mill cleaning. He continued his education up north. He liked living there and enjoyed the access to the outdoors.
- [11] Just before he finished high school, the plaintiff was offered a full time job at the mill. He accepted the opportunity and consequently did not obtain his graduation diploma. He worked at the mill for a number of years and then moved to another one. It was while he worked there, in the late 1980s, that the plaintiff severely injured his left arm in a workplace accident. He caught his arm in a piece of machinery, which resulted in a compound fracture and tissue damage. He ultimately lost full function of his left hand and his left hand fingers still get numb in the cold.
- [12] The plaintiff had a difficult time returning to work at the mill after his workplace grievance was dismissed. At this time, he sought to change professions. In 1990, he married his current spouse. After four years of education and on-the-job training, he ultimately obtained his plumber trade Red Seal Certificate of Qualification in 1992. He found work in the Lower Mainland in the plumbing industry. The plaintiff is a journeyman plumber with experience and qualifications in plumbing and gas fitting and has worked in the trade for approximately 28 years.

- [13] At the time of the collision, the plaintiff was employed as a foreman and superintendent journeyman plumber at Dual Mechanical Ltd. He testified that he worked long hours to support his single income family and to pay for his children's activities. He would wake up between 3:30 a.m. and 4:00 a.m. to travel to suppliers for 5:00 a.m., where he would pick up pipes and fittings for the day's work.
- [14] While at a job site, the plaintiff was required to lift heavy piping up ladders with and without the assistance of others and use chain falls for pipes weighing more than 100 pounds. The plaintiff testified that he would have to climb ladders with pipes and heavy fittings, use large heavy wrenches, and concrete drills weighing 10 to 12 pounds.
- [15] Prior to the collision, the plaintiff testified that he thoroughly enjoyed fishing, hunting, and mountain biking. He did these activities with his children and friends. The plaintiff spoke of the good memories he created with his children while doing these activities.
- [16] The plaintiff testified that, prior to the Accident, he regularly helped with household chores, including laundry, dishes, cleaning, yard work, and landscaping. He was putting a fence in at the time of the Accident. He pressure washed the house, did any painting required, and winterized the home every year. The plaintiff's home is heated with oil and wood and he would collect wood by felling trees and splitting logs. The plaintiff also cleaned his own chimney two or three times a year and did most of his own vehicle maintenance. He took great pride in doing these things himself. By the time of the Accident, his sons were helping him with some of these tasks.
- [17] While working as a plumber, the plaintiff testified that he incurred bumps and sprains, which was simply part of being involved in the trade. He testified that prior to the Accident he did not have neck or right arm pain, headaches, or anxiety. He did use a CPAP machine to deal with diagnosed sleep apnea which allowed him to sleep properly. The plaintiff also had prior intermittent back pain.
- [18] The plaintiff testified that he did not suffer from any psychological difficulties prior to the Accident.
- [19] The plaintiff testified that he has a high tolerance for pain.

Treatment

- [20] The plaintiff has primarily treated his injuries with physiotherapy (17 sessions between February 2015 and June 2015), over-the-counter pain medication such as ibuprofen, and psychological assessment and counselling (17 sessions between February 2019 and June 2020). He had nine visits with his family doctor related to his injuries.
- [21] The plaintiff testified that he does not want to take any kind of pain medication that is addictive.

[22] The defendants point out that the plaintiff has not received any physiotherapy in the last five years. The plaintiff testified that the physiotherapy helped subside the harsh initial pain, but that after a few months the easing of the pain was not improving from the treatment.

[23] The plaintiff also sought out psychological counselling for his driving anxiety. He testified that he would continue with counselling if it was recommended.

Assessment of the Evidence

Credibility of the Plaintiff's Evidence

[24] Justice Dillon sets out the well-known factors on assessing credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[25] The plaintiff's credibility was not called into question by the defendants.

[26] I find the plaintiff to be credible. There was no delay in his responses to questions. There was no attempt to exaggerate. In fact, as the defendants point out, the plaintiff focussed on what he could do post-collision and mentioned very little he could not. The plaintiff testified that "you have to get in there and keep the work going" and "at the end of the job my signature is there, end of the day everything done is about job security so you get referred again".

[27] The defendants do not disagree that the plaintiff has pain. It is the cause and amount of pain and whether it is disabling that are primarily at issue.

[28] The testimony of the plaintiff's lay witnesses, Mr. Peter Hillman, a longtime friend and former co-worker, Mr. Glenn Vanvliet, also a former co-worker who is now a friend, and Mr. Stew Marriott, a current co-worker, was also consistent with or amplified the plaintiff's testimony with regard to his hard, one might say extreme, work ethic, work skills, and drive to get the job done whatever it takes. These witnesses testified to the plaintiff's withdrawal

from socializing post-Accident. They spoke to the plaintiff's job requirements and industry norms. These witnesses were all very direct in their testimony and did not attempt to embellish or advocate for their co-worker or friend.

- [29] Mr. Hillman spoke of previously seeing the plaintiff weekly or more but post-Accident not seeing him as often. Mr. Hillman observed the plaintiff having what he called a considerable hard time doing the physical part of his job after the Accident. He also observed the plaintiff taking anti-inflammatory medication, although he did not say how often. Post-Accident he observed the plaintiff trying not to wince or grimace and grabbing his arm on occasions in what he thought was a state of pain. He used to go bow hunting and fishing with the plaintiff but after the Accident he observed the plaintiff no longer using his 50 lb. bow and being restricted to some fly fishing. The last time they went fishing together they took the plaintiff's sons. Only the sons fished with Mr. Hillman, while the plaintiff stayed back in camp as he could not help Mr. Hillman put the boat in the water. This was in May 2020 however, at a time when the plaintiff injured his knee.
- [30] Mr. Vanvliet spoke of the plaintiff's previous and post-Accident recreational activities which they did together and his observations on the outside maintenance of the plaintiff's home. He described the plaintiff's property as being an acreage that requires a great deal of care and maintenance, which was previously completed by the plaintiff. He observed that the plaintiff's property is not kept up as well as it was prior to the Accident. Mr. Vanvliet also testified that the plaintiff would regularly pressure wash his house and chop firewood before the Accident. They used to get together about once every month for a beer which they did not regularly do after the Accident.
- [31] Mr. Marriott has known the plaintiff for approximately three years. Mr. Marriott testified that he worked a five-month job with the plaintiff which ended in April 2020, during which time he saw the plaintiff experience pain and observed the plaintiff hold his arm in pain. He testified that there is not an adequate amount of help available at All Pro Services Ltd. and that he has seen the plaintiff perform laborious tasks on his own. Mr. Marriott listed the power tools often used at their job such as drills, saws, and grinders, all of which he has seen the plaintiff use. He testified that these power tools are heavy and require two hands to use. He testified that bumps, bruises, and injuries are common in the industry and that he and the plaintiff work through these types of injuries. Mr. Marriott testified that he has been hurt on the job, made a worker's compensation claim, and missed time off of work.

Injuries

- [32] The plaintiff testified that following the Accident he experienced pain in his neck, back, and right elbow. His neck and back pain resolved prior to trial and were "starting to ease" approximately one week after the Accident. He testified that on a good day he has constant aching in his arm and on a bad day he just wishes he could cut it off.

- [33] The plaintiff described experiencing ongoing pain in his right wrist and shoulder which developed after the Accident.
- [34] The plaintiff also described a change to his sleeping ability following the Accident. Prior, with the help of his CPAP machine, he testified that he was sleeping about 6-8 hours per night. He now sleeps about 3-4 hours a night due to pain. He testified that his right arm throbs and aches, preventing him from getting comfortable despite the use of pillows and topical ointments. The plaintiff testified that after a day of work his right arm is so painful he wants to "chew it off" and get rid of it in order to sleep.
- [35] For his arm pain, the plaintiff took and continues to take anti-inflammatories and Tylenol Arthritis. He wore a sling intermittently when his arm was aching at a job site, unless he had to complete duties where the sling interfered. The plaintiff still wears a sling when his pain is aggravated by his work duties.
- [36] The plaintiff testified that he experiences driving anxiety and that his eldest son pointed out to him that he "white knuckles" his steering wheel while driving and flinches when large trucks drive by. He described having repeated dreams of the Accident and being in a state of shock when he pulled broken glass from the rear seat truck window off his son's face. The plaintiff also testified to ongoing ups and downs with respect to his mood and concerns over losing his children in a car accident. He also testified as to the change in relationship with his wife and others. He thought his wife did not trust him to take the children on trips. He sees his friends less because he is apprehensive to travel.
- [37] After the Accident, the plaintiff injured his knee at work in June 2015. He sustained this injury while using a mini-sledgehammer, which weighs between one and two pounds, to chip away excess concrete. He admitted this work aggravated his arm pain at the time.
- [38] He had a subsequent knee injury just prior to trial at the end of April 2020 which was not work related. The plaintiff missed five and one-half months of work due to the knee injuries. At trial, he testified that he no longer has knee pain from the recent accident and was awaiting an MRI exam to confirm his clearance for work.

Dr. Zarkadas

- [39] Dr. Zarkadas is qualified as an expert in orthopedic surgery, soft tissue injury, and chronic pain. He saw the plaintiff and evaluated him in January 2020.
- [40] In the examination and after a review of his medical history, Dr. Zarkadas found that the plaintiff had underlying right elbow osteoarthritis, which he opined was likely aggravated by the Accident.
- [41] His examination of the plaintiff was consistent with a diagnosis of ongoing soft tissue injury, hand numbness associated with ulnar neuropathy, and pain in the right wrist and shoulder referred from the right elbow.

- [42] Dr. Zarkadas opined that the plaintiff's osteoarthritis was pre-existing but asymptomatic. In his opinion, the Accident was responsible for aggravating the arthritis and a soft tissue injury to the right elbow.
- [43] Dr. Zarkadas opined that the plaintiff has reached maximum medical improvement and will be left with a permanent partial disability. Dr. Zarkadas testified that the plaintiff's condition was likely to deteriorate with the progression of the osteoarthritis.

Dr. Jackson

- [44] Dr. Jackson is a registered clinical counsellor and the plaintiff's treating psychologist. The plaintiff attended counselling sessions with Dr. Learn and Dr. Jackson to treat Accident-related injuries. Dr. Jackson testified that at times the plaintiff would be on the verge of tearing up during their cognitive behavioural therapy sessions where they discussed the plaintiff's sadness and frustrations relating to his pain and functional impairments.
- [45] The plaintiff completed the self-reporting screening tool known as the Beck Depression Inventory-II and scored 27. Dr. Jackson testified that this was indicative of a moderate level of depression. Dr. Jackson testified that a score of 29 would indicate severe depression.

Adverse Inference

The Plaintiff's Failure to Call Evidence of his Spouse and Son

- [46] The defendants argue that I should draw an adverse inference from the plaintiff's failure to call any evidence from the plaintiff's wife or eldest son. They submit it was important to have the plaintiff's spouse give evidence in regard to the plaintiff's abilities to take part in domestic activities inside and outside of the house. Furthermore, the plaintiff gave evidence that the collision affected his family life. The defendants argue that the plaintiff's family's testimony would have been helpful in that regard. The defendants also submit that it would have been important to have the plaintiff's son give evidence of his observations of his father, as the plaintiff claims it was his son that pointed out his driving anxiety. Finally, as the plaintiff claims that a good portion of his recreational activities prior to the Accident involved his sons, the defendants submit that his eldest son's testimony would have been helpful to this point.
- [47] The plaintiff refers me to *Brooks v. Habib*, 2019 BCSC 1398, which cites the well known decision in *Buksh v. Miles*, 2008 BCCA 318. The defendants refer me to *McIlvenna v. Viebig*, 2012 BCSC 218, and the Canadian Encyclopedic Digest, CED (West. 4th), vol. 26, title 61, which set out the law with respect to adverse inferences.
- [48] The CED citation provides a helpful summary:

§199 While the parties to a civil action have complete discretion regarding which witnesses to call, there are dangers in not advancing certain testimony. Where the plaintiff chooses not to tender important witnesses, it may result in a failure to meet the burden of proof. In a significant

early decision, the Supreme Court indicated that the failure to call a witness with potentially important evidence to a party's case was grounds for the trier of fact to presume that the evidence would have been adverse in nature. For a time, it was generally accepted that this judgment mandated an adverse inference to be drawn in any case where a party failed to call a particular witness who might have had facts bearing on the case.

...

§200 More recently, the courts have qualified this approach, recognizing that an adverse inference should not arise in every case where a party failed to call a witness with evidence material to its case. Advances in disclosure and exchange of documents between parties mean that both sides now have equal access to information, and can call witnesses who might assist them. Today, the adverse inference is discretionary, and should not be drawn unless it is warranted in all the circumstances. In particular, the judge should consider whether: there is a legitimate explanation for failing to call the witness; the witness is within the exclusive control of the party or is equally available to both parties; and the witness has key evidence to provide or is the best person to provide the evidence in question. In a case before a jury, the trial judge should charge the jury that it is appropriate to infer that a failure to call material evidence uniquely available to a party was an indication that such evidence would not have been favourable to that party, but that jurors are not obliged to draw such an inference.

- [49] In response, the plaintiff submits that his wife, as noted in the psychologist's records, was suffering from shingles as recent as June 2020. The negative impact of stress from testifying outweighed the possible benefit of her testimony with regard to the plaintiff's psychological injury claim and reduced household maintenance capacity. With regard to his eldest son, the plaintiff submits the decision not to call his testimony is due to the plaintiff's sense of pride in his role as a protective father and not wanting his son to see his vulnerability in the courtroom.
- [50] The defendants knew of these witnesses and the nature of their possible testimony well in advance of the trial. Given their familial relationship, the weight of their evidence would have been given careful scrutiny. The testimony of the plaintiff's treating psychologist and of other witnesses, along with the plaintiff's own testimony provided evidence supporting the claim of psychological injury and, to a certain extent, reduced capacity for household maintenance and recreational activity.
- [51] I find that it was not necessary for the plaintiff to call his spouse and eldest son as witnesses. The evidence of the plaintiff's counsellor, his co-workers, and friends and the plaintiff's testimony itself all enable me to determine an accurate understanding of the plaintiff's psychological state pre- and post-Accident. The rationale for not calling these witnesses makes sense in the circumstances of this case. If the defendants were of the opinion that their evidence would be of such a contradictory nature, they could have called them as witnesses, but there is nothing on its face that would have reasonably led them to that conclusion.

[52] I decline to exercise my discretion to make an adverse inference in these circumstances.

The Defendants' Failure to Call Evidence from their Expert Witness

[53] The plaintiff submits that I should draw an adverse inference from the fact that the defendants did not call the evidence of Dr. Leith, the orthopedic surgeon who conducted an independent medical examination of the plaintiff on behalf of the defendants. His report was prepared and exchanged by the defendants in the usual course, and he was listed as a witness for the defendants.

[54] The defendants submit that the burden of proof of the injury claims lies with the plaintiff. The plaintiff submits the decision in *Chekoy Sr. v. Hall*, 2013 BCSC 790, to support their request that I draw an adverse inference. There, the defence requested the plaintiff attend an independent medical examination at the request of the defence in exchange for receiving a copy of the resulting report. The plaintiff attended the examination, but no report was provided to the plaintiff. At trial, counsel for the defence refused to provide the report to the plaintiff. The failure to provide the report without adequate explanation allowed for an adverse inference to be drawn as to causation in that case (at para. 85).

[55] In this case, the report of the expert was provided to the plaintiff. The defendants submit that they did not call his evidence as they were of the opinion they did not need to call it to rebut the plaintiff's case. The plaintiff did not seek to reopen its case in order to call the defendants' expert. Like other witnesses, apart from privilege limitations, there is no property in an expert witness. They are obliged to be independent and impartial.

[56] The plaintiff had a copy of the expert's report. If it was so helpful to them they could have called the expert themselves. They knew exactly what the opinion was in advance. The defendants have provided a satisfactory explanation, being that they did not see the need to rebut the plaintiff's case.

[57] I decline to exercise my discretion to find an adverse inference based on the defendants' decision not to call the evidence of the orthopedic surgeon who conducted an independent medical examination of the plaintiff.

Causation

[58] The defendants concede that the plaintiff sustained soft tissue injuries to his upper extremity, neck, and lower back as a result of the Accident. They submit that the soft tissue injuries to his neck and back were mild, and resolved shortly after the Accident.

Right Arm Pain

[59] The defendants concede that the plaintiff has ongoing pain in his right upper extremity. However, they dispute its cause. The defendants submit that the plaintiff's post-Accident incident at work in early 2015 (where he tried to break concrete with a mini-sledgehammer) was more likely the cause of his ongoing symptoms. The plaintiff reported to his

physiotherapist that his symptoms were improving prior to this event. He further reported a worsening of his symptoms after this event. The plaintiff admitted that he may have aggravated his arm while using the mini-sledgehammer.

- [60] The defendants refer to Dr. Zarkadas' opinion that any amount of trauma, from a torquing of the joint to a fracture, as long as force is placed through the joint, could aggravate the underlying osteoarthritis in his arm. However, I do not find that the mini-sledgehammer incident was the initial cause of the aggravation of the plaintiff's osteoarthritis. The defendants did not ask Dr. Zarkadas about the mini-sledgehammer incident, and whether this would have changed his opinion on causation. Absent any evidence to the contrary, the force of the collision and impact to the plaintiff's right arm and elbow is a much more likely explanation for the initial and long lasting aggravation of the plaintiff's osteoarthritis than the mini-sledgehammer incident.

Psychological Issues

- [61] Causation of the plaintiff's psychological issues is also in dispute. The plaintiff did not complain about having driving anxiety until three and one-half years after the Accident. The defendants submit that the onset of these symptoms is too remote in time to be related to the Accident and that the Court has no expert evidence the onset of symptoms three and one-half years later can be causally related to the Accident.
- [62] The plaintiff is not claiming his symptoms began three and one-half years after the Accident. He claims he failed to recognize that his behaviour was that of a person exhibiting symptoms of anxiety and depression. He did not think to explore the causation of his symptoms until his son remarked about how he gripped the steering wheel when being approached by a truck. He made the link between his symptoms and the Accident at that time.
- [63] Dr. Jackson testified that he observed the plaintiff holding his right arm in pain during their sessions, and at times it was his impression that the plaintiff had been on the verge of tears. They discussed the plaintiff's frustration from his pain and emotional disposition. The plaintiff's testing, based on self-reporting, indicated moderate depression.
- [64] The plaintiff's longtime friend, Mr. Hillman, testified to the reduction in the social interactions and not going hunting and fishing together.
- [65] The plaintiff's friend, Mr. Vanvliet, testified that prior to the Accident the plaintiff would occasionally stop by his home after work for a beer and that he performed the plumbing required at Mr. Vanvliet's home. Mr. Vanvliet testified that the plaintiff is not as lively after the Accident and that he now sees him far less often. He noted that the plaintiff was "not a complainer" and wondered if the Accident may have meant that the plaintiff did not want to sit at someone else's house and complain about his condition. He has observed the plaintiff in pain and has heard him complain of his arm when he has come over.

- [66] The plaintiff testified to avoiding taking long driving trips with his family as he fears the possibility of another accident. His memories of the Accident, and, in particular, taking the glass off his son's face, makes him anxious to drive when there are trucks approaching.
- [67] Although the plaintiff does not proffer an expert report from a psychiatrist, the totality of evidence from the plaintiff, the collateral witnesses, and documentation show he is suffering a serious and prolonged disturbance arising above the ordinary annoyances, anxieties, and fears that come with living in a civil society. The plaintiff refers me to *Saadati v. Moorhead*, 2017 SCC 28 at paras. 31-40, for this principle. Where a psychiatric diagnosis is not available, the court may still find on a balance of probabilities the occurrence of mental injury:
- [38] To be clear, however: while relevant expert evidence will often be helpful in determining whether the claimant has proven a mental injury, it is not required as a matter of law. Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury. And, of course, it also remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused any mental injury, or at least any mental injury known to psychiatry. While, for the reasons I have given, the lack of a diagnosis cannot on its own be dispositive, it is something that the trier of fact can choose to weigh against evidence supporting the existence of a mental injury.
- [68] This is not a case of a severe personality change like that found in *Saadati*. However, I find the plaintiff's symptoms of driving anxiety and low mood connected to his chronic pain to be real and negatively affecting the plaintiff's mental health. They are mental injuries. I further find that they are caused by the Accident: the plaintiff did not exhibit these symptoms prior to the Accident and they are reasonably connected to the event.

Damages

Non-Pecuniary Damages

- [69] The plaintiff refers me to the often-cited decision of *Stapley v. Hejslet*, 2006 BCCA 34, which outlines the purpose of and considerations for assessment of non-pecuniary damages. In *Stapley*, Justice Kirkpatrick cites *Lindal v. Lindal*, [1981] 2 S.C.R. 629, as good authority informing the underlying purpose of non-pecuniary damages:
- [45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the

maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.).

[Emphasis added in Stapley.]

[70] The court then sets out an "inexhaustive list of common factors" to be considered, being the:

- (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;
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff)

[71] In *Peterson v. Verma*, 2014 BCSC 2622 at para. 69, the Court spoke to the fairness component of non-pecuniary damages awards:

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

Pain, Suffering, Loss of Enjoyment and Loss of Amenities

[72] The collision was significant and traumatic. The plaintiff is a hardworking journeyman plumber and the primary income earner for his family. He took great pride in his ability to provide for his family, and take on physically demanding duties around the house as well as showing his sons how to fish and hunt big game.

- [73] He and his past and present co-workers testified to his taking on the physically demanding work, even after the Accident, because he believed, as foreman, his job was to get the work done the right way. His work ethic and perceived obligations to his family has resulted in him enduring more pain than he may have otherwise had if he had no one to take care of.
- [74] Insofar as he mitigated his lost income, for which the plaintiff does not make a claim (he in fact increased his income over the years since the Accident), the plaintiff experienced increased pain and suffering.
- [75] Dr. Zarkadas opined that the plaintiff has reached a maximal level of recovery from the injury to his upper right extremity and is left with a permanent partial disability as it relates specifically to his right elbow and upper extremity. Dr. Zarkadas did not expect significant improvement over time and thought the plaintiff's symptoms may slightly worsen with the progression of the osteoarthritis.
- [76] The plaintiff is an individual that identifies with strenuous physical activity, much of which requires upper body strength: fishing, hunting, home maintenance, and working as a journeyman plumber. He is no stranger to injury, but to be left with a permanent injury hits at the heart of the plaintiff's lifestyle.
- [77] The plaintiff is a person who is classically stoic by nature. As the plaintiff, his co-worker, and friend have said he just works past the pain and gets what needs to be done, done. The plaintiff testified that he was concerned about job security if he did not work as hard as he had before. Mr. Vanvliet, the plaintiff's friend, testified the plaintiff was not much of a complainer.
- [78] The plaintiff is exhausted at the end of a work day, but chronic pain prevents comfortable sleep, making the plaintiff's days and nights difficult.
- [79] Instead of enjoying fishing and hunting with his friends and children, his friends described him as essentially being a bystander in his own life and "hurting too badly". I accept that these activities were a significant part of the plaintiff's pre-Accident life and that he thoroughly enjoyed taking part in them with his friends and family. I further find that the plaintiff is no longer able to take part in these activities to the extent he previously could. When the plaintiff injured his knee this year his activities were temporarily additionally negatively affected, apart from the injuries caused by the Accident.
- [80] The plaintiff testified that the memory of the collision makes him think of having almost lost his children, and that he experiences highs and lows. He no longer wants to go on family vacations because he thinks of himself as a bad omen. The plaintiff testified that the Accident was very traumatic for his wife and it has caused difficulties in their relationship. His description of the pain in his right arm since the Accident was compelling. He said at times it is so bad that he just wants to "chew his arm off".

- [81] His friends also testified as to the reduction in their social time with the plaintiff since the Accident. They have become more distant since the Accident.
- [82] I do not accept the defendants' submission that the plaintiff's injuries were short lived and resolved within a few months of the Accident. I accept that the plaintiff's injuries resulted in loss of enjoyment of life, physical and psychological pain and suffering, inconvenience, and loss of amenities.

Quantum

- [83] The plaintiff seeks an award for non-pecuniary damages of \$165,000. While each case turns on its own facts, counsel refers me to: *Hauk v. Shatzko*, 2020 BCSC 344 (\$150,000); *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 (\$180,000); *Lalonde v. Lyall*, 2019 BCSC 2259 (\$90,000); *Taylor v. Grundholm*, 2015 BCSC 860 (\$90,000); and *Rickett v. Sangra*, 2019 BCSC 167 (\$80,000).
- [84] The defendants submit for my consideration: *Pavan v. Guolo*, 2016 BCSC 324 (\$40,000); *Gregory v. Penner*, 2010 BCSC 22 (\$30,000 for the soft tissue injuries); *Fifi v. Robinson*, 2012 BCSC 1278 (\$42,000).
- [85] As noted above, I accept that the plaintiff's injuries resulted in loss of enjoyment of life, physical and psychological pain and suffering, inconvenience, and loss of amenities. The plaintiff is experiencing and will likely continue to experience severe pain. His loss of function has a particularly negative impact owing to the plaintiff's prior interests and activities. The plaintiff's psychological injuries as they relate to driving anxiety are more likely to resolve itself in time than the low mood associated with the pain and loss of functionality.
- [86] The cases supplied by the plaintiff's counsel provide some guidance as to an appropriate award for damages as they are more in line with the injuries sustained by the plaintiff and his personal circumstances. Having regard to my findings and the above decisions, I assess the plaintiff's non-pecuniary damages in the amount of \$140,000.

Future Loss of Earning Capacity

- [87] While not claiming a loss for past wages, the plaintiff does claim damages for loss of future income earning capacity. The plaintiff did not miss any time from work due to the injuries claimed, apart from a small amount of time to attend physiotherapy. The plaintiff testified that he had no particular plans for retirement prior to the Accident. The plaintiff's annual income in 2010 was approximately \$70,000. He has worked consistently since then and earned \$77,000 in 2017, \$81,000 in 2018, and \$101,000 in 2019.
- [88] Until the case of *Perren v. Lalari*, 2010 BCCA 140, this Court struggled with trying to reconcile the case law on this head of damage. The court in *Perren* clears up much of this confusion.

[89] After summarizing the case law, the court in Perren confirmed as follows:

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original.]

[90] The possibility of future loss of income must be real and substantial and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. at para. 27. The award cannot be based on a theoretical loss: *Kim v. Morier*, 2014 BCCA 63 at paras. 7-8.

[91] The plaintiff submits that he has been rendered less capable overall from earning income from all types of employment. Mr. McNeil, a registered occupational therapist, testified as an expert in industrial and vocational rehabilitation, functional capacity evaluation, and costs of future care. He assessed the plaintiff in May 2020 over a period of four hours.

[92] Mr. McNeil's opinion was that the plaintiff's right hand strength was below average. Based on his assessment results, his opinion was that the plaintiff would not be capable of working in occupations in the heavy physical demands category. He found that the plaintiff "has not demonstrated the capacity to perform his work as an Industrial/Commercial Plumber on a full time or part time basis at a competitively employable work pace without accommodations". Those accommodations include: pacing himself, limiting his overhead work and horizontal reaching, and limiting the lifting requirements to no more than 50 pounds.

[93] He explained that the plaintiff was already declining and was only going to get worse. On cross-examination, he agreed that "other injuries" could affect the plaintiff's overall capacity, and that he was unable to complete some of the testing as a result of the plaintiff's then knee injury. Mr. McNeil was confident in his assessment of the plaintiff's upper extremity functionality as it related to his occupational needs and I do find that evidence to be reliable.

- [94] Mr. McNeil opined that the plaintiff had not demonstrated the capacity to perform work as an industrial/commercial plumber or a plumber supervisor on a full-time or part-time basis at a competitively employable work pace without accommodations. The former position has heavy work demands, while the supervisory position generally has medium to heavy work demands.
- [95] Industrial plumbing requires heavy lifting, overhead reaching, awkward positioning, and constant use of a person's dominant arm. In this case, the plaintiff's right arm. Mr. McNeil's opinion is that the plaintiff is not suited for his current position given the accommodations he requires.
- [96] The defendants submit that Mr. McNeil's defensive demeanour under cross-examination should cause me to place no weight on his opinions. While I agree that Mr. McNeil was at times combative and on the point of job description requirements he was defensive in his consideration of occupational requirements set out in additional job description databases than just the National Occupational Code, I find his observations and assessments of the plaintiff to be reliable and helpful. In addition to interviewing the plaintiff about his job requirements, I find it reasonable to look to a variety of job description databases, particularly when each is prepared for different purposes and uses. Mr. McNeil explained his methodology, and in that explanation became defensive with defendants' counsel who challenged him on the fact he reached out to additional occupational description databases. However, Mr. McNeil's testimony was not what I would characterize as that of an advocate for the plaintiff.
- [97] Dr. Zarkadas testified that osteoarthritis typically gets worse over time. He further opined that the injuries caused by the Accident may slightly worsen with the progression of the plaintiff's osteoarthritis, and that the elbow and upper extremity injuries may affect his ability to work or retire at the age of 65 as a commercial plumber. The use of the word "may" does not equate to a real possibility: *Kim v. Morier*, 2014 BCCA at para. 8.
- [98] The plaintiff submits that as time progresses, the ability for him to sustain any kind of employment given his age, experience, and disabilities becomes less and less. This is anticipated to result in a shortened work life due to a combination of pain and what he says is an inability to complete the functional requirements of his work. When asked about his anticipated future trajectory, the plaintiff testified that he did not know what else he could do, and how much longer he can do what he is doing. The plaintiff's testimony, and that of Mr. Vanvliet, as well as Mr. Marriott, was that the plaintiff is a "working foreman" and that regardless of what may be in his job description he does a lot of physical labour. However, the plaintiff himself testified that he chooses to take on that work which is not normally within a foreman's job responsibilities, instead of seeking replacement or additional resources, or accommodation in the workplace.

- [99] The plaintiff's stoicism, work ethic, pride, and commitment to his breadwinner role in the family have kept him in the workforce to date. To his credit, he has steadily earned a greater income each year since the Accident.
- [100] As the defendants submit, there is no question the plaintiff is working with pain. He has been working without interruption due to injuries from the Accident for the past five years. He had previous and subsequent injuries which have required him to take time off work. When the plaintiff was hired by his current employer in early 2018 as a foreman he was told not to worry about his upper extremity injury from the Accident, as they had "young bulls" who can do the more labour intensive part of the job and they needed his experience. The plaintiff testified that he would not openly ask for assistance, and that he would grit his teeth and just keep going.
- [101] However, ongoing pain takes a toll on people and one's ability to tolerate chronic pain diminishes with age: *Davidge v. Fairholm*, 2014 BCSC 1948 at para. 166.
- [102] On the totality of the evidence, I find that there is a real and substantial possibility that the plaintiff will experience future income loss for the following reasons:
- a) He continues to suffer from daily chronic pain.
 - b) His upper extremity injuries are permanently disabling.
 - c) Without reducing his work pace and accommodating his functional limitations, there is a real possibility of future workplace injury.
 - d) The plaintiff's ongoing limitations and reduced functionality will likely continue in the future and are likely permanent.
 - e) To continue long term in his current supervisory position the plaintiff would require accommodations from his employer with respect to a reduced pace and limited lifting and overhead work, more so in a non-supervisory position.
 - f) As a result of the pain and permanent disablement there is a real and substantial possibility that the plaintiff will have to retire earlier than 65, and the plaintiff testified that he had no plans to retire even at that age.
- [103] There are two ways to assess loss of future income earning capacity: the earnings approach and the capital asset approach, see: *Perren* at paras. 11-12. The former method is usually more appropriate where it is more easily determined by way of mathematical measurement where an estimated annual income and remaining years of work are identifiable. The latter method is typically used when the loss is not as easily measurable. Here, where the plaintiff has a known and long history of employment as well as being currently employed in the same field I find it is appropriate to look to the earnings approach for assistance in assessing the plaintiff's loss.

- [104] In assessing future loss I am required to estimate a pecuniary loss by weighing, while not specifically being required to assign specific numeric values to, the possibilities and probabilities of future events and relating the evidence and findings of fact to the quantification of the loss: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21. Contingencies ought to be considered in each case to aid in the proper assessment of damages to ensure fairness and reasonableness of the award.
- [105] The plaintiff's evidence was that his current employer has acknowledged his physical limitations, so there is a real possibility that his current level of physical demands would be reduced in future years. The plaintiff's testimony was that he did not seek accommodation in the workplace, and just did what needed to be done to get the job done. This was in part due to the lack of ability in the employees he supervised or, he testified, due to lack of resources generally, or that he wanted to ensure the job was done to his standards.
- [106] The plaintiff is now 56 years old. If his employer is not able to afford the accommodations required for the plaintiff to continue working fulltime for the long term he will have to compete with healthy counterparts in the open job market, before he could retire.
- [107] If unable to continue to perform the duties of his current position, it is possible that the plaintiff may obtain a position that is less physically demanding, despite his evidence that such a job is not readily available in his industry. That position may not provide income at the same level.
- [108] The plaintiff's psychological condition could worsen due to the cumulative effects of pain and lack of sleep. Dr. Jackson did not provide an opinion with regard to the plaintiff's psychological symptoms or prognosis. There was no evidence before me as to the plaintiff's psychological prognosis. Pain management treatment and treatment of sleep issues may improve the plaintiff's symptoms.
- [109] The plaintiff may suffer a future indivisible injury at work or outside work that renders him unemployable or he may be laid off due to economic factors. The plaintiff has a history of work and non-workplace injuries which have negatively affected his ability to work, at least on a temporary basis.
- [110] The plaintiff seeks an award of \$675,000 for loss of future income earning capacity.
- [111] The plaintiff submits that the totality of evidence, including the plaintiff's work ethic and lack of concrete plans for retirement, supports a finding that he would retire at age 67, but for the Accident. That same work ethic is anticipated to keep the plaintiff in the workforce for approximately another three to four years to age 59-60, at which point his worsening right elbow condition will prevent him from being able to meet the needs of his occupation. This would equate to seven to eight years of lost income. Partial capacity may also be ascertained through a percentage-based diminishment of some or all years: *Khademolhosseini v. Ji*, 2019 BCSC 854 at para. 90. Contingencies and discount rates would also have to be taken into consideration. The plaintiff submits calculations based on s. 56 of

the Law and Equity Act, R.S.B.C. 1996, c. 253, and the Law and Equity Regulation, B.C. Reg. 352/81, setting out discount rates used for present value future earnings, and the Civil Jury Instruction multipliers, taking into account inflation and general increases for years of lost income. I find this appropriate and useful: *MacGregor v. Bergen*, 2019 BCSC 315.

- [112] The defendants submit that the plaintiff is not entitled to an award as he is capable of working at his current level even with the pain he experiences. This disregards the long term effects of chronic pain on a person's functional ability.
- [113] Given the skill level of the plaintiff, his reputation with his employer and the industry, and his own sense of joy and pride in his work, I find it is likely that the plaintiff will be able to work at his current performance level fulltime for at least three years but not likely more than five years. In my view, it is fair and reasonable to value the plaintiff's loss of income earning capacity, taking into consideration the other various contingencies at play and discount rates, at \$325,000.

Loss of Housekeeping Capacity

- [114] The plaintiff refers me to *Hinagpis v. Adaza III*, 2019 BCSC 880 in support of his claim for a separate award under this head of damages. He submits he has incurred a loss of capacity, one that should be compensated by a pecuniary damage award. The defendants submit such an award is not supported by the evidence.
- [115] I find that this is an appropriate case to make a separate award for loss of housekeeping capacity. The plaintiff testified that prior to the Accident he enjoyed taking care of his property which included routine maintenance such as pressure washing, lawn maintenance, wood chopping, and being independent with respect to changing the oil and mechanical work on his family's vehicles. He feels a sense of pride when he completes home improvement projects without having to pay for help. He has been able to continue to do much of that work, although he states he has let things slide around the property. Mr. Vanvliet noticed the landscaping is not kept up to the high standards it used to be although his evidence was not specific enough for me to discern what work exactly might not be taking place or the cause of his observation.
- [116] Mr. McNeil opined as to the value of the home maintenance work conducted by the plaintiff before the Accident, and also provided a functional capacity assessment of the plaintiff based on the size of the plaintiff's property and the maintenance which was regularly performed by the plaintiff. His assessment was that the plaintiff was restricted in his capacity to maintain his home as before or complete renovations, and that he would require assistance for heavier tasks like power washing, gutter cleaning, and hedge and tree trimming. This was all activity that the plaintiff and lay witnesses testified the plaintiff previously did regularly. The plaintiff did not testify how long it took him to do these tasks.

- [117] The plaintiff submits two hours of work for 30 weeks a year is warranted until the plaintiff reaches the age of 75. Taking into account the discount rate for non-income future loss, he claims an amount of \$45,930. The defendants submit the plaintiff requires no assistance to perform household work as a result of his injuries and will not require assistance in the future. The plaintiff's claim appears to be based on the plaintiff currently requiring assistance. However, the evidence does not show that level of assistance is currently required.
- [118] I find that this is an appropriate case for an award for future loss of housekeeping, as the plaintiff will likely require assistance in the future because of his injuries. Taking into account the discount rates and negative contingencies including the fact that his children had started doing some of the maintenance work around the home and likely would continue to do so for some years while they reside with the plaintiff, I award a total of \$8,000 for future loss of housekeeping capacity.

Cost of Future Care

- [119] The plaintiff is entitled to be returned to the position he was in had the Accident not occurred. The court must attempt to assure full compensation through the provision of adequate future care required as a result of the Accident. Such an award should be based on what is reasonably necessary given the medical evidence to promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.).
- [120] Assessment of the cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9.
- [121] Dr. Zarkadas opined that pain medication will likely provide the greatest symptom relief. However, the plaintiff testified that he is not inclined to take prescription level medications, and generally avoids medications that mask pain. However, he testified that he takes over-the-counter ibuprofen at times. Dr. Zarkadas testified that cortisone shots into the plaintiff's elbow may provide temporary relief, but may also accelerate the arthritis changes in the plaintiff's elbow, and that the plaintiff was not yet a candidate for joint replacement.
- [122] Mr. Jackson did not provide any evidence that the plaintiff requires more sessions with a clinical counsellor or a psychologist. Although the plaintiff did testify that he was receiving benefit from these sessions and that he only stopped due to COVID-19. Both the plaintiff and Mr. Jackson testified that the plaintiff's psychological symptoms were improving.
- [123] Mr. McNeil recommended a body pillow (\$49.99 every two years) to aid in sleep. He costed counselling at \$220 per session. The plaintiff submits that two counselling sessions per year to age 75 is a balanced and fair approach for ongoing maintenance given his condition is expected to worsen. He also claims an amount for continued use of over-the-counter anti-inflammatory medications.

[124] I find that additional counselling is reasonably medically necessary but not until the plaintiff reaches the age of 75. The plaintiff has made progress and an additional 10 sessions would be more appropriate. Pillows to aid in sleep and over-the-counter anti-inflammatories I also find to be reasonably medically necessary. I award a total amount of \$3,000 for cost of future care.

Special Damages

[125] The parties agree on all of the items under this heading except for the mileage rate for travel costs related to medical treatment. The defendants submit that the rate awarded should be \$0.30/km which is based on the court rates. The plaintiff submits \$0.55/km is more appropriate citing Grewal-Cheema v. Tassone, 2010 BCSC 1182 at para. 60, and a number of other subsequent decisions as recent as Zyda v. Sine, 2019 BCSC 2173 at paras. 158-159, all of which found that \$0.50/km was an appropriate mileage rate. I find that \$0.50/km is an appropriate rate for mileage costs.

[126] I therefore make an award for special damages of \$1,545.92.

Conclusion

[127] In summary, I make the following orders in accordance with the reasons above:

Non-pecuniary damages

\$140,000

Future loss of earning capacity

\$325,000

Loss of housekeeping capacity

\$8,000

Cost of future care

\$3,000

Special damages

\$1,545.92

Total

*\$477,545.92

Rounded up to \$477,550.00

[128] If the parties wish to make submissions on costs, they may do so provided they contact Trial Scheduling within 30 days of receiving this decision to schedule a costs hearing. If they do not do that, then I award the plaintiff costs at Scale B.

"Wilkinson J."

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