
CANADA / JUDGMENT

Harder v. Poettcker

2017 BCSC 312

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 312 Harder v. Poettcker

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Harder v. Poettcker,

2017 BCSC 312

Date: 20170224

Docket: M103503

Registry: Vancouver

Between:

James Harder

Plaintiff

And

Lee Poettcker

Defendant

Before: The Honourable Mr. Justice J. Sigurdson

Reasons for Judgment

Counsel for the Plaintiff:

Valmon J. LeBlanc

Jesse R. Kendall

Counsel for the Defendant:

Gillian M. Dougans

Place and Dates of Trial:

September 8-11, 14-15,

18, 21-22, 2015

Written Submissions of the Plaintiff:

December 17, 2015 and

February 3, 2016

Written Submissions of the Defendant:

January 26, 2016

Place and Date of Judgment:

Vancouver, B.C.

February 24, 2017

INTRODUCTION

- [1] The plaintiff, then 66 years old, was injured on February 3, 2009 when the motor vehicle he was backing out of a parking spot in a shopping mall was struck from behind by a vehicle driven by the defendant.
- [2] The matter was tried by a jury. The jury found the defendant negligent but found the plaintiff to be 85% at fault. On appeal, the Court of Appeal directed the jury verdict on liability to be entered but referred the assessment of damages to me as the trial judge.
- [3] This is the assessment of damages. Given the apportionment of liability the plaintiff is entitled to be compensated for 15% of the damages that I assess.
- [4] The plaintiff had pre-existing degenerative changes in his back and had prior back surgery but his counsel argues he was operating at quite a high level. Prior to the accident the plaintiff had also previously suffered from fibromyalgia.
- [5] Mr. Harder's counsel says that the injuries in the accident caused him significant pain and suffering and ultimately the need for back surgery and the accident caused a subsequent flare-up of fibromyalgia. The plaintiff says that the soft tissue injuries that he suffered in the accident included neck pain and increased lower back pain as well as occasional headaches, and that all of these injuries affected his ability to work on his rural property and the projects he did and enjoyed.

- [6] The plaintiff says that a conservative non-pecuniary award should be in the range of \$75,000 to \$95,000. The plaintiff says that in assessing general damages I should be mindful of the impact of the injuries on a person like Mr. Harder who, as his counsel described, is in his "golden years".
- [7] Mr. Harder also makes a claim for loss of past and future housekeeping capacity because of an inability to do work and maintenance on his property that he says he was able to do previously. The plaintiff suggests that \$30,000 is a reasonable award for past loss of housekeeping capacity and that an award for future loss of housekeeping capacity should be between \$35,000 and \$45,000. He also claims as special damages monies paid to third parties to do tasks that he says he would have done but for the accident. That claim, which is part of a larger special damages claim, is for \$32,412.42 for monies that he said he paid to others for work he could have done but for the accident. This claim of \$32,412.42 is made up of two components: \$23,625.42 for documented labour expenses with receipts and \$8,785 for cash payments to third parties.
- [8] Mr. Harder also claims the cost of future care in the range of \$17,605 to \$31,644.
- [9] The defendant disputes that Mr. Harder's back surgery in 2009, or a subsequent flare-up of fibromyalgia, was caused by the accident.
- [10] The defendant acknowledges that the plaintiff was injured and says that he suffered a mild to moderate soft tissue whiplash injury but takes the position that the plaintiff continued to enjoy an active retired lifestyle and his damages should be assessed on the basis that his activities were always going to be affected by his pre-existing degenerative back condition, his fibromyalgia (which the defendant said waxed and waned), and the fact of his aging.
- [11] The defendant says that the plaintiff's injuries represent a mild to moderate soft tissue injury superimposed on a pre-existing actively degenerative back condition and suggests that an appropriate award for non-pecuniary damages should be in the range of \$25,000 to \$35,000.
- [12] Special damages, apart from housekeeping expenses, the defendant says, should be between \$1,557 and \$8,904.
- [13] The defendant says that a reasonable award for past loss of housekeeping would be an amount to cover maintenance work for what the defendant describes as the acute period - from the accident to December 2009 - and would amount to less than \$1,350.
- [14] The defendant argues that by the time of trial Mr. Harder was no longer suffering from any accident-related injuries and no award for future loss of housekeeping or future care needs should be made.

EVIDENCE AT TRIAL

- [15] The plaintiff, Mr. Harder, was born in 1943. He is retired and he and his wife live on a large property in the Kelowna area. They have lived there since about 1981 and Mr. Harder maintained that property and took care of some rental properties that generated income for his family.
- [16] Prior to the February 3, 2009 accident, it is not disputed that Mr. Harder had low back problems. In the late 1980s he received a CPP disability pension and has since not worked for many years at a full-time job but he testified that he was able to stay busy on his hobbies and doing work on his property. His disability pension ended when he turned 65, almost a year before the subject accident.

The accident

- [17] The plaintiff was injured while backing his vehicle out of a parking spot in a mall and turning to his right when his vehicle was struck from behind by the defendant's vehicle. He said that he had his foot on the brake when the collision occurred. He described the force of the impact as quite hard.
- [18] Mr. Harder said that he felt some low back pain at the scene of the accident.
- [19] Mr. Harder went to a family physician the next day after having, he said, more lower back pain and neck pain.

The plaintiff's pre-existing condition

- [20] Mr. Harder, as I noted, had pre-existing back problems. He had been involved in earlier motor vehicle accidents and following those accidents had laminectomies at L4/5 and L5/S1 in 1984 and in 1987.
- [21] Mr. Harder was T-boned in a 1995 motor vehicle accident, resulting in neck and back complaints. In 1997 or 1998 he had a further accident that he said exacerbated his neck and back complaints. The second of the two accidents in the 90s was less significant.
- [22] In 1999 Mr. Harder was referred to a rheumatologist for complaints of pain "all over". He testified that he was not sure if the rheumatologist Dr. Shuckett diagnosed him with fibromyalgia at that time but her records show that she did diagnose him with fibromyalgia in 2000.
- [23] Mr. Harder had a further motor vehicle accident in 2006 and following that had an x-ray of his lumbar spine in 2006 and an MRI of his lumbar spine in 2007. He had attended physiotherapy in 2007 prior to the subject accident of February 3, 2009.

- [24] Mr. Harder was referred to Dr. Shuckett in 2008 for low back pain following the 2006 accident but he cancelled that appointment as he said he was feeling better and did not attend her office at that time.
- [25] Prior to the subject accident, the plaintiff said he did physiotherapy and stretching but did not take medication and said that he only felt normal discomfort if he did more than he should have.

Complaints following the subject accident

- [26] The day after the accident of February 3, 2009, the plaintiff complained to his family doctor of neck and low back pain. He was prescribed Tylenol and physiotherapy.
- [27] Over the next week to ten days, Mr. Harder described the pain as worsening in his right leg and said that it affected his walking. As to sleeping, he said he had trouble getting comfortable and twisting caused pain that bothered him and continues to bother him at times. He described his neck pain progressing to headaches. He said he did not have leg pain before the accident.
- [28] He testified that his neck pain and headaches have not changed much since the accident. He said he rests two to three times a day and does none of his usual activities since the accident in question and what he is able to do around the house is significantly reduced.
- [29] Shortly after the accident Mr. Harder went to a private clinic and saw a neurosurgeon, Dr. Chan. In July 2009 he had surgery, a laminectomy, that was performed by Dr. Chan at the False Creek Clinic. He said he had it done privately because of what he understood to be the length of the public waiting list for this kind of surgery. After a brief complication due to leakage following surgery that resolved quickly, Mr. Harder said that his back pain improved.
- [30] Mr. Harder said he went back to physiotherapy in 2009 and found that it helped temporarily but he did not get permanent relief from it.
- [31] He described the pain after the accident by the change in medication he says he took after the 2009 accident as compared to before the accident. Before the accident, Mr. Harder said he only had normal discomfort if "he did more work than he should have".

The evidence of the impact on Mr. Harder's life and his activities

- [32] The plaintiff said before the accident he could walk as long as he wanted. He said that after the accident and the surgery he could only walk for 15-30 minutes without difficulty. After that amount of time he said that he is tired from the pain.
- [33] He said since the accident he now drives his vehicle for shorter periods of time as he said his back stiffens up and causes him pain. He said his neck pain and headaches have not changed much since shortly after the accident. He said he now tires easily.

- [34] He complains he cannot sleep as comfortably as he did before the accident.
- [35] Mr. Harder testified about the family property in Kelowna and the work that he enjoyed doing on his property, his cars, and his small orchard. He said that he was handy and able to do work around his property and on his car. Even though Mr. Harder received a CPP disability pension in the past and was not formally employed for many years, he did work taking care of his rental properties and said he enjoyed the maintenance of his property and doing the various tasks that came with that.
- [36] Mr. Harder testified that he used to mow the lawn, prune the small orchard, tend to the vegetable garden, remove snow and drive without difficulty to Arizona, a destination about 2,500 kilometres away. He did grass-cutting and various household projects like leaf-removal and construction projects around the property. He described working on a used Mustang he bought for \$1,500. Following the accident however he said he had to take it easy and did not work on his car or on his property. He described how his back problems affected his ability to work by saying that, for example, working on the car is difficult now because of the twisting and turning that is involved. The accident he said has reduced his ability to do pruning and working on the car or the maintenance and projects on his property.
- [37] Typically before the accident, Mr. Harder said, he would work a good half day; he was advised to stay active. He estimated that he used to work for 15 hours a week before the accident, doing pruning and working on his car and those sorts of things, but now he said that he is able to work perhaps an hour a day. He said he has not worked on his restored Mustang since 2008.
- [38] He also testified that he has been unable to fish or drive an all-terrain vehicle as he did before. Mr. Harder testified that since the accident he has spent about \$100 per month on pain medication including Tylenol 3.
- [39] Since 2008 Mr. Harder and his wife travelled to Arizona and spent between a month and two-and-a-half months there. Mr. Harder said the drive of 2,500 kilometres in two days to Mesa became more difficult after the accident. He said he only uses a little medication in Arizona as there is not much physical activity other than walking, biking or using the pool.
- [40] Mr. Harder has been married to Mrs. Harder for 48 years. She described the work that her husband did around the house in the two to three years prior to the accident as including yard work, pruning fruit trees, riding his lawn mower, building a shed and working in the garden three to four hours a week. She described projects that her husband did prior to the accident and said that he did most of them himself but that he hired help for the heavy work. She said that before the accident he had spent six to ten hours a week on the yard and in the house.

- [41] Mrs. Harder said that her husband rarely took medication before the accident. She described his physical activities prior to the accident including bike-riding, badminton and bocce. The year before the accident she said that he drove to their vacation spot in Arizona and after a 13-hour drive appeared alright but tired.
- [42] She said that since the accident he has slowed down; they have a grass-cutter come in and she helps him with some household tasks as he does not move around as much. She said her husband walks less now and does not play sports any more. She said that the accident has slowed him down and shortened his walks and now he either won't take on projects or will have someone else do them.
- [43] Mr. Harder gave evidence of the monies that he has expended to have people do work on and around his property. This formed part of his special damages claim that I have described above as well as a basis for his future loss of housekeeping opportunity. He testified as to amounts he has paid for work he said he would otherwise be able to do himself and he gave evidence of the amounts he estimated he paid in cash for such work but did not keep receipts.
- [44] Harry Wright, a friend of the plaintiff for 30 years, testified that he would see Mr. Harder about twice a month in the years before the accident, would go for coffee with him, had helped him "the odd time" with taking a load of material to the dump, and helped him install garage siding at his house before the accident. Mr. Wright said that he was paid \$50 by Mr. Harder for three hours' work. He says that when Mr. Harder works now he tires easily.

The medical evidence

- [45] The plaintiff only called one expert medical practitioner, Dr. Shuckett, a rheumatologist, who testified by way of a video deposition. She had seen Mr. Harder long before the accident in December 2000 and then following the accident in December 2009. She filed two medical reports dated May 5, 2011 and May 7, 2015. She has seen Mr. Harder in total about 10-11 times.

- [46] She opined:

In the MVA, I believe that he also suffered some neck injury with whiplash injury that has led to musculoligamentous and zygapophyseal joint capsular pain. Headaches have also been a problem since this MVA. I believe that these are cervicogenic, or arising from the neck. I believe the prior MVAs put him at greater risk of exacerbation of these areas with the 2009 MVA.

He did not have fibromyalgia when I saw him in late 2009 but, when I saw him in early 2011, I believe that he was getting into a situation of chronic pain syndrome and fibromyalgia. I believe that the fibromyalgia and chronic pain syndrome are materially contributed to by the subject MVA but cannot rule out that other factors, such as possible psychosocial stressors, may be contributing to the fibromyalgia. These were not obvious when I have seen him, but could be present to some degree. The fact that he did not have evidence of at least 11/18 painful

fibromyalgia tender points in Dec 2009 may serve to weaken temporal association of onset of fibromyalgia to the subject MVA of February 2009. However fibromyalgia after trauma can probably take one to one and a half years to set in in some patients in my clinical experience and according to a paper by Dr. R. Bennett a fibromyalgia expert. Another writer has suggested fibromyalgia tends to be evident by about 6 months post trauma. I can say that when I examined the patient June 22, 2010 as well as April 15, 2011, he had 17/18 painful fibromyalgia tender points. Fibromyalgia tender point count can vary from one assessment to another. There is a move away from reliance on fibromyalgia painful tender points in diagnosing fibromyalgia. At this point, I believe he has fibromyalgia syndrome but this was not as clearly evident Dec/09. It may be that the fibromyalgia set in after his back surgery as fibromyalgia has been described to have a potential of setting in post op and may have been contributed to by his spinal procedure which was a sequela of the subject MVA.

- [47] In short, although Dr. Shuckett diagnosed Mr. Harder as having fibromyalgia in 2000, she did not diagnose him with fibromyalgia in 2009 after the accident but she concluded in June 2010 and subsequently that he did have fibromyalgia. Dr. Shuckett agreed that fibromyalgia is a condition that waxes and wanes. In that respect, she said Mr. Harder did not meet the diagnosis for fibromyalgia ten months after the accident but that he did meet the diagnosis subsequently.
- [48] I turn to the issue of whether the back surgery was caused by the subject motor vehicle accident. Dr. Shuckett opined on the possible link between the motor vehicle accident of 2009 and the surgery by Dr. Chan. Dr. Shuckett said that the timing of being in the motor vehicle accident and the private laminectomy surgery for what she referred to as new back pain suggested the intervening event (the accident) played some role in the new back pain. She said that his worsening back pain may be caused by his pre-accident degenerative changes and the accident itself. Where one started and stopped, she said, was a challenging question, but she thought the motor vehicle accident precipitated a new level of pain. She said you have to consider he had significant underlying degenerative change, how he felt and his function before the accident, and what she called "unbearable pain" after the accident.
- [49] Dr. Shuckett also pointed to spontaneous inflammation of the ligamentum flavum that she thought could contribute to spinal stenosis that resulted in the 2009 surgery. In her report she said that "I believe that the ligamentum flavum hypertrophy and the concentric bulging of the disc could potentially have been brought on, or at least exacerbated, with the subject MVA".

- [50] The plaintiff's back surgery was done at a private clinic by the neurosurgeon, Dr. Chan. The plaintiff did not call Dr. Chan to testify and the defendant's counsel says I should draw an adverse inference that his evidence would not support the plaintiff's case that the surgery was caused by the accident. The plaintiff's counsel says that no adverse inference should be drawn as all the medical records were disclosed and it was open for the defendant to call Dr. Chan as a witness if he wished.
- [51] The defendant called two expert witnesses: Dr. Wade, a rheumatologist, and Dr. Splawinski, a spinal surgeon.
- [52] Dr. Wade opined that Mr. Harder suffered a mild to moderate musculo-ligamentous injury of the cervical and lumbar spine as a result of the subject motor vehicle accident.
- [53] Dr. Wade examined the plaintiff in March 2013 and was of the opinion he did not have fibromyalgia at that time. That condition, he noted, can wax and wane, an opinion that was shared by both rheumatologists who testified. He also agreed that symptoms of fibromyalgia can present themselves later following a traumatic event. He opined that fibromyalgia may have delayed onset but that most likely you would link it to the time of the event. He agreed that trauma can be responsible for the onset of symptoms but with resolution of the soft tissue injury symptoms he said one would expect symptoms of fibromyalgia to improve over time.
- [54] Dr. Wade noted that the plaintiff had problems of the spine going back to the 1980s and that he had decompression surgery on two occasions. He defined spinal stenosis and described a laminectomy as surgery where bone is removed to release nerve pain.
- [55] Dr. Wade said Mr. Harder had a successful resolution of his sciatica - right leg pain - following the surgery in July 2009.
- [56] Dr. Wade said that he would defer to a back surgeon as being, in his opinion, the expert better qualified to give opinion "regarding the accidents and the subsequent surgery of the lumbar spine". He said it was speculative whether, absent the accident, Mr. Harder would have required surgery in 2009. He said it is outside his qualifications as a rheumatologist to opine that the accident was the "straw that broke the camel's back", but he said that although potentially that could be the case, that opinion should be from a surgeon, not a rheumatologist.
- [57] Dr. Splawinski, an orthopaedic and spinal surgeon, and the only surgeon to testify at trial, prepared a report dated December 12, 2012 where he said in part:

I believe that Mr. Harder's injuries that he sustained in the motor vehicular accident of February 13th 2009 were relatively minor and should be classified as that of minor whiplash to his neck and soft tissue injury to lower back. I believe these symptoms, i.e. of axial neck and low back pain, have settled down quickly. Residual symptoms that Mr. Harder now complains of are mostly related to degenerative lumbar spine changes which are not directly related to his car accident.

In my opinion, Mr. Harder should be able to resume his previous level of activities with occasional back pain as expected in an individual who has had four separate lumbar spinal surgical interventions I think his overall level of function is as expected for his age with his past medical and surgical history. I do not believe that Mr. Harder would require physiotherapy treatments but would benefit, like any aging individual, from self-directed exercise routine and healthy lifestyle.

[58] On the issue of whether the spinal surgery was caused by the accident, Dr. Splawinski said:

In my opinion, Mr. Harder was suffering from longstanding lumbar spinal stenosis, which predated his motor vehicular trauma of February 13th 2009. This is documented by the MRI, which preceded his motor vehicular trauma by two years. Mr. Harder has had two previous decompressive procedures which no doubt were related to his narrow lumbar spinal canal. Both of these procedures were successful in relieving his leg symptoms. His most recent procedure, once again, was successful in relieving his symptoms and addressed the narrow lumbar spinal canal by decompressing the area of stenosis.

In my opinion, the motor vehicular accident from February 13th 2009 was associated with subsequent worsening of symptomatic lumbar spinal stenosis. The motor vehicular accident, however, did not cause worsening of lumbar spinal stenosis per se. This can be stated with some certainty, given that there are two MRI scans available for review; one preceding and one following the car accident. In my opinion, it is more likely than not that Mr. Harder would have recurrent symptomatic radicular pains in his legs as a result of his spinal stenosis which preceded the motor vehicular accident of February 13th 2009.

Some of the associated changes seen in Mr. Harder's radiologic investigations show degenerative disc changes and arthrosis of facet joints. These are normal changes encountered in aging spine. They are not beyond the normal and are frequently associated with mechanical back pain. These are not directly caused by motor vehicular accident of February 13th 2009 but rather develop over the lifetime of the individual with normal aging pattern of the spine.

Dependent on decompression that was carried out, Mr. Harder has good prognosis for the future and is unlikely to require further surgical interventions on his lumbar spine, given that L1-2 level does not show as much narrowing as the levels below showed. Hence, additional surgery or medical intervention in the future are unlikely to be required.

[Emphasis added.]

[59] Dr. Splawinski accordingly was of the view that the MRIs were essentially identical and said that there was lumbar spinal stenosis at L2-3 and L3-4 and he wrote "this implies narrowing of the lumbar spinal canal particularly at L2-3." The narrowing can cause pain when walking. This longstanding stenosis predated the motor vehicle accident. He says that the motor vehicle accident did not cause the worsening of the spinal stenosis per se, but says that the plaintiff would have had recurrent radicular pain from the spinal stenosis. Dr. Splawinski did not agree with Dr. Shuckett's opinion that "the ligamentum flavum

hypertrophy and concentric bulging of the disc could potentially be brought on, or at least exacerbated, with the subject MVA as those structures were the same on the MRI that was before and after the subject accident."

- [60] Dr. Splawinski however agreed on cross-examination that you could not just look at an MRI and say that a patient was symptomatic. He also agreed with the general proposition that a car accident can cause an asymptomatic condition to become symptomatic. Dr. Splawinski agreed that there were multiple causes of Mr. Harder's pain and that the motor vehicle accident was one of them.

DAMAGES

Non-pecuniary damages

- [61] The assessment of damages in this case concerns a plaintiff who had a pre-existing back problem, suffered soft tissue injuries to his neck and back in the accident, and following the accident, I find, had increased back pain to a degree.
- [62] It is no answer to Mr. Harder's claim for damages that he would have suffered a lesser injury if he had been less susceptible. A tortfeasor must take a plaintiff as he finds him. I must however also consider whether the plaintiff's disability would have manifested itself at some point in the future regardless of the defendant's negligent conduct.
- [63] Mr. Harder is entitled to an award which will theoretically restore him to his pre-accident position but he cannot recover an amount that represents complete recovery because Mr. Harder was not a person with a completely healthy back when the accident occurred.
- [64] Mr. LeBlanc argued that the subject accident caused new symptoms and a new injury to his back and suggests that the doctors were in agreement on this. He suggested that Dr. Shuckett, Dr. Wade and Dr. Splawinski all considered the temporal relationship and increased symptoms significant.
- [65] Mr. Leblanc said that there is no evidence that Mr. Harder's condition would have worsened and required surgery in any event without the accident. He said the tenor of the evidence was that the lower back getting worse would be a gradual development.
- [66] Ms. Dougans, however, asked me to find that Mr. Harder has a pattern of downplaying his pre-existing back problems. The defendant says that the plaintiff was not asymptomatic at the time of the accident; he had been on CPP disability pension for 20 years for a severe and prolonged disability and Dr. Shuckett, in giving her opinion, was not aware that he was on a disability pension, something that counsel for the defendant argued might have been important to her to know. I find, considering the whole of the evidence, that Mr. Harder did downplay his existing back problems at the time of the accident. Although he generally did not recall them, reference to back problems or back pain appear in his family doctor's clinical records in 2006, 2007 and 2008, in his physiotherapist's records in 2007, and by the fact that he had an x-ray of his lumbar spine in 2006 and an MRI of that area in 2007.

- [67] The defendant's counsel acknowledged, however, that both the defendant's expert witnesses found a soft tissue injury, in one case mild and in another mild to moderate, but argued that Mr. Harder has two main conditions or complaints that were not caused or contributed to by the subject accident: surgery for spinal stenosis and a recurrence or a diagnosis of fibromyalgia that was not diagnosed after the accident but was diagnosed again ten months after the subject accident.
- [68] The defendant says that if Mr. Harder was going to have fibromyalgia anyway, the subject accident was not the cause, and if he was going to have the spinal surgery he had anyway, the subject motor vehicle accident was not the cause.
- [69] Ms. Dougans argued that Dr. Splawinski does not agree with Dr. Shuckett that the July 2009 surgery was the result of the subject motor vehicle accident and that he would have pain down his leg and eventually have this surgery anyway. She suggested that the appropriate expert qualified to give an opinion on whether surgery was caused by the subject accident was a surgeon not a rheumatologist. Ms. Dougans suggested that on the issue of whether the accident caused the need for surgery I should draw an adverse inference from the failure of the plaintiff to call Dr. Chan.
- [70] As to fibromyalgia, Ms. Dougans says that Mr. Harder had it in 2000 but did not meet that diagnosis when seen by Dr. Shuckett ten months after the accident. Both Drs. Wade and Shuckett agreed that fibromyalgia is a condition that waxes and wanes. Although Dr. Shuckett felt there was a temporal connection to the motor vehicle accident when it was diagnosed in 2010, Dr. Wade thought you would expect the temporal connection to be revealed when the symptoms were at their highest at the time Mr. Harder had his surgery.
- [71] I have concluded that I do not have to consider whether I would draw an adverse inference against the plaintiff for not calling Dr. Chan because on the whole of the evidence before me I accept and prefer the evidence of Dr. Splawinski to the effect that the surgery was not caused by injuries suffered in the motor vehicle accident. I consider the question of whether the surgery was caused by the accident in this case is more within the purview of a surgeon than a rheumatologist and I give greater weight to the opinion of Dr. Splawinski in the circumstances who was also able to review the scans of the plaintiff's back that were taken both before and after the accident.
- [72] Accordingly, the evidence does not disclose that the accident caused the surgery. The plaintiff had soft tissue injuries, superimposed on a back that would likely at some time in future require surgery.
- [73] I also conclude on the whole of the evidence that the plaintiff's fibromyalgia, a waxing and waning condition, was not caused by the accident.
- [74] The plaintiff had fibromyalgia prior to the accident and he had a chronic back condition prior to the accident that would eventually, I find, require surgery. I think that although he had pre-existing back pain, he was doing reasonably well prior to the accident and the soft

tissue injuries that he suffered in the accident would have been more easily tolerated by him had he not had the prior conditions. While I accept the defendant's position that the plaintiff's activities were always going to be affected by his pre-existing degenerative back condition, his fibromyalgia and the fact that he was aging, those conditions made his soft tissue injuries less tolerable than they otherwise would have been if they happened to a younger person without those conditions.

- [75] Mr. Harder is not a young man and the injuries from the accident have had a significant impact on his enjoyment of life and the pleasure he experienced from doing the things that he was able to do around his property for himself and his family.
- [76] My conclusions therefore are as follows.
- [77] The plaintiff suffered a moderate soft tissue injury to his lower back and neck in the motor vehicle accident. Those soft tissue injuries were more painful and discomfoting to the plaintiff than they otherwise would have been because he has a troublesome back that had in the past required surgery on two occasions.
- [78] However, the evidence does not disclose that the accident caused the need for the plaintiff's back surgery. In that respect I prefer the evidence of the surgeon Dr. Splawinski to the evidence of the rheumatologist.
- [79] I expect that Mr. Harder became more uncomfortable as a result of the accident and decided to have the surgery privately. I think that he had the surgery more quickly than he otherwise would have had it because of the soft tissue injuries he suffered. That finding is relevant to whether the cost of the private surgery with a shorter waiting list is recoverable.
- [80] I have also concluded that on the evidence the plaintiff has not demonstrated that his fibromyalgia was brought on by the trauma in the motor vehicle accident. However, like his pre-existing back condition, it was an aspect of his pre-existing condition that on the evidence waxed and waned in any event and I think was an aspect of his condition that probably made his injuries from the accident more uncomfortable and debilitating when he had fibromyalgia.
- [81] How long did the injuries from the accident to his lower back and his neck persist?
- [82] Dr. Shuckett thought (as she described in 2015) that they probably continued as he had probably achieved maximum medical improvement. Dr. Splawinski thought that he suffered a soft tissue injury to his neck and lower back and that the symptoms of neck and lower back pain settled down relatively quickly. Dr. Wade described his injury as a mild to moderate soft tissue injury.
- [83] I find that the injuries were soft tissue injuries suffered by the plaintiff that largely resolved by trial more than six years after the accident and any continuing discomfort that Mr. Harder suffers is largely related to his pre-existing back problem or his fibromyalgia which I find was not caused by the accident. The discomfort and pain suffered by Mr. Harder during

the recovery period was however more significant than otherwise because they occurred to a man with a troublesome back and waxing and waning fibromyalgia. The defendant concedes that there was at least an acute period of discomfort and restricted activity.

[84] I find that in assessing the plaintiff's evidence I should be cautious because I think that the evidence shows that he tended to minimize his pre-existing back problems.

[85] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, and loss of enjoyment and amenities of life. A non-exhaustive list of factors to be considered in awarding non-pecuniary damages was provided by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34:

[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.]

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

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

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

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

- (i) loss of lifestyle; and
 - (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).
- [86] The plaintiff, for much of the time up to trial, has been unable to enjoy his work around his property and on his hobbies since the accident to the extent that he could before the accident. These are losses that pertain to his claim for loss of housekeeping capacity but they also pertain to his general damages claim as they affect the plaintiff's loss of lifestyle and enjoyment of life.
- [87] The evidence of his level of function prior to the accident and the activities that he was able to undertake was not seriously challenged by the defendant. Mrs. Harder described the work that he did and enjoyed and she said that he took it easy when he was tired. She testified that he has slowed down since the accident and cannot do the activities around the house and the property and with his grandchildren that he did before and that his ability to walk has become limited.
- [88] The evidence of Mr. Wright was to the effect that he did not notice Mr. Harder having difficulty with work around the property prior to the accident but since the accident described him tiring more easily.
- [89] The plaintiff says, correctly I think, that his age is a relevant factor and the impact of soft tissue injuries on him and his ability to be mobile and work on his property is more significant than it would be for a younger man.
- [90] Considering all of the evidence, I assess the plaintiff's non-pecuniary damages at \$50,000.

Past loss of housekeeping capacity and special damages for labour expenses incurred

- [91] The plaintiff's claim in connection with tasks around his house and on his property has two aspects: his past loss of housekeeping capacity, and reimbursement for actual expenditures he has incurred to pay third parties to work on his property, his vehicles and projects that without the accident he would have done himself.
- [92] I will deal with the claim for future loss of housekeeping capacity under the heading "Future Losses".
- [93] Loss of housekeeping capacity is a compensable claim and may form part of an award separate from the non-pecuniary damages claim. The jurisprudence indicates that this claim may be allowed even if replacement costs are not actually incurred by a plaintiff as the loss is one of capacity, but the authorities indicate that the court should be cautious and conservative in its assessment.
- [94] In *Liu v. Bains*, 2016 BCCA 374, the Court of Appeal said:

- [25] Since the decision in *Kroeker*, it has been well-established in this province that domestic services have value and an injured party may justifiably claim for loss of housekeeping capacity, even if these services are provided gratuitously by family members: *McTavish v. McGillivray*, 2000 BCCA 164 at para. 63.
- [26] It lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.
- [27] In this context, I am satisfied that it was appropriate for the trial judge to treat Ms. Liu's claim for lost housekeeping capacity independently from her non-pecuniary loss. I see little merit in the appellants' submission that adding the two heads of damage together is an acceptable means of testing the reasonableness of one of them. In any event, in the absence of a challenge to the award for non-pecuniary loss, it is questionable whether this Court is in a position to judge the merits of such a submission: *Kroeker* at para. 23; *Campbell* at para. 23.
- [95] In *Westbrook v. Brizuela*, 2014 BCCA 48, Garson J.A. said:
- [76] As noted in *O'Connell* damages for loss of capacity to complete homemaking tasks are not dependent upon whether replacement costs are actually incurred because what is being compensated is the loss of capacity itself. In contrast, damages for future cost of care are "directly related to the expenses that may reasonably be expected to be required" (*O'Connell* at para. 67) and cannot be awarded should no such reasonable expectation of an actual future expense be found. In the instant case, the evidence supports an award for the loss of capacity to perform certain homemaking tasks; however, I agree that this award should be approached conservatively.
- [77] Gibbs J.A., speaking for the majority in *Kroeker*, suggested a cautionary approach to awards for the loss of ability to perform household tasks. At para. 29 he wrote:

There is much merit in the contention that the court ought to be cautious in approving what appears to be an addition to the heads of compensable injury lest it unleash a flood of excessive claims. But as the law has developed it would not be appropriate to deny to plaintiffs in this province a common law remedy available to plaintiffs in other provinces and in other common law jurisdictions. It will be the duty of trial judges and this Court to restrain awards for this type of claim to an amount of compensation commensurate with the loss. With respect to other heads of loss which are predicated upon the uncertain happening of future events measures have been devised to prevent the awards from being excessive. It would be reasonable to expect that a similar regime of reasonableness will develop in respect of the kind of claim at issue in this case.

Ultimately, the award for loss of ability to perform household tasks in Kroeker was reduced by two-thirds, from \$23,000 to \$7,000. As in Kroeker, a cautionary approach should be taken here.

[78] Mr. Kerr estimated the annual cost of replacement homemaking at \$1,872 on the basis that Mr. Westbroek required three hours of homemaking services every two weeks to assist with his share of household tasks. He based his calculation on an hourly rate of \$24.00. My understanding of the evidence is that Mr. Westbroek did not pay anyone else to perform the household chores he was unable to do himself but rather his wife assumed those responsibilities. The judge appears to have awarded and capitalized the \$1,872 to age 65. There was no evidence at the second trial as to the allocation between the spouses of household tasks. A cautionary approach would suggest that this award should be reduced by two thirds.

[96] As I mentioned earlier, the plaintiff claims the sum of \$30,000 for loss of housekeeping capacity pre-trial.

[97] The plaintiff also claims for expenses that he has incurred. The plaintiff says that he has made expenditures in relation to the work that he used to do on his property and his projects and hobbies he used to perform. These expenditures were grouped by him as payments with receipts and payments for cash without receipts. These claims were advanced as special damages claims. In particular, the plaintiff claims the sum of \$23,625.42 for amounts paid to third parties to perform work on the property and his vehicles that he says he would have done himself but for his injuries. He also claims \$8,785 for cash payments to third parties for work on his property and his vehicles that he says he would have performed himself but for his injuries.

[98] The evidence in support of these claims is as follows.

[99] First the past loss of housekeeping capacity.

[100] The plaintiff's evidence was that within a few weeks of the accident he was having difficulty walking and was unable to perform household tasks and upkeep as he had in the past. The evidence in support of this claim is somewhat general but Mr. Harder said that he spent about 15 hours a week doing this sort of thing and the plaintiff says that now he can do about an hour a day and the difference or reduced capacity is about eight hours a week. The jobs he does such as washing cars, gardening, etc., now take longer. The plaintiff's counsel says the loss of capacity should be calculated on the basis of a loss of about five to eight hours a week assuming an hourly wage of \$15 - an amount he paid Mr. Wright to help. A loss of eight hours per week for the time he was in Canada at that wage rate would exceed \$32,000. His counsel suggests that rounded off this amounts to a loss of capacity of about \$30,000 pre-trial.

- [101] The defendant also says that on Mr. Harder's own evidence he is able to do one hour a day or seven hours a week but that his wife's evidence was that he only used to do six to ten hours a week. This, the defendant says, indicates that the loss is modest. I recognize that both Mr. and Mrs. Harder gave estimates but they both described in their view a reduction in his capacity. Their evidence however was quite general.
- [102] The plaintiff, as I mentioned above, also claimed monies expended on household and household-related tasks during the period up to trial. While I think that this claim for loss of housekeeping capacity and payments to third parties for housekeeping work should be assessed independently of the non-pecuniary damage claim, there is some potential for duplication of damages awarded for past amounts to third parties, in cash or otherwise, and his reduced housekeeping capacity due to his soft tissue injuries.
- [103] In assessing this loss, I take into account his pre-accident condition and I find that he was subject to some significant restrictions on his activities and his ability to do household duties without discomfort due to his pre-existing physical difficulties. There was however no serious cross-examination that the expenses he says he incurred were not incurred, but I think, given his age and his physical condition prior to the accident, that some of the expenses would likely have been incurred in any event.
- [104] The defendant says that the special damages award for housekeeping and labour should be modest and should take into account that the plaintiff has someone else do his work to allow him to enjoy his travels and his trips.
- [105] The defendant says that a reasonable award of expenses is the amount of yard work receipts that the defendant says total \$1,349.
- [106] In assessing these claims, I am attempting to avoid duplication between the award for past loss of housekeeping capacity and special damages for out-of-pocket expenses for monies paid to others to do work on the property and on his projects. I also find that his injuries from the accident improved over time and any ongoing difficulty with doing household tasks by the time of trial was part of the aging process or the product of his pre-existing back problem or his fibromyalgia.
- [107] In the circumstances, I assess the plaintiff's past loss of housekeeping capacity until trial at \$10,000 and I assess special damages for monies paid to third parties to do work on his property and projects that he otherwise would have done himself but for the accident at \$15,000.

Other special damages

- [108] The plaintiff also claims as special damages the sum of \$15,295.26.

- [109] These treatments and medication expenses include: \$7,100 for physiotherapy treatments, \$650 for medication (Tylenol #3, Lyrica and Cymbalta) and \$7,435 on fees and procedures related to his laminectomy (\$949 for an MRI, \$498.75 as an administrative fee paid to Dr. Chan, and \$5,900 paid to False Creek Surgical Centre).
- [110] The defendant's position is that physiotherapy to December 2009, medication to December 2009 for a subtotal of \$1,557.22, and possibly the private healthcare cost of \$7,437.75, is recoverable. The theory behind the defendant's position is that the plaintiff's damages should be limited to a recovery period ending in December 2009 when the Harders travelled to Arizona.
- [111] I think that the special damages incurred as a result of the private surgery are recoverable as special damages. Although I have found that the accident did not cause the condition requiring surgery, the plaintiff probably moved ahead with that surgery because of his discomfort from the soft tissue injuries in the accident on top of his pre-existing back condition and as such it is recoverable.
- [112] Although the defendant says that the plaintiff has not put forward medical evidence to support the need for physiotherapy following the accident apart from the fact that the plaintiff indicated he was going to physiotherapy and his doctor did not object, I nevertheless find that some further physiotherapy past December 2009 was reasonable and a greater amount of medication cost than to December 2009 should be awarded. Although the defendant suggests that an appropriate award is at most \$8,904.97, I think in all the circumstances a reasonable award for special damages that is fair to both parties is \$12,000.

Future Losses

- [113] The plaintiff makes claims for future loss for cost of care and loss of housekeeping capacity. I will discuss the claims in that order.
- [114] Claims for cost of future care must be medically justified and reasonable. The award of damages for future care cost must be moderate and fair to both parties: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at para. 210.
- [115] The plaintiff claims the cost of future care of between \$17,605 and \$31,644 for medication, physiotherapy, a rehab program and a personal trainer.
- [116] The defendant says that none of these are proven. I agree with that submission because I find that the plaintiff has not established that any ongoing difficulties he may have are related to the accident but to the extent that they continue are the product of previous conditions that by this point would have manifested themselves in any event.
- [117] I have concluded that the soft tissue injuries that the plaintiff suffered in the motor vehicle accident had resolved by the time of the trial.

[118] Because I have concluded that the plaintiff's injuries from the accident have resolved I make no award to the plaintiff for any sum for cost of future care or loss of future housekeeping capacity.

SUMMARY

[119] Based on the finding of contributory negligence, the plaintiff is entitled to an award of 15% of the damages that I have awarded (general damages of \$50,000, loss of housekeeping capacity of \$10,000, recovery of monies paid to third parties \$15,000, and special damages of \$12,000) and that amounts to (15% of \$87,000) \$13,050.

[120] If the parties are unable to resolve the issue of costs, they may arrange through the registry to appear before me at some time before April 30, 2017 at the latest.

"The Honourable Mr. Justice J. Sigurdson"

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