CANADA / JUDGMENT

Harestad v. Harestad

2023 BCSC 2329

COURT
Supreme Court of British Columbia

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2023 BCSC 2329 Harestad v. Harestad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Harestad v. Harestad,

2023 BCSC 2329

Date: 20231205

Docket: M209470

Registry: Vancouver

Between:

Hunter William Harestad

Plaintiff

And

Carl Wayne Harestad

Defendant

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Judgment

Counsel for the Plaintiff:

S. Wheeldon

Counsel for the Defendant:

B.H. Keigan

K. Benloulou

Place and Dates of Trial:

Vancouver, B.C.

November 27-December 1, 2023

Place and Date of Judgment:

Vancouver, B.C.

December 5, 2023

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Introduction

[1] THE COURT: Hunter Harestad was a 15-year-old grade 10 student when on November 27, 2016, he suffered serious back injuries after a truck driven by his father, Carl Harestad, slid off Highway 20 near the top of Heckman Pass, a mountain road that is a highway in name only (the "MVA").

[2] Liability is admitted. Thus, the only issues before the court are to determine the nature and extent of Mr. Harestad's injuries caused by the MVA and to assess damages.

Facts

The Plaintiff's Background

[3] The plaintiff was born in August 2001. Throughout his life, he has lived in Bella Coola, British Columbia - a small community on the central coast. The only highway that connects Bella Coola with the balance of British Columbia is Highway 20, which runs from Bella Coola in the west to Williams Lake in the east. The top of Highway 20 is known as Heckman Pass. Heckman Pass is known for steep grades (up to 18%), approximately 72 switchbacks, significant changes of elevation and a peak elevation of about 5,000 feet. Parts of it are gravel, and there are no guardrails.

[4] Throughout his life, the plaintiff embraced the rural life and outdoor activities with his family. He has always been fascinated with farming and with cowboys. Throughout his life, he has spent countless hours at his grandfather's 160-acre farm on which the grandfather raised cattle and grew hay for feed. The plaintiff would help out on the farm and learn about

farming. He learned how to operate most of the farm equipment on his own. As well, he has a close relationship with one of the horses at the farm, learning to ride at age seven. The plaintiff listens to country music, is a fan of western movies, and often wears his cowboy boots and hat.

[5] The plaintiff was described by many witnesses as a gentle, happy child who loved to sing and, despite being taller than most of his peers, was at times bullied.

[6] The plaintiff's family had a close relationship with the Mikkelson family. Don Mikkelson worked for many years with the plaintiff's father, and Don's two sons, Patrick and Phillip, have always been the plaintiff's closest friends. Throughout his life, the plaintiff visited the Mikkelson home regularly. The plaintiff and the Mikkelson brothers would regularly spend time outdoors, including biking and quadding.

[7] The plaintiff played soccer growing up. He also participated in track and field competitions through his school. He went on hunting trips each fall with his father and various other relatives.

[8] In the fall of 2016, the plaintiff was a grade 10 student attending high school and living an active, outdoor life.

The MVA

[9] On the morning of November 27, 2016, the plaintiff, his brother, and the defendant left in the morning to get firewood from a particular location on the east side of Heckman Pass near Anahim Lake. They travelled in the defendant's 2005 Dodge Ram 3500 truck, which towed a trailer. The trailer did not have winter tires.

[10] The defendant drove. It took about one-and-a-half to two hours to get to the firewood spot. Once there, over the course of about six hours, the three of them filled up the bed of the truck and half of the trailer. By that time, it was starting to get dark, so they headed home.

[11] The Heckman Pass section of Highway 20 had compact snow when the Harestads travelled it that day. As they drove back toward Bella Coola and up the Pass, the temperature fell below zero degrees, and it was snowing. The defendant found the road to be slippery and very difficult to drive. When they reached the top of the pass, they stopped to put chains on the truck. The defendant was quite concerned about the road conditions, and he told his sons not to wear seatbelts and to be ready to jump out of the truck should it start to go over the edge.

[12] About five minutes after they began their descent, the trailer took control of the truck, jackknifed, and began to pull the truck off the road. The defendant, who was on the uphill side, jumped out of the truck and onto the road. The plaintiff, who was in the right rear passenger seat, jumped out on what was the downhill side. His brother remained in the truck.

[13] The plaintiff's evidence was that everything went white. What he next remembers is that he was about 60 feet down the embankment, and the truck was on its side about ten feet away. The defendant came down to check on his sons. The plaintiff tried to make his way up the hill, but could not climb up. Some friends who had been travelling behind them and who had witnessed the accident stopped and created a makeshift harness that they used to help bring the plaintiff up the hill. They drove the plaintiff directly to Bella Coola Hospital.

Events After the MVA

[14] The plaintiff was hospitalized in Bella Coola. On November 29, 2016, when weather permitted, he was medevacked to BC Children's Hospital in Vancouver.

[15] The plaintiff was diagnosed with multiple mid- to lower-back fractures, a right ankle fracture, and a tailbone (sacral) fracture. Specifically, with respect to the back, he was diagnosed with a compression fracture of T9 (the ninth thoracic vertebra); a comminuted burst fracture at T12 extending through the posterior elements associated with the T11/T12 interspinous process widening; and fractures through S3 and S4.

[16] The plaintiff's right ankle fracture was put in a cast and ultimately healed without lasting effect.

[17] The plaintiff underwent fusion surgery on December 9, 2016, with two rods being placed from the T10 through L2 vertebrae. The evidence at trial included various scans showing the two rods and ten screws going from the rods into the spinal column. The rods are each about 150 mm in length, and the screws are each 45-50 mm long.

[18] In the course of these treatments, the plaintiff was diagnosed with some cardiac issues, specifically an aortic root dilation. At one point, while that issue was being evaluated, he was advised to avoid contact sports. The evidence indicated that this heart-related restriction was only temporary and was lifted after about three months. The plaintiff acknowledged that his doctors continue to "monitor" his heart; however, there are no heart-related restrictions on his activities.

[19] The plaintiff returned home in mid-December 2016. He was provided with a scooter that he used to get around while his ankle healed. Getting in and out of his house was particularly challenging given that there were ten stairs at the front of the house with no handrail, and he used crutches to access the house until his ankle had healed.

Post-MVA School and Work History

[20] The plaintiff returned to school in January 2017. He had a specialized chair that helped minimize the pressure on his back but would still find it difficult to sit for any period of time. He described his back pain as varying from someone poking him with a big needle to someone hitting his back with something hard.

[21] The plaintiff has also reported increased and more regular migraine headaches since the MVA, intermittent pain in his upper neck and upper back, and issues with anxiety and low mood. He described initially feeling lucky to have survived as well as he did, and then as he had to deal with the ongoing pain for the long term, he began to feel depressed and angry.

[22] The plaintiff resumed participating in track and field. He resumed the hunting trips as well, although the trips were shortened and modified to reduce the amount of hiking and do less camping. The plaintiff resumed driving on quads but would no longer go over jumps. He resumed horseback riding but was unable to go any faster than a walk. He found trotting too jarring for his back.

[23] The plaintiff's parents separated in late 2018.

[24] After graduating from high school in June 2019, the plaintiff took a retail meat-cutting program at Thompson Rivers University in Kamloops. The plaintiff described enjoying that program. He had back pain as he performed the work but got it done. The plaintiff lived in student housing while at university. His mother took a new job in Kamloops and helped out from time to time.

[25] The plaintiff returned to Bella Coola in June 2020 and began working at the local co-op store as a meat cutter's assistant. He was paid $14.60 an hour. Initially, the break schedule was inflexible with 15 minutes in the morning and afternoon and a one-hour lunch break.

[26] The plaintiff now lives in a rented two-bedroom house, which he shares with his brother. His brother works in Alberta and is out of town for long periods of time.

[27] The plaintiff's mother retired and moved back to Bella Coola in mid-2021. She subsequently began to assist the plaintiff with housekeeping work. Both the plaintiff and his mother gave evidence that he had difficulty keeping up with day-to-day housekeeping.

[28] At the end of August 2022, the plaintiff was promoted to meat department supervisor, and his pay was increased to $19 per hour. He has an assistant who can assist with some of the more physical parts of the work, like unloading shipments. The bulk of his work takes place in a refrigerated room, which aggravates his back pain. At times, he says that his back feels like he has been hit in the back with a baseball bat. Then if he does not sit down, it starts to go numb.

[29] The plaintiff has adjusted his work hours. He now starts work at 6:30 a.m. He takes multiple smaller breaks and typically goes home to rest during his lunch break. He declines much of the overtime work that is available and sometimes leaves work early. He finds his back worsens as each day passes and that as each day in a week passes by, his back pain also worsens.

[30] The plaintiff's current supervisor gave evidence. She described the plaintiff as an asset to the store - he is knowledgeable, takes pride in his work, and is a person with whom people enjoy working. She has been working with the plaintiff recently to find ways to accommodate his

back issues, including ensuring flexibility with breaks, sending him home on occasion, and finding equipment, including an antifatigue mat. She is currently looking into the possibility of purchasing a higher worktable that would reduce the amount of stooping required, which is significant given the plaintiff's height.

[31] The plaintiff enjoys his work at the co-op and intends to stay there indefinitely. He also enjoys farming, and his dream would be to one day have a hobby farm like his grandfather does. However, the two medical experts raised concerns about his ability to do that.

Current Symptoms

[32] The plaintiff continues to suffer significant back pain. He also has pain in his tailbone. It is aggravated by his work, but he is determined and stoic and completes the bulk of his shifts. The plaintiff also regularly suffers from migraine headaches.

[33] The plaintiff gave evidence that his ankle has pretty much healed, although it occasionally will feel stiff or lock up.

[34] The plaintiff avoids taking medications as much as possible. He believes that drugs are bad. While he was on stronger prescription medications, including morphine and T3s in the days following the MVA, since shortly after his surgeries were completed, he has limited himself to occasionally taking Extra Strength Tylenol.

[35] The plaintiff has established a number of behaviours to manage his symptoms, including taking multiple breaks of varying lengths at work, stretching and walking around. When home, he sits in his recliner chair, which he finds helpful. The plaintiff continues to engage in several activities but paces himself and has created adaptations to deal with the pain. He will go quadding but avoids jumps and primarily stays on level trails. He will ride his horse but only at a walk. He uses a ride-on mower for yard care. He goes hunting and camping but with modifications to reduce the amount of hiking involved and to ensure he has a reasonable mattress to sleep on.

[36] The plaintiff now pays his mother to come to his house for two-to-three hours each week to do housekeeping. The mother's evidence was that she is paid usually about $50 per week.

Expert Evidence

[37] Three expert reports were tendered by the plaintiff - from a neurosurgeon, a physiatrist, and an occupational therapist. Although the defendant did not tender any expert reports, each of the experts whose reports were tendered by the plaintiff was required to attend for cross-examination.

Dr. Heran, Neurosurgeon

[38] Dr. Heran is a neurosurgeon practicing at Royal Columbian Hospital as well as other facilities in the Fraser Health region. He conducted an independent medical assessment of the plaintiff on June 9, 2023, at the request of counsel for the plaintiff and issued his report on June 15, 2023.

[39] Dr. Heran's conclusions with respect to prognosis are summarized as follows:

Mr. Harestad presents with persisting thoracolumbar junction region pain. His pain is central and toward the left side. His pain is likely related to chronic local changes adjacent to the fracture sites involving the soft tissues. It is unlikely to be related to any instability or failure of hardware given the serial imaging demonstrating stability in the past. The greater liklihood [sic] that this is now ingrained in the soft tissue area and is essentially chronic myofascial type pain. It would be expected to be worsened with physical activities and engagements where those muscles are active. Rest makes it better. This is exactly what he describes. Given the duration of time that has passed, and knowing that the soft tissue sources of symptoms that can arise following a traumatic event typically are plateaued if not resolved by two to three years, this means that he is going to continue in this course indefinitely in the future. Stating this, he should have no breakdown of the structural spinal elements into the future. He definitely is at increased risk for adjacent level accelerated breakdown next to the fusion segments, notably at the T9-10 and adjacent levels as well as L2-3 and levels below. This further would increase the risk for symptomatic development of degenerative disc disease, particularly in his low back as well as accelerated deterioration at the spondylolisthesis at L5-S1. Therefore, overall, in the long-term, he cannot be declared plateaued as he has many years to go of further deterioration as described.

[40] With respect to treatment recommendations, Dr. Heran's comments are as follows:

From a treatment standpoint, there is nothing specific that he requires at this point. Any treatments utilized in the past inclusive of this surgery that was conducted in his low back was a requisite. There was really no other option for management of the unstable T12 fracture that he had. He would benefit from continuing with the swimming program on a regimented basis at least three times a week with a swimming pass available to him indefinitely. Similarly with conditioning exercises and a gym routines through a personal trainer three times a week with a gym pass available to him. He would benefit from scheduled massage therapy as well as other local treatments for the myofascial tensions that do develop. If the benefit is greater than a couple of days, it is worthwhile to proceed with these, particularly if the benefit is up to a week or so from a maintenance perspective. He will definitely need to premediate himself prior to any arduous tasks that would worsen his symptoms with anti-inflammatories and acetaminophen. I would recommend only doing this on an occasional basis, typically no more than about three times in a week.

From a treatment perspective in the future, if he does have progressive deterioration into the adjacent levels or develops deterioration at the lumbosacral region or from the spondylolisthesis, surgical intervention would likely be a consideration. Further imaging would be required at that time with scoliosis x-ray series, flexion and extension x-rays and an MRI scan. He probably should have a baseline MR1 scan of his spinal axis as well as an x-ray series done now to establish a baseline from where he resides and for comparative purposes for the future.

[41] Finally, with respect to functional matters, Dr. Heran concluded:

From a functional perspective, the limitations that he has had have influenced him adversely with respect to any load-bearing activities and prolonged standing and less so sitting activities. These are expected to continue indefinitely into the future. For such, assistance would be required and he already notes that he requires assistance for anything more than 50 pounds weight loading endeavors. Similarly for yard work and other repetitive activities I would recommend assistance being provided to him as opposed to placing the burden upon him with frequent break taking and escalation of his symptoms regardless. Therefore, hired assistance for portions of yard maintenance and deeper cleaning, renovation type tasks and farming activities is recommended. He probably would benefit from a formal functional capacity evaluation if he were ever to proceed with a different line of work other than meat cutting into the future. With this, a vocational assessment would be valuable.

[42] Dr. Heran noted in his evidence that given the nature of the surgery and the inflexibility created by the rods in the plaintiff's back, there is a particular risk of further deterioration at adjacent levels of the spine. That may well ultimately require further surgery, and if that happens, then there will be an even greater risk of yet further surgery being required.

Dr. Sangha, Physiatrist

[43] Dr. Sangha is a specialist in physical medicine and rehabilitation. He conducted an independent medical examination of the plaintiff on June 20, 2023, at the request of counsel for the plaintiff and issued his report on June 28, 2023.

[44] In his report, Dr. Sangha described the plaintiff's impairment state as follows:

a) Multilevel thoracic spine compression fractures, T2 and T7-T10. An unstable three-column fracture at T12, which required T10-L2 instrumented posterior spinal fusion, persistent loss of anterior height at T12 and T7 and T8;

b) Left transverse process of T8;

c) Compression fracture of L2. L4 compression with 50% height loss;

d) S3 and S4 fractures extending through the neural foramina and involving the posterior elements bilaterally with ventral sacral angulation;

e) Coccydynia;

f) Undisplaced right medial malleolar fracture which has resolved; and

g) Cervicothoracic junction strain with chronic myofascial pain.

[45] Dr. Sangha opined that given that six-and-a-half years have now passed since the MVA, the nature of the injuries and the longstanding duration of his problems are negative prognostic indicators. He noted that the plaintiff has persistent issues with chronic pain consistent with his impairment state and that:

He is at risk not only for continued exacerbations but functional decline due to potential adjacent segment disease given the nature of his required operative repair which was an instrumented fusion. The vast majority of recovery from these types of polytraumatic injuries occurs within the first year with maximum recovery generally achieved by the second year.

[46] Dr. Sangha commented that given the nature of the spinal fusion surgery over multiple levels, the plaintiff is:

at high risk of adjacent segment disease with accelerated post-traumatic changes next to his fused levels. The onset of such changes would likely result in increased pain and range of motion, with deterioration in function, and possible neurological compromise. This would require some combination of increased healthcare utilization; gait aids; oral, topical, and /or injectable therapies; home modifications; physical therapies; attendant care needs; and/or surgery (such as revision surgery with extension of his fusion and instrumentation). He will always be at risk of hardware failure and latent infection.

[47] Dr. Sangha described the plaintiff as a "young man who will age with disability." He noted that the plaintiff is at the present time:

at his prime to be able to fend off the impact of his significant spinal derangements. With age, and any post-traumatic degenerative changes, his pain and the functional impact of his impairments will become magnified.

In the future, he can be expected to have flare-ups of pain and dysfunction, and in response the appropriate therapies would include physical therapy, chiropractic, and/or massage therapy. Dr. Sangha further suggested that judicious use of NSAIDs and acetaminophen for the plaintiff's spinal pain is reasonable and that he will have to pace and modify the way he performs activities.

[48] With respect to work functions, Dr. Sangha noted the significant level of pain that the plaintiff currently experiences over the course of a work day and expressed scepticism as to the plaintiff's ability to continue this sort of work over the long term given the likelihood of functional decline over the years. Dr. Sangha expressed similar scepticism as to the plaintiff's ability to play a significant role in the operation of a hobby farm like the one owned by his grandfather.

[49] Dr. Sangha was asked about the importance of physiotherapy. He described the risk of a person falling into deconditioning if they are not given proper instruction as to stretching and other such activities. He did not identify any deconditioning issues with respect to the plaintiff and noted that a young person may be able to do well without such a program more than one who is older.

[50] With respect to the plaintiff not wanting to take more powerful medications, Dr. Sangha commented that those medications would not improve his recovery. Rather, all they would do is potentially help him to manage it better. He noted as well that many of those medications come with side effects such as somnolence, dizziness, and cognitive blunting. He suggested that the taking of NSAIDs and acetaminophen - which is the product the plaintiff uses - is likely the most effective approach.

Christina Peters, Functional Capacity and the Cost of Future Care

[51] Ms. Peters is an occupational therapist whose expertise encompasses both conducting functional capacity evaluations and preparing recommendations and cost estimates for future care. She travelled to Bella Coola to meet with the plaintiff on June 27 and 28, 2023. She was also provided with a copy of Dr. Heran's report. Ms. Peters' report is dated July 27, 2023.

[52] In the functional capacity evaluation, which focused on work requirements of a butcher, the plaintiff demonstrated functional range of movement in most aspects, although he demonstrated difficulty with prolonged static stooping. He was able, at least on the first day of testing, to do medium to entry level heavy strength work with respect to physical handling up to waist height and medium physical strength work when handling items from the waist to shoulder height or above. Ms. Peters noted that the plaintiff's ability noticeably declined from day one to day two of testing.

[53] Ms. Peters evaluated the testing results against known work requirements and concluded that the plaintiff is able to meet the physical demands for a retail meat cutter within the context of his current reasonably well-curated work environment.

[54] The various future care items that were recommended or costed by Ms. Peters will be discussed below.

Issues

[55] The issues before the court are to determine the nature and extent of Mr. Harestad's injuries caused by the MVA and to assess damages.

Credibility and Reliability

[56] Reliability and credibility are related but distinct concepts. The distinction between them was considered in R. v. Morrissey (1995), 22 O.R. (3d) 514, 1995 CanLII 3498 (C.A.), at para. 35, cited in United States v. Bennett, 2014 BCCA 145, at para. 23:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously, a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable ...

[57] In considering credibility, the evidence of a witness must be assessed for "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and those conditions": Faryna v. Chorny, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.). A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness' evidence is found in Bradshaw v. Stenner, 2010 BCSC 1398, at para. 186, aff'd 2012 BCCA 296. A trier of fact may accept none, part, or all of a witness' evidence and may attach different weight to different parts of a witness' evidence. Gill Tech Framing Ltd. v. Gill, 2012 BCSC 1913, at para. 28.

[58] In Edmondson v. Payer, 2011 BCSC 118, Justice N. Smith dealt with a situation in which numerous minor issues were seized on to attack a plaintiff's credibility:

[31] In Diack v. Bardsley (1983), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], aff'd (1984), 31 C.C.L.T. 308 (C.A.), McEachern C.J.S.C., as he then was, referred to differences between the evidence of a party at trial and what was said by that party on examination for discovery, at 247:

... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.

[32] That observation applies with even greater force to statements in clinical records, which are usually not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most pertinent to the medical advice or treatment being sought on that day. There is no record of the questions that elicited the recorded statements.

[59] Overall, I found all of the witnesses credible and mostly reliable.

[60] There were minor inconsistencies between the plaintiff and his mother as to the amount she was paid for housework. There were minor inconsistencies between the plaintiff and his supervisor, Ms. Williams, as to approximately how often he leaves work early and approximately how often he accepts or declines overtime work. All of these relate to uncertain approximate numbers and were expressed as such by all involved. I found both the plaintiff's mother and Ms. Williams to be particularly reliable and so have used their numbers in my analysis below.

[61] As well, the plaintiff had stated on his discovery that he was not paying for housekeeping services, which was different from his evidence at trial and also from his mother's evidence. I accept that the evidence I heard at trial was correct.

[62] The cross-examination at trial was primarily focused on obtaining evidence in support of the defendant's theories as to damages, and there were few questions that directly impacted on credibility or reliability.

[63] Most importantly, I accept Mr. Harestad's evidence as to the pain he is in and the impact his back injuries in particular have had on his work and recreational pursuits.

Causation, Injuries, and Prognosis

Legal Principles

[64] The general test for causation, for which the leading case is Athey v. Leonati, [1996] 3 S.C.R. 458, 1996 CanLII 183, was concisely summarized by Justice Kent in Kallstrom v. Yip, 2016 BCSC 829, at para. 318:

1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;

2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;

3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is it is part of the cause of an injury, the defendant is liable; and

4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.

[Emphasis in original.]

[65] In Athey at paras. 32, 34-35, Justice Major noted the following key legal principles:

[32] The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss .

[34] The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

[35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Citations omitted.]

Positions of the Parties

[66] The plaintiff says that but for the MVA, he would not be suffering from the back pain that he experiences.

[67] The defendant suggests that there were other causes for some of the symptoms reported by the plaintiff. Specifically:

a) The defendant pointed to a note in one of the expert reports that the plaintiff at some point underwent various testing with respect to a heart condition and that while that testing was underway, was medically advised to avoid strenuous activities. The defendant notes that the plaintiff's mother testified that those heart issues are "still being monitored", even though there was no further medical advice to avoid strenuous activities in respect of those heart issues.

b) With respect to his symptoms of low mood, the defendant points to the fact that the plaintiff experienced bullying while an elementary student and the fact that his parents separated after the MVA. These are said to be alternative causes of any low mood or depression.

c) With respect to tailbone pain, the defendant points to evidence that at some point prior to the MVA, the plaintiff had landed on hard ground while attempting a high jump at school. The plaintiff's evidence was that his tailbone area was sore for about a week afterward. The evidence was inconsistent as to when this occurred. At times, the plaintiff had suggested it was in the fall of 2016, but he appeared confident by the end of his testimony that it was actually in the spring of 2016.

Analysis

[68] Clearly the plaintiff's significant back injuries were caused by the MVA, and the pain and other symptoms he continues to experience as a result of those back injuries are caused by the MVA.

[69] In my view, the better view of the evidence is that the heart condition is something that was tested for, but there is no basis in the evidence to conclude that it continues to affect the plaintiff in any material way.

[70] With respect to psychological issues, as will be seen below, I have declined to make a specific award in respect of counselling services. That said, it would be hard to imagine a person suffering life-changing injuries of the sort experienced by the plaintiff without them having some impact on that person's mood and outlook on life.

[71] With respect to the tailbone pain, I accept the evidence that the earlier fall had only impacted the plaintiff for a short time. There is no basis in the evidence to conclude that it had lasting effect.

Damages

Non-Pecuniary Damages

Legal Principles

[72] Both parties directed my attention to the judgment of Justice Kirkpatrick in Stapley v. Hejslet, 2006 BCCA 34, at paras. 45-46:

[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).

[73] Stapley reminds the court that in assessing non-pecuniary damages, one must consider the particular plaintiff, in their particular circumstances, and make an award that accommodates those unique circumstances.

Positions of the Parties

[74] Both parties note somewhat of a dearth of recent judgments involving plaintiffs suffering multiple fractured vertebrae. As a result, the cases that have been cited stretch back many years.

[75] The plaintiff submits that an appropriate award in this case would be $225,000. The plaintiff bases its submission on six cases that he says are comparable:

a) Slocombe v. Wowchuk, 2009 BCSC 967, in which the 25-year-old plaintiff suffered thoracic and lumbosacral spine injuries with associated chronic pain, headaches, and pre-existing asymptomatic spondylolisthesis that became symptomatic. He did not require spinal surgery. The court awarded general damages of $125,000 ($173,000 in 2023 dollars);

b) Asham v. Forsythe, 1997 CanLII 3192 (B.C.S.C.), in which the 18-year-old plaintiff suffered compression fractures of lumbar vertebrae at L1 and L2, which were treated with a back brace, as well as fractures of her left elbow, right ankle, and both feet. At trial, the injuries to her feet and back continued to limit her physical activities, including making it painful for her to lift heavy objects, and there was a risk of early onset of osteoarthritis. The court awarded general damages of $100,000 ($175,000 in 2023 dollars);

c) X. v. Y., 2011 BCSC 944, in which a 42-year-old plaintiff sustained various injuries, including a burst fracture in the thoracolumbar region requiring fusion surgery involving rods and screws. The plaintiff was also fitted with a clamshell brace during his recovery. The plaintiff was an RCMP officer, had to transfer to more administrative positions within the RCMP, and was limited to working four days a week, requiring regular breaks from sitting during the day. The court noted that the plaintiff had endured significant pain and discomfort while exhibiting perseverance and fortitude in resuming as many of his pre-collision activities as possible. The court awarded general damages of $140,000 (which would be the equivalent of $183,800 in 2023 dollars);

d) Schoenhalz v. Reeves, 2013 BCSC 1196, in which the 17-year-old plaintiff suffered transverse process fractures of the T2-T3 vertebrae, as well as a fractured pelvis and third-degree burns. The court awarded general damages of $150,000, which were then reduced by 20% as a result of the plaintiff being found contributorily negligent. (The base award of $150,000 is $193,415 in 2023 dollars);

e) Turner v. Dionne, 2017 BCSC 1905, in which the plaintiff suffered severe soft tissue injuries to her neck and back, a compression fracture of T11, a concussion, severe depression, and anxiety. The court awarded general damages of $200,000 ($242,322 in 2023 dollars); and

f) McCluskey v. Desilets, 2013 BCSC 1147, in which the plaintiff suffered a mild traumatic brain injury, fractured cervical vertebrae in three places, plus a compression fracture at T8 and a transverse process fracture at L1, significant jaw injuries, a collapsed lung, headaches, chronic pain, and psychological injuries. The court awarded general damages of $200,000 ($257,000 in 2023 dollars).

[76] The plaintiff acknowledged that the final two of these cases involved injuries that were more significant than the present case. However, with respect to the first three cases, the plaintiff noted a caution from the Court of Appeal against taking cases from the early 2000s and simply adjusting for inflation: Valdez v. Neron, 2022 BCCA 301. The plaintiff also notes the much different age of the plaintiff in the X. v. Y. case.

[77] The defendant argued that the appropriate award for non-pecuniary damages in this case is $200,000, which they say incorporates an amount in respect of housekeeping. The defendant identified three cases said to be comparable. One of them was the X. v. Y. case, also relied upon by the plaintiff. The other two were:

a) Schenker v. Scott, 2013 BCSC 599, var'd on other grounds 2014 BCCA 203. The plaintiff was 20 years old at the time of the accident in 2009. She suffered a C7 fracture as well as fractures from T4-T8 and underwent spinal fusion surgery. Expert evidence indicated that she would have long-term health issues. The plaintiff worked as a tree planter and pushed through two additional seasons of that work. The award of non-pecuniary damages was $150,000 ($189,000 in 2023 dollars).

b) Rickards v. Turre, 2023 BCSC 439, in which the plaintiff was a 12-year-old, struck by the defendant's car, whose main injury was a lateral tibial plateau fracture of the left leg leading to chronic knee pain, depression and anxiety, and weight gain. He also suffered a medial collateral ligament injury which healed, some scrapes and bruises, and a small residual area of numbness on his shin, which was painful if bumped. There was also a real and substantial possibility of worsening osteoarthritis. Non-pecuniary damages in that case were assessed at $110,000.

Analysis

[78] In my view, the two most comparable cases are X. v. Y. and Schenker. In my view, there should be an upward adjustment from the awards in these cases, and particularly the award in X. v. Y., given the age of the respective plaintiffs.

[79] Having considered my conclusions on causation, the cases provided to me by the parties, and the various factors discussed in Stapley, I would assess non-pecuniary damages in this case at $210,000.

Loss of Housekeeping Capacity

[80] The plaintiff argues that a separate award should be made with respect to loss of housekeeping capacity. The plaintiff submits that this court should award an amount that would permit the plaintiff to pay for housekeeping services at a rate of $20 per hour for two hours per week until he turns 70. Applying the 2% discount rate (which is applicable to cost of future care claims but also said to be the appropriate rate in this situation), and the resultant multiplier of 30.6731, the plaintiff says that the present value of this claim is $60,000.

[81] The plaintiff relies on the judgment of Justice Basran in Steinlauf v. Deol, 2021 BCSC 1118, who summarized the applicable principles as follows at para. 222:

· Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.

· A plaintiff who has suffered an injury that would make a reasonable person in his circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.

· Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.

· As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.

· Evidence of the loss of homemaking capacity is provided by the work being performed by others, even if done gratuitously.

[82] Prior to the accident in that case, the plaintiff lived on his own while he pursued a career as an RCMP officer. Having reviewed all of the evidence, Justice Basran concluded the plaintiff was "incapable of performing household tasks and will continue to rely on others to do this work." He awarded $164,000 for the cost of housekeeping based on the plaintiff having help for five hours per week at $20 per hour. The Court of Appeal affirmed the approach taken by the trial judge at paras. 116-117 of the Court of Appeal judgment (indexed at 2022 BCCA 96), noting that it was consistent with the approach set out in Kim v. Lin, 2018 BCCA 77.

[83] Recent appellate authorities on this issue include Liu v. Bains, 2016 BCCA 374, where the court approved an award of $70,000 commenting at paras. 25-26:

[25] 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.

[84] In Kim v. Lin, the plaintiff was a 27-year-old wife and mother who had prior to the accident in question been primarily responsible for the family's household work and childcare. The Court of Appeal dismissed an appeal from an award of $418,000 for loss of housekeeping capacity. Chief Justice Bauman noted at para. 33:

[33] where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu, "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": at para. 26.

[85] In Kim, Chief Justice Bauman cited with approval (at para. 30) the comments of Professors Cassels and Adjin-Tettey in Remedies: The Law of Damages, 3rd ed. (Toronto: Irwin Law Inc., 2014) at 187-188:

Where the plaintiff continues to perform the tasks but with difficulty, requires more time to complete tasks, or manages to get by without doing or intending to do these tasks, the loss may be compensated for as part of non-pecuniary damages for pain and suffering and loss of amenity. Specifically, compensation is intended for the plaintiff's pain in persevering with housework, loss of satisfaction in not contributing to the upkeep of one's home, and/or for having to live with a disordered and perhaps not a well-functioning home. There may be a fine line between situations of diminished capacity to perform tasks and when the plaintiff completes tasks with difficulty. Care needs to be taken in making these distinctions to ensure fairness to both plaintiff and defendant. A pecuniary award may be appropriate where the evidence indicates that a reasonable person in the plaintiff's circumstances should not be expected to continue to perform the tasks in question due to their injuries. Such a position avoids prejudicing plaintiffs who are stoic, or are unable to benefit from gratuitous services or afford to hire replacement services prior to trial.

[Footnotes omitted.]

[86] In McKee v. Hicks, 2023 BCCA 109, the Court of Appeal explained what some had thought was a difference between the approach in Kim and that reflected in another judgment - Riley v. Ritsco, 2018 BCCA 366. The court in McKee noted at paras. 105-112:

[105] It is important to recognize that what was being sought in Riley was not an award of pecuniary damages, but rather a segregated award of non-pecuniary damages to recognize a decline in the plaintiff's aptitude for housekeeping chores. The Court accepted that its assessment of non-pecuniary damages needed to recognize the plaintiff's diminished housekeeping abilities, but considered that the case did not call for a segregated non-pecuniary award:

[102] I acknowledge what was said in Kroeker about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

[106] The decisions in Kim and Riley have led to some confusion in the trial court, with at least one judgment describing the two decisions as "apparently inconsistent" (St. Jules v. Cawley, 2021 BCSC 1775 at para. 71). The Supreme Court has frequently referred to the judgment of Justice Gomery in Ali v. Stacey, 2020 BCSC 465 in attempting to describe the effect of Kim and Riley. At para. 67 of Ali, Gomery J. reconciled the practical operation of the Court's findings in Kim and Riley as follows:

a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; Kim at para. 33.

b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; Riley at para. 101.

c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; Kim at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; Kim at para. 44.

d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; Riley at para. 102.

[107] Much of what is said in Ali accurately reflects the approach this Court countenanced in Kim and Riley, and it has served the trial court well. That said, there are some nuances of this Court's jurisprudence that are not completely reflected in Ali.

[108] It is important to recognize that Kim and Riley dealt with somewhat different issues. Kim considered a situation of genuine incapacity - one where the injuries made it unreasonable to expect the plaintiff to perform some household tasks. Kim established that such claims are typically to be dealt with by awarding pecuniary damages. Further it states that such damages should generally be assessed with a view to the cost of obtaining replacement services on the open market.

[109] Kim recognizes, however, that the preference for awarding pecuniary damages in such cases is not absolute. A judge retains discretion to assess damages as non-pecuniary, where it is considered appropriate to do so. The case also suggests (citing McIntyre v. Docherty, 2009 ONCA 448) that, in some cases, full compensation for the loss of housekeeping capacity may require an award of both pecuniary and non-pecuniary damages.

[110] Especially in light of this Court's unanimous decision in Riley, I do not read Kim as suggesting that there is a discretion to award pecuniary damages in cases where the plaintiff remains capable of performing all household tasks but encounters some frustration or difficulty in doing them. Such cases are cases where the damages are non-pecuniary in nature.

[111] Riley was such a case. The Court acknowledged that the plaintiff's difficulties had to be considered in assessing the amount of non-pecuniary damages but rejected the idea that a segregated non-pecuniary award was necessary. It also suggested that segregated non-pecuniary awards should not be made absent special circumstances.

[112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[87] The defendant argues that the work done by the plaintiff's mother is voluntary and not necessary. That is, the plaintiff is capable of cleaning his own house to the extent he wants to, but his mother simply wants to help out. The defendant notes that prior to the mother's retiring and moving back to Bella Coola in April 2021, the plaintiff did his own housekeeping. The defendant notes as well that the plaintiff's brother, Daylon, shares the house with the plaintiff, although is often out of town for work. The defendant submits that Daylon, when home, is able to help out. The defendant argues that the court should conclude that there is not a sufficient need for outside housekeeping service, and that this is a case where it is the plaintiff who realistically does the bulk of his housekeeping work - a

factor properly recognized in the award of non-pecuniary damages.

[88] In my view, it was clear on the evidence that the plaintiff's mother regularly comes to his house to assist with some of the basic cleaning tasks. I accept that this is necessary because of the impact on the plaintiff of the physical exertion required of him in order to perform his employment functions.

[89] While the evidence was not entirely consistent as to the exact number of hours worked by the plaintiff's mother and the exact amount paid to her, I am satisfied that she does at least two hours per week of work. I am also satisfied that if the plaintiff's mother was no longer able to perform this work, it would be appropriate for the plaintiff to pay an arm's-length party to do the work, and to do so would likely cost at least the $40 per week on which the plaintiff's claim is based.

[90] In my view, this is an appropriate case for a pecuniary award for loss of housekeeping capacity, which would recognize that the plaintiff, although performing some housekeeping tasks himself notwithstanding the pain he is in, would reasonably seek out and pay others to perform some portion of the household work.

[91] In my view, given the young age of the plaintiff, the determination he shows in continuing to put in maximum effort at work, and the risk of further degeneration in his physical capacity moving forward, the award of $60,000 that is sought is reasonable.

Loss of Earning Capacity

[92] The parties were agreed that $10,000 is an appropriate award for the plaintiff's past loss of income-earning capacity.

[93] The parties had very different views with respect to an appropriate award for loss of future income-earning capacity, and that issue was a major focus of both the evidence and of submissions at trial.

Legal Principles

[94] The task of assessing a claim for loss of earning capacity was described by Justice Dickson, as he then was, in Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, at p. 251, 1978 CanLII 1:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: The Queen v. Jennings, [[1966] S.C.R. 532]. A capital asset has been lost: What was its value?

[95] Assessing a party's loss of future earning capacity therefore involves comparing the plaintiff's likely future had the accident not happened to their future after the accident. This assessment depends on the type and severity of the plaintiff's injuries and the nature of the anticipated employment in issue: Ploskon-Ciesla v. Brophy, 2022 BCCA 217, at para. 7.

[96] The fundamental goal is, to the extent possible, to put the plaintiff in the position he would have been but for the injuries caused by the defendant's negligence: Pololos v. Cinnamon-Lopez, 2016 BCSC 81, at para. 133.

[97] The proper approach to assessing future loss of income-earning capacity was canvassed by the Court of Appeal in Rab v. Prescott, 2021 BCCA 345, where at para. 47, Justice Grauer set out the following three-step process:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in Brown). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in Dornan at paras 93-95.

[98] Step one requires consideration of whether the evidence establishes a potential future "event" that could lead to a loss of capacity such as a chronic injury.

[99] In Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.), at para. 8, the court set out four factors that may be considered:

[8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[100] With respect to the Brown factors, Justice Grauer stated the following in Rab, at para. 36:

[36] ... these considerations are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.

[101] The plaintiff is not entitled to an award for loss of earning capacity if there is not a real and substantial possibility of a future event leading to income loss. Ploskon-Ciesla at para. 14. Thus, the second step of the tripartite test involves determining whether there is a "real and substantial possibility" of a future event leading to a pecuniary loss: Rab, at para. 47. This "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": Gao v. Dietrich, 2018 BCCA 372, at para. 34.

[102] In describing the "real and substantial possibility threshold" in Rab, Justice Grauer stated at para. 28:

[28] Difficult as it is, that task is a necessary first step in the analysis of whether a plaintiff has established a claim for loss of future earning capacity. This was explained by Mr. Justice Goepel, dissenting but not on this point, in Grewal v. Naumann, 2017 BCCA 158:

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: Perren v. Lalari, 2010 BCCA 140 at para. 32.

[103] In Dornan v. Silva, 2021 BCCA 228, Justice Grauer concluded at para. 75 that:

[75] to support a contingency deduction, the law does not require that the "measurable risk" involved be wholly inherent in the plaintiff's pre-existing condition, without the need for any external event to act upon it in order to give rise to a debilitating effect. The question is whether, given the pre-existing condition, there was a real and substantial possibility of future debilitating symptoms absent the accident. That real and substantial possibility may arise solely from the nature of the pre-existing condition itself, or require an external event acting upon that condition. In either case, the possibility must be real and substantial, not speculative.

[104] He continued at paras. 92-95 to note that:

[92] The importance of evidence in cases involving a specific contingency was discussed in Graham (and cited with approval by this Court in Hussack):

46 [C]ontingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.

47 If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: Schrump v. Koot, supra, at p. 343 O.R.

[Emphasis added.]

[93] The process, then, as discussed above at paras 63-64, is one of determining whether, on the evidence, the contingency or risk in question is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood, as we saw from the excerpt from Athey quoted above at paragraph 64.

[94] It follows that here the judge was required to engage in three different kinds of assessments. The first concerned what had happened to the appellant in the past, which had to be proved on a balance of probabilities. The second concerned what might happen to the appellant in the future, which possibilities, as discussed in Athey, could be taken into account only to the extent they were found to be real and substantial possibilities.

[95] Once the hypothetical event in question was found to be a real and substantial possibility, it became incumbent upon the judge to undertake the third assessment: the relative likelihood of that possibility.

[105] In Lo v. Vos, 2021 BCCA 421, the plaintiff had developed severe depressive symptoms after the motor vehicle accident. The trial judge reduced the award of damages based on a real and substantial possibility that the plaintiff would have developed depression after the collision anyway as a result of pre-existing back pain. The Court of Appeal concluded that nothing on the evidence of the case was capable of supporting that conclusion, commenting at paras. 71, 74-75 and 78-79:

[71] I observe at the outset that no expert in this case suggested that, absent the accident, the appellant was at risk of developing a major depressive disorder, or any of the other psychological problems that the appellant experienced after the accident, and which were found to be the cause of her continuing disability. There was no evidence of a risk of a natural (i.e., without accident) progression from the pre-existing state to the relevant future hypothetical event.

[74] The existence of a specific contingency such as was found here must be proven by evidence that is capable of supporting the conclusion that the occurrence of the contingency is a real and substantial possibility, as opposed to a speculative possibility: Graham at 15; Hussack v Chilliwack School District No. 33, 2011 BCCA 258.

[75] In my respectful view, nothing in the evidence in this case is capable of supporting that conclusion. There was no indication that the appellant had any inherent vulnerability to mental health problems because of her without-accident state. Instead, on the evidence, it took a particular combination of factors that began with the appellant's pre-existing condition, but also required the impact of the injuries caused by the accident in the form of (1) soft tissue and acute injuries leading to (2) a condition of chronic pain that, (3) when combined with PTSD arising from the accident, resulted in (4) the development of generalized anxiety disorder and major depressive disorder.

[78] I should add that it is, of course, essential to consider a plaintiff's pre-existing state, such as the appellant's low back problems here, in the assessment of damages. That is part of her original state, and distinguishes her from someone whose original state was free of any physical problems. But whether her original state gave rise to a measurable risk of a future hypothetical event is a different question, requiring additional evidence.

[79] In the circumstances before us, it is my respectful view that the evidence was not capable of establishing, as found by the judge, a measurable risk that the appellant "would have developed a major depressive disorder consequent on chronic lower back pain even without the accident". That is no more than speculation.

[106] In Lo, the Court of Appeal concluded that there was a palpable and overriding error in the trial judgment, and the Court substituted the trial judge's award of $225,000 for loss of earning capacity with an award of $810,000.

[107] The third and final step of the tripartite analysis involves assessing the value of the possible future loss, which step must include assessing the relative likelihood of the possibility occurring.

[108] With respect to assessing loss of future earning capacity, there are two established approaches: (1) the earnings approach; and (2) the capital asset approach: Rab, at paras. 66-68; Grewal at para. 48; and Perren v. Lalari, 2010 BCCA 140, at para. 32. Both approaches are correct but apply in different situations. The earnings approach is more straightforward and is applicable when the loss is easily measurable: Perren, at para. 32. For example, when

an accident results in injuries that render the plaintiff unable to work at the time of trial and for the foreseeable future: Ploskon-Ciesla, at para. 11. The capital-asset approach is less clear-cut and is more appropriate when the loss is not measurable in a pecuniary way: Perren, at para. 12. For example, in instances where the plaintiff's injuries have led to continuing deficits but their income at trial is similar to what it was at the time of the accident: Ploskon-Ciesla, at para. 11.

[109] The assessment of loss must be based on the evidence but requires an exercise in judgment and is not a mathematical calculation: Pololos, at para. 133. Questions of reasonableness and fairness of awards should be reviewed at the end of the assessment, once the real and substantial possibilities that are identified have been assessed and a preliminary conclusion has been reached: Lo, at para. 117.

Positions of the Parties

[110] The plaintiff submits that he is in pain daily at work with such pain worsening as each day and each week goes by but that he minimizes his injuries or continues on, albeit with accommodations from his employer, and notwithstanding those accommodations, having to take the occasional day off or leave work early. The plaintiff submits that the plaintiff is working at or near his limit right now and that based on the prognosis of both Dr. Heran and Dr. Sangha, the probability is that his capacity will only decrease as he ages. The plaintiff notes that there is a possibility based on that evidence that he will require a future surgery that would leave him totally disabled and submits that this is a risk that the court should recognize.

[111] The plaintiff bases his earning capacity calculation on the implied assertion that but for the MVA, the plaintiff would have had a full-time career as a butcher to age 65.

[112] The plaintiff submits that the evidence indicates that at present, he misses approximately 25-30 hours of work each month, which is said to be approximately 14.5 % of the time he should be at work. The plaintiff notes as well that he accepted very little of the overtime work available to him and that he has minimal capacity to do side work during the hunting season.

[113] The plaintiff submits that in the short term, future income loss to age 30 could be based on a $50,000 annual income, for which a 15% loss based on the multiplies as set out in the CIVJI manual would give a present value of just over $56,000.

[114] The plaintiff submits future earning capacity for ages 30 to 40 should be based on a $60,000 annual employment income, which is based on what his supervisor suggested would be the peak earning capacity for a grocery store butcher and meat department manager in Bella Coola, plus a further $15,000 to reflect income from overtime and side project work for ages 30 to 40. The plaintiff submits that the court should assess the likelihood of lost income for this time as 25%. The plaintiff calculates the present value of this loss as approximately $140,000.

[115] Finally, the plaintiff submits that it is likely that he would be forced to retire at age 40 rather than age 65. It calculates the present value of the 100% loss of an income of $60,000 for this 25-year period as $1.24 million, and for an income of $75,000, the number is $1.55 million. The plaintiff submits that the value of this loss should be assessed at $1.4 million, which is between these two numbers.

[116] Thus, the plaintiff submits that the total loss of capacity would be calculated as $56,000 to age 30; $140,000 from ages 30 to 40; and $1.4 million from ages 40 to 65; for a total of $1.596 million. The plaintiff submits that even if one considers contingencies, the award for loss of earning capacity should be least $1.4 million.

[117] The defendant notes that the plaintiff successfully completed high school on time, as well as the TRU program, and has been working full-time since he returned to Bella Coola some three-and-a-half years ago. He has not taken any extended time off due to the MVA. He has an employer who is willing to accommodate his disabilities, including by improving his working environment, providing him with extra breaks, and allowing him to leave work early when necessary. He has been promoted and now supervises another employee. The defendant submits that the plaintiff should be able to work smarter, not harder, and that he has equipment available to him that will allow him to do that.

[118] The defendant also notes the existence of other medical concerns, including the heart issues that the expert witnesses referenced in passing, which might have impacted his earning capacity in any event.

[119] The defendant submits that the plaintiff has not met the burden of proof to establish that his future earning capacity has been diminished as a result of his injuries from the MVA or at the very least there should be a substantial negative contingency applied to reflect the plaintiff's pre-existing health conditions.

[120] In the alternative, should this court determine that an award for future earning capacity should be made, the defendant submits that the plaintiff's projected average annual income loss to age 65 should be assessed as $19,777. This number reflects a gradually increasing hourly wage (up to $30 per hour) with loss of capacity starting at 3% in the upcoming year, increasing to 10% by age 33, then to 15% by age 43, 20% by age 53, and 25% by age 63. The calculation contemplates three scenarios: The plaintiff working to age 65 in his current role; the plaintiff switching to an alternative (lower paying) vocation at age 45; and the plaintiff retiring at age 45. It calculates the average annual income loss from these scenarios at $8,440, $14,735, and $36,157 respectively. The average of these three numbers is $19,777. The defendant calculates a present value based on an average annual deficit of $19,777, which gives rise to a total loss of $500,000.

Analysis

[121] Dealing with the first step of the tripartite test, it is clear that the plaintiff has been rendered less capable overall of earning income. His evidence was that he is slowed in his work. He has to take extra breaks, and he is regularly required to leave before the end of his regular shifts. While he is a motivated employee who works without complaint to the limits of his abilities, he is still less marketable as an employee. He currently has an employer and a supervisor who see value in what he brings to the role and to this point are willing to accept his limitations. Given the plaintiff's age, however, there is a significant risk that during what remains in his working career, he will be in a position where he is required to seek new work, and for that he is clearly less marketable.

[122] Dealing with the second step of the test, I begin by looking at the plaintiff's likely career path absent the MVA. In my view, the most likely course would have been for the plaintiff to work as a butcher or in a comparable career requiring physical work and a good work ethic. The plaintiff was not strong academically and sometimes struggles to express himself. I also accept that he would have been the sort of employee who would accept available overtime and would have taken on seasonal work to supplement his basic employment income.

[123] I do not accept that there is a real and substantial possibility that would give rise to any sort of contingency deduction from the plaintiff's absent-MVA course. The two medical experts made reference in passing in their reports to investigation of a heart condition, but the evidence of the plaintiff is that although he had limited activity for a period of time while it was being investigated, that restriction was removed, and he was cleared for regular activity. While the plaintiff has been tested at times for various syndromes, there was no admissible evidence as to the nature and extent of any of those syndromes and how they could impact the plaintiff's earning capacity. Both medical experts were clear that these matters were outside of their expertise. In my view, no contingency deduction is appropriate with respect to these matters.

[124] Dealing with the plaintiff's actual likely career path in light of the accident, it is my view that the evidence establishes a current relatively stable career path in which the plaintiff is accommodated, does miss work on a fairly regular basis, and declines some but not all overtime work. His ability to perform any seasonal butchering work during hunting season is very limited. As well, I accept based on the medical evidence that while the exact timeline is uncertain, the plaintiff's ability to earn income will likely be reduced in the future, partly on a gradual basis and partly in connection with acute events such as a possible surgery.

[125] I do not, however, see it as likely that the plaintiff will retire fully at age 40 as suggested by the plaintiff. I accept that he lives, as he always has, in a small community that likely has a limited range of available employment for someone with significant physical disabilities. However, in light of the plaintiff's strong connection to this community and his strong work ethic, I think it is likely that he would continue to work, albeit at a reduced income level.

[126] Both parties have put forward calculations that are in effect based on the earnings approach. I accept that the plaintiff has a significant employment record at this point, and the available information as to likely earnings in his chosen career is sufficient to apply that approach. That said, it is my view that the plaintiff's proposed calculation with respect to income loss after age 40 is excessive, while the defendant's proposed calculation, starting as it does with only a 3% loss of capacity, fails to account for the reality of the plaintiff's actual reduced earning capacity. That underassessment of his current loss of earning capacity permeates the balance of the defendant's calculation as well.

[127] In my view, an appropriate award for loss of earning capacity in this case would be $750,000. I base this on the defendant's calculation as to the $500,000 but add in a further $250,000 as an upward adjustment to provide a more realistic assessment of the plaintiff's existing and future decreased earning capacity.

[128] In my view, there are both positive and negative contingencies at play here. For example, there are possibilities that the plaintiff's condition will remain stable longer than anticipated, while there are equally contingencies that the condition will deteriorate more quickly than thought. I conclude that those contingencies are already incorporated into the assessment of the $750,000, and there is no need to apply a further upward or downward contingency to that number.

Cost of Future Care

Legal Principles

[129] The purpose of an award for the cost of future care is to restore the injured party to the position they would have been in but for the accident. This is based on the necessary medical evidence to promote the mental and physical health of the plaintiff: Pang v. Nowakowski, 2021 BCCA 478, at para. 56. In Gao, the Court of Appeal summarized the applicable principles at paras. 68-70 as follows:

[68] An award for damages for cost of future care is based on the principle of restitution. In Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229 at 241 242, Dickson J., as he then was, explained the purpose of an award for cost of future care:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not

been committed. To this extent, "restitutio in integrum" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.

[69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); Aberdeen v. Zanatta, 2008 BCCA 420 at para. 41; Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: Milina at 84; Aberdeen at para. 42.

[70] In Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).

[130] Assessing damages for cost of future care is not a precise accounting exercise. As noted in Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9:

[21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

[131] Future care costs are a matter of prediction requiring the court to determine the present value of future care needs of an injured party while also considering contingencies to account for the fact the future may differ from evidence procured at trial: Thind v. South Coast British Columbia Transportation Authority, 2022 BCSC 197, at para. 76. The test is whether a reasonably minded person of ample means would be ready to incur the expense: Brennan v. Singh, [1999] B.C.J. No. 520, 1999 CanLII 6932 (S.C.), at para. 78; Cheema v. Khan, 2017 BCSC 974. The court must be satisfied that the care item is one the plaintiff would, in fact, use; that it was made necessary as a result of the accident; and that it is not a care item that the plaintiff would have procured in any event. Williams v. Sekhon, 2019 BCSC 1511, at paras. 171 to 172.

Positions of the Parties

[132] The plaintiff submits that he is 22 years old with a permanent impairment that will deteriorate and that, while the exact course of the future is uncertain, what is clear is that it will involve future care. The plaintiff submits that an appropriate award could be $200,000 based on the recommendations and cost estimates in Ms. Peters' report. The plaintiff relies on the multiplier of 28.6616 (for 43 years to age 65). The net calculations show the total present value of all the recommended treatments would be $260,534.

[133] The defendant argues that while the medical recommendations are extensive, the plaintiff's actual participation to date and the various treatments being considered have been minimal. He has not to date pursued massage therapy, chiropractic treatment, or active rehabilitation with a kinesiologist. He only attended six physiotherapy sessions after finding that he did not have time given his work commitments. The defendant suggests an award of $40,000 would be appropriate in the circumstances.

Analysis

[134] Dr. Heran recommended a swimming program at least three times a week, exercise at the gym with a personal trainer three times a week, massage therapy and local treatments for myofascial tensions that do develop. Dr. Heran also noted the need for assistance in home and yard maintenance and cleaning. Dr. Sangha recommended physiotherapy, chiropractic treatment, and/or massage treatment to treat flare-ups, as well as functional support such as occupational therapy, an in-home assessment, and an ergonomic analysis of the work site.

[135] In my view, Ms. Peters' report already serves as the in-home assessment contemplated by Dr. Sangha.

[136] Ms. Peters has identified that in Bella Coola, physiotherapy and massage therapy treatments are approximately $120 per session, with chiropractic treatments at approximately $60 per session. I am cognizant in reviewing this cost of the plaintiff's minimal participation to date. At the same time, I note Dr. Heran's comment that the plaintiff is at the prime of his life in terms of his ability to manage symptoms. At the same time, he has been focused on establishing himself in his career. The plaintiff testified that he will pursue recommended treatments, and in my view it is realistic to think that he will do so and will do so increasingly as he ages and as the predicted degenerative changes arrive.

[137] Ms. Peters has proposed budgeting for 12 sessions of physiotherapy per year and 12 sessions of massage therapy per year, with the latter focused on dealing with flare-ups. In my view, that is a reasonable level of service. The present value of $2,880 per year is $82,545.

[138] With respect to fitness, Ms. Peters researched costs of swimming, participation in a fitness centre, and sessions with a kinesiologist to set up and monitor a training program. She noted that there is no indoor pool in Bella Coola, but rather an outdoor pool that is open during July and August (and which the plaintiff has made use of). The fitness centre has a cost of $30 per month, which includes some directed group classes. There are no kinesiologists in the Bella Coola Valley, so Ms. Peters has recommended that virtual services be used - with ten sessions to start up an initial program and one to two sessions annually thereafter to review and revise the program as needed. Sessional rates are $80 to $110.

[139] In my view, these recommendations are reasonable. I would calculate the cost at $1,000 for the initial set of kinesiology, with annual costs of $640, made up of $80 for a pool pass, $360 for a fitness pass, and $200 for ongoing kinesiology (having a present value of $18,343). The total for this category is $19,343.

[140] Ms. Peters has recommended that $1,250 to $2,500 be set aside for vocational support for such time as the plaintiff is unable to continue work as a butcher. In my view, there is a possibility that at some point he will need to change careers, and that possibility is real and substantial. I would add $1,000 to the award to make provision for vocational support. The reduced amount reflects the fact that this expense is not a certainty.

[141] Ms. Peters has noted the comments of Dr. Heran about the likelihood of further medical treatment with respect to the plaintiff's back issues as well as the limits on Bella Coola's medical facilities and has provided cost estimates for travel to and from Vancouver for specific medical consultations and investigations. In light of the comments of both Dr. Heran and Dr. Sangha, I think this is a likely expense. Ms. Peters has proposed a provision be made for eight to ten trips for which her estimated cost is $10,800 to $14,200. In my view, it would be reasonable to award $11,000 in respect of these likely future travel costs.

[142] Ms. Peters has also identified that the plaintiff would likely need additional home support in the event of future medical interventions. The costs of this support are significant. In my view, there is a real and substantial possibility of future medical interventions, but not a certainty. I would add $6,000 to the award to reflect these costs.

[143] Ms. Peters has noted the lengthy wait times for certain services to be provided through the Medical Services Plan, with particular reference to MRIs. She has proposed provision be made for up to three private MRIs over the plaintiff's lifetime. The rationale is that some MRIs may be required more urgently, and it may not be reasonable to make the plaintiff wait. I am not convinced that there is a real and substantial possibility that the plaintiff will be required to pay for a private MRI. I would not make an award in respect of this part of the claim.

[144] Ms. Peters recommended certain household and yard equipment for the plaintiff adapted to his limitations (automatic vacuum, adjustable handled mop, a long-handled battery-operated scrubber, large wheelbarrow) which equipment would cost approximately $1,275 and be replaced every five years. The present value of this is $10,200. In my view, this is a reasonable claim.

[145] Ms. Peters identified certain equipment that would help reduce heavy lifting and prolonged stooping should the plaintiff open a home butcher facility. In my view, the evidence does not establish a real and substantial possibility that the plaintiff would set up his own butchering business.

[146] The plaintiff seeks an award in respect of the costs of psychological counselling. I recognize that Saadati v. Moorhead, 2017 SCC 28, makes clear that a medical diagnosis of a recognized DSM-5 disorder is not a precondition to an award in respect of psychological issues. However, it is my view that the evidence of actual need for counselling in this case is very limited. In essence, the plaintiff and a handful of other witnesses spoke of his low mood. One or two of the witnesses suggested that in their opinion, the plaintiff may be depressed. It would perhaps not be surprising that in light of the life-altering consequences of the MVA and the pain burden the plaintiff is bearing, his mood would have suffered. It is my view, however, that the evidence simply does not provide sufficient medical justification for a claim for counselling services.

[147] Finally, in light of Dr. Heran's recommendation for the plaintiff to have assistance from time to time with heavier duty yard and home projects, I would add a further $10,000 to the award. I recognize that Ms. Peters had recommended a much higher amount, $1,800 per year for yard maintenance and $1,375 per year for home maintenance. It is my view that the plaintiff will continue to have some residual capacity for projects during weekends and holidays, and that an award of the magnitude suggested would be excessive.

[148] In my view, having considered the various claims advanced by the plaintiff, I consider an appropriate award for the cost of future care to be $140,000.

Conclusion

[149] For the reasons set out above, I would award:

a) Non-pecuniary damages of $210,000;

b) Loss of housekeeping capacity of $60,000;

c) Loss of past earning capacity of $10,000;

d) Loss of future earning capacity of $750,000; and

e) Cost of future care of $140,000.

[150] Should either party seek costs other than the usual order, they should provide their submission to me in writing through Supreme Court Scheduling within six weeks of this judgment. The other party may reply within three weeks thereafter. I will advise whether I believe a hearing is necessary, although the parties are welcome to indicate in their submissions whether they believe that a hearing would be appropriate. If neither party makes a submission with respect to costs, then the plaintiff will have his costs on Scale B.

[151] If the parties identify any mathematical errors or if there is any issue that I have failed to deal with that was properly before me, then the parties may seek clarification of those matters with the same schedule for submissions as in respect of costs.

[SUBMISSIONS]

[152] THE COURT: If there is a claim that was advanced in your submission that I have not dealt with in this judgment, we should stick with the protocol that I have set out. You can bring this to my attention by a submission made through Supreme Court Scheduling in accordance with what I have set out above. Given that I have set out a protocol for anything that was missing that was properly before me, I think we should follow that protocol.

"Veenstra J."

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