

CANADA / JUDGMENT

Hastings v. Mathew

2020 BCSC 1418

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1418 Hastings v. Mathew

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hastings v. Mathew,

2020 BCSC 1418

Date: 20200924

Docket: M83032

Registry: Nanaimo

Between:

Jonathon Hastings

Plaintiff

And

Kizhakekathil Mathew and Indhumathy Mathew

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 43 and paragraph 59 on September 29, 2020.

Before: The Honourable Mr. Justice Thompson

Reasons for Judgment

Counsel for the Plaintiff:

N.E. Smith

Counsel for the Defendants:

E. Wagner

Place and Dates of Trial:

Nanaimo, B.C.

August 24-27 & 31, 2020

September 3-4, 2020

Place and Date of Judgment:

Nanaimo, B.C.

September 24, 2020

- [1] This is an assessment of damages incurred by Jonathon Hastings in a rear-end motor vehicle accident in Nanaimo on 14 November 2015. Mr. Hastings, now 38 years old, is a construction contractor. His case is that the low back injury he sustained in the MVA continues to significantly impact his capacity to earn income, his ability to attend to chores and home renovations, and his enjoyment of family and recreational life.
- [2] The plaintiff, his wife, his father, a neighbour, and a customer gave evidence. Expert evidence was received from a neurosurgeon, an orthopaedic surgeon, a functional capacity assessor, a vocational consultant, and an economist. There are few disputed facts. Mr. Hastings is a reliable historian, the lay evidence he called provides support for his evidence, and the expert opinion evidence is not controversial. The parties are a considerable distance apart, however, on most heads of damages.

Before the Motor Vehicle Accident

- [3] Mr. Hastings grew up in Nanaimo. His father was a commercial construction contractor, and as a young boy Mr. Hastings showed considerable proficiency and interest in building things. His father also sparked his interest in outdoor life, and taught him to hunt and fish.
- [4] From the time Mr. Hastings was 14 years old, his father arranged employment for him at commercial construction sites during the summer and on other school breaks. Mr. Hastings did not excel in school because of his difficulties with reading and writing -- difficulties that were evidenced in the results of the tests conducted by the vocational expert in this case. He did, however, graduate from high school with his cohort in 2000. While in high school, he met his future wife. They began living together soon after leaving high school, and have been together since. They now have two boys, ages seven and six.
- [5] After high school, Mr. Hastings began working full-time in construction. By June 2006, he had obtained his red seal certification as a wall and ceiling installer, a trade formerly known as carpenter lather; he thus became a member of the same trade as his father. Mr. Hastings worked in his trade doing commercial construction work in the years through to 2014. His usual work was installing non-combustible framing and drywall, as well as T-bar and

suspended ceiling systems. He was employed on large projects such as colleges, malls, police detachments, medical clinics, condominium buildings, and hotels. He acquired particular aptitude and interest in doing "deficiency work" -- because of the breadth of his abilities and the knowledge of the building he acquired during its construction, he was well-placed to lead a crew remedying a list of deficiencies after construction was substantially complete. He explained that it is advantageous to have the person that laid out and constructed the walls and ceilings do deficiency work because they are thoroughly familiar with the structure.

- [6] In January 2014, he completed work on a large project in Victoria. Working out of town was hard on the family, which by this time included a one-year-old, and another on the way. Mr. Hastings and his wife resolved that he would look for work close to home, but after a few months looking for work in his trade, he took lesser paying work with Adrian's RV Repairs Ltd. Mr. Hastings did some mechanical work on the RVs, but most of his work at Adrian's was structural repair and renovation of the vehicles. This was the job he held at the time of the November 2015 MVA; his pre-MVA plan was to do this work at Adrian's for about another year -- i.e., until approximately the end of 2016 -- then attempt to return to his customary lines of construction work. As it turned out, for reasons unconnected with Mr. Hastings' MVA injuries, he was laid off from his job at Adrian's effective 28 December 2015.
- [7] Mr. Hastings' evidence that he planned to work in the Nanaimo area until approximately the end of 2016 was corroborated by his wife's evidence: she testified that their plan was that Mr. Hastings would work close to home for a total of two or three years. Mr. Hastings' evidence was that moving on from working at Adrian's would have been a financial necessity -- he testified that the family was losing ground financially while he was working there.
- [8] Mr. Hastings was generally in good health in the years prior to the MVA. He had intermittent bouts -- never lasting longer than a week -- of non-disabling low back pain for which he saw a doctor on a couple of occasions. In the distant past, he had fractured his right hand and injured his right ankle. The fracture and insertion of a plate in his hand left him with weakness and restriction in range of motion of his last two fingers. The ankle injury rarely caused him discomfort. None of these pre-MVA conditions had any material impact on his ability to work or to enjoy recreational activities such as hunting, fishing, and surfing.

The Motor Vehicle Accident and Resulting Injuries

- [9] Mr. Hastings was the front seat passenger in the family's minivan. His wife was driving; their two boys were also in the vehicle. After leaving a drive-thru restaurant, Ms. Hastings stopped to yield for traffic as she was intending to enter onto the Island Highway. Their vehicle was struck from behind by the defendants' sedan. The impact pushed the minivan forward and damaged its bumper and receiver hitch.

- [10] At the moment of impact, Mr. Hastings was leaning forward. He had two coffees between his feet on the floor and was dividing up food for the boys. After information was exchanged with the defendant driver, the Hastings family attended at a walk-in clinic, principally to check on the health of the children. By the time they were at the clinic, Mr. Hastings' neck and back had stiffened and he felt some numbness in his right thigh. During the wait for medical examination, he went to a pharmacy and purchased anti-inflammatory medication.
- [11] Mr. Hastings had neck pain and positional dizziness following the MVA, but these symptoms disappeared within weeks. His low back pain is the most serious result of the MVA. He describes it as a muscle knot that never goes away. If he moves the wrong way, the pain can get particularly severe -- he describes these episodes as debilitating shooting pain which, at the time of trial, take up to three days to settle back down to base-level pain. When this debilitating pain comes on, he notices some numbness in his upper right thigh.
- [12] Mr. Hastings' back pain has affected his sleep and his mood. Prior to the MVA, he would sleep well; since, he sleeps on his side and positions seven pillows and a rolled up blanket for stability, and he tosses and turns. For a time he turned to beer and marihuana to dull the pain so he could try to get some work done around the yard and home after work. Not surprisingly, this strategy turned out to be counterproductive and has, for the most part, been abandoned.
- [13] In the months following the MVA, Mr. Hastings was followed by his family doctors and attended physiotherapy. A CT scan of his lumbar spine in May 2016 revealed two congenital defects involving the dorsal elements of L5. The relevance of these abnormalities was addressed by experts, and is further discussed below. In mid-2016, Mr. Hastings attended the Nanaimo Regional General Hospital's pain clinic for assessment, following which he attended for another course of physiotherapy treatments between August and December 2016.
- [14] In April 2017, at the request of his solicitors, Mr. Hastings was assessed by a neurosurgeon, Dr. Rajesh Sahjpaul, who diagnosed myofascial and mechanical low back pain. This pain pre-dated the MVA but was aggravated. Dr. Sahjpaul described the two defects at L5; each is longstanding and stable, i.e., not degenerative. While he did not rule out the possibility that the defects might have played some role in producing Mr. Hastings' pre-MVA back pain, Dr. Sahjpaul's opinion is that the pain was principally myofascial. As to prognosis, his opinion is that Mr. Hastings will more likely than not be left with persistent low back pain. Barring further injury, this pain is unlikely to worsen. The treatment recommendations included formal assessment in a pain management program with consideration given to injection therapy -- it was hoped that the injections would provide some relief but were not expected to be curative. (Mr. Hastings subsequently saw Dr. James Francis, a general physician, for injections of lidocaine to his low back. These provided only a slight amount of relief.)

- [15] Dr. Sahjpaul was asked in cross-examination about the prospect of surgery. He testified that when he saw Mr. Hastings in 2017, he did not think it was a good idea. An L5/S1 fusion is an option down the road if Mr. Hastings wanted to take this step, but it would not be a cure -- Dr. Sahjpaul recommends surgery for patients whose symptoms have plateaued at a level that is disabling. By "disabling" I infer that Dr. Sahjpaul means substantially incapacitated. Mr. Hastings' condition has plateaued at a level that is slightly improved from what it was when he saw Dr. Sahjpaul three years ago. My understanding of Dr. Sahjpaul's evidence considered in the round is that surgery may be an option, but it is not a good option and he would continue to advise against it barring an unexpected worsening of Mr. Hastings' condition.
- [16] In October 2017, Mr. Hastings underwent a one-day functional capacity evaluation by Andrew Wong, an occupational therapist. Mr. Hastings exhibited good effort throughout the day. Mr. Wong's key findings were that Mr. Hastings demonstrated the ability to perform full-time work in heavy strength jobs, with limitations for stooping, work at low levels, overhead reaching, and handling large unbalanced loads.
- [17] Mr. Hastings undertook shockwave physiotherapy and IMS needling treatments between January and August 2018. He has an aversion to needles, and he found the IMS treatments painful. These treatments initially inflamed his back pain but they eventually had the valuable effect of reducing the bounce-back time from his episodes of disabling pain -- from a period of weeks down to a few days; this is one important way in which Mr. Hastings' condition is better than it was when he saw Dr. Sahjpaul. Mr. Hastings' plan to return for another round of needling therapy this year has been delayed by the COVID-19 outbreak.
- [18] In April 2018, Mr. Hastings took a battery of tests supervised by Sheryl Thompson, a vocational rehabilitation consultant. These tests revealed superior spatial and mechanical reasoning abilities, and supported Mr. Hastings' evidence of his significant difficulties with reading and writing. Ms. Thompson's opinion is that he is suitably employed as the owner/operator of his own construction business because of the autonomy and flexibility this gives him. As owner/operator he controls his selection of job tasks and pace of work. Ms. Thompson identified various heavy strength pre-injury options that would appear to be no longer sustainable, suggesting a loss of vocational capacity. She identified occupations such as residential home inspector and janitor as viable vocational alternatives. Mr. Hastings would require some formal training to obtain necessary qualifications to be a home inspector and there are other significant start-up costs to entering this line of work. With regard to the option of becoming a janitor, Mr. Hastings is understandably disinterested in leaving behind his accumulated knowledge, skills, and residual capacity as a builder to do janitorial work.
- [19] In February 2020, Mr. Hastings was assessed by Dr. Alan Richardson, an orthopaedic surgeon. This appointment was arranged at the request of the defendants. With respect to Mr. Hastings' low back, Dr. Richardson considers that his longstanding L5 defects were likely operative in producing his intermittent pre-MVA back symptoms, and that the MVA

aggravated his symptoms. But for the MVA, he would have carried on with intermittent symptoms. In order to confirm that the defects to the L5 vertebra are stable, Dr. Richardson recommended a bone scan and a further MRI. Dr. Richardson doubts that these further investigations would reveal instability of clinical significance at the site of the developmental abnormality, but if they did, it would be in order to refer Mr. Hastings to a surgeon for consideration of whether an L5/S1 fusion is appropriate. If Mr. Hastings were to undergo a fusion, he would be off work for three to six months, and he would require physiotherapy, exercise including core strengthening, and pain medication. In the likely event that there is no instability at the site of the L5 defects, core-strengthening exercise and an interventional pain clinic are called for. Mr. Hastings has not had the further imaging suggested by Dr. Richardson.

- [20] I find that if the MVA had not occurred, Mr. Hastings would have continued to have intermittent non-disabling back pain. I find that as a result of the MVA, his chronic back pain is highly likely to persist indefinitely. I conclude that there is only a very slim possibility that he will have surgery.

Non-Pecuniary Damages

- [21] The Court of Appeal outlined the proper approach to the assessment of non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46, leave to appeal refused, [2006] S.C.C.A. No. 100. The factors to be considered include Mr. Hastings' age, the nature of his injuries, the severity and duration of his pain, disability, emotional suffering, loss or impairment of life, the impairment of his family and social relationships, the impairment of his physical and mental abilities, and loss of lifestyle. Stoicism should not reduce a non-pecuniary damages award -- and I find that Mr. Hastings has been fairly stoical in his reaction to the challenges presented by his MVA injuries.
- [22] Mr. Hastings' chronic back has affected his relationship with his wife and his boys: he used to return home from work, play with his boys, and help his wife prepare dinner or cleanup the kitchen. Now he is irritable and spends much of his time at home on the couch, nursing his back. He has had to modify his hunting and fishing such that he does not derive the same enjoyment and contentment from being in the outdoors. He no longer surfs, fearing injury. The plaintiff submits that the appropriate award is in the range of \$110,000 to \$125,000, citing *Slocombe v. Wowchuck*, 2009 BCSC 967; *Clayton v. Barefoot*, 2018 BCSC 239; *Fox v. Danis*, 2005 BCSC 102; and *Chawla v. Lambright*, 2017 BCSC 1884. The defendants urge an award of between \$40,000 and \$60,000, relying on *Chapman v. Zilm*, 2020 BCSC 695; *Klim v. Purdy*, 2014 BCSC 578; and *Szymanski v. Morin*, 2010 BCSC 1.
- [23] Each case must be decided on its own facts. An individualized assessment is called for, and it is neither possible nor desirable to develop a tariff: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637; *Dilello v. Montgomery*, 2005 BCCA 56 at paras. 39-43. However, reference to awards made in similar cases can be of assistance in arriving at a fair award for non-pecuniary damages. All of the cases cited by counsel were to some extent helpful. Despite some

distinguishing facts, the Szymanski case is a quite useful comparator. In that case, an energetic, hardworking and stoic 55-year-old floor installer suffered a neck injury which left him with chronic mild to moderate pain. He continued to work, but did so in pain. His previously active outdoors lifestyle was impacted by his condition, particularly his pursuits of hunting, mountain hiking, and canoeing. Justice Ker awarded \$75,000 (approximately \$85,000 in current dollars), a small part of which was based on Mr. Szymanski's inability to conduct home renovations at his usual pace.

- [24] I must endeavor to return Mr. Hastings to his original position, but not better than his original position. In this regard I am cognizant of his various pre-MVA conditions including his intermittent low back pain; however, because none of these conditions disabled Mr. Hastings to any degree, they are nearly immaterial to the assessment. Having regard to the Stapley considerations, I fix the appropriate sum for non-pecuniary damages at \$95,000. I do so without accounting for the effects of Mr. Hastings' injuries on his domestic capacity because the parties agree that this is an appropriate case in which to make a separate award for impairment of this capacity.

Past Loss of Capacity to Earn Income

- [25] In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 30-31, the Court of Appeal explained that a claim for what is often described as "past loss of income" is actually a claim for past loss of earning capacity -- i.e., "a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury". The value of the loss may be measured in different ways: for example, by actual earnings the plaintiff would have received, by a replacement-cost evaluation of tasks that the plaintiff is now unable to do, or by an assessment of reduced business profits. The test to be applied to hypothetical events, whether past or future, is whether there is a real and substantial possibility that the events would occur: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Smith v. Knudsen*, 2004 BCCA 613 at para. 29; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 43-46; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. In measuring the value of the loss, the events are to be given weight according to the relative likelihood that they would have occurred: *Athey*, at para. 27; *Smith*, at paras. 29, 31.
- [26] What is called for in this case is a comparison of Mr. Hastings' actual earnings with an assessment of his earnings assuming the MVA had not occurred ("without-accident earnings") in the nearly five-year period from the date of the MVA to trial. The parties approach the measurement of the value of the past loss of earning capacity in this way, but urge sharply different outcomes. The plaintiff claims \$212,500 (before accounting for income tax) on the assumption that without the MVA he would have become fully employed within about a month after losing his employment at Adrian's. His further assumptions are that he would have become employed in the relatively lucrative line of work he was doing before he worked at Adrian's, and that he would have earned approximately \$85,000 per annum -- the average of his earnings in 2012 and 2013. The claim is discounted 15 percent

for negative contingencies.

- [27] I heard no evidence about Mr. Hastings' earnings in the years before 2012. In 2012, his employment income was \$69,394 and in 2013 it was \$100,656. In 2014, his employment income dropped to \$39,831, and he received \$4975 in Employment Insurance benefits -- this drop in employment income and receipt of EI benefits reflects his departure from his trade in January 2014 and being out of work until he began at Adrian's in April 2014. In 2015, working for Adrian's throughout, his employment income was \$51,288.
- [28] For their part, the defendants submit that \$15,000 (before accounting for income tax) is the appropriate past loss of capacity award. They rely on Dr. Richardson's evidence as to the amount of time off work that is typically reasonable following a soft tissue injury to the lumbar spine. They point to Mr. Hastings' return to work at Adrian's immediately after the MVA and his loss of that work for reasons unconnected to his injuries. And, they put particular emphasis on the absence of evidence of specific opportunities for work that the plaintiff missed out on because of his MVA injuries. On this latter point, the defendants cite *Job v. Van Blankers*, 2009 BCSC 230 at paras. 117-126, in which the claim of a self-employed architectural photographer, who was 29 years old when injured, was disallowed on the basis that her unsupported testimony that she missed opportunities to work full-time was insufficient to discharge the burden of proof. The plaintiff was "unable and even unwilling to provide any documentary evidence in the form of spreadsheets, client lists, and the like to demonstrate or substantiate that claim" (para. 117). Justice Ker characterized the evidence supporting this claim as "entirely vague and unsatisfactory" (para. 126).
- [29] Of course, these cases turn on their facts. In order to satisfy the onus of proof on the balance of probabilities standard, the evidence must be sufficiently "clear, convincing and cogent": *F.H. v. McDougall*, 2008 SCC 53 at para. 46. However, the quality of evidence necessary to meet the relative standard described in *F.H. v. McDougall* depends on the "nature of the claim and of the evidence capable of being adduced": *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 40. We are addressing hypothetical past events: but for the MVA, what type of work would have been sought by Mr. Hastings in the pre-trial period? Would he have restricted himself to looking for work in the Nanaimo area? Would he have been fully employed? I am satisfied that the evidence clearly establishes a real and substantial possibility of loss on the balance of probability standard. Mr. Hastings' work history shows a strong attachment to his wall and ceiling installer trade, and demonstrates his ability to find fairly consistent employment in that trade over a period of many years. I accept his evidence and his wife's evidence that he stopped working away from home because of their family situation. And I accept that they planned on this geographic restriction on his employment would be necessary for only a few years.
- [30] I assess the past loss of capacity by breaking it down into two periods: 2016, and 2017 to trial. The beginning of 2017 marks when I find it is likely that Mr. Hastings would have sought work in his trade, and outside of the Nanaimo area if necessary: this would be three years after he returned from the job in Victoria, having resolved to find work in Nanaimo.

There is no loss in 2015, because, although he was sore and in pain, Mr. Hastings returned to work at Adrian's after the MVA, and continued to work there without missing time during the seven weeks until his permanent layoff at the end of December 2015 due to shortage of work.

- [31] The plaintiff claims that his loss for 2016 is \$51,446 less a 15 percent contingency deduction -- this amounts to approximately \$44,000; the defendants urge a finding of a \$15,000 loss in this period on the basis that it was reasonable for Mr. Hastings to be away from work for some part of that year. The plaintiff's submission acknowledges that Mr. Hastings would have been laid off by Adrian's whether the MVA happened or not, and the submission assumes that by February 2016 he would have found work befitting his skills and experience in the Nanaimo area. This scenario further assumes that he would have earned at the 2012/2013 rate. The plaintiff's claim for 2016 allows for the deduction of \$25,554 -- the total of EI benefits received and the \$3000 he earned doing odd jobs.
- [32] I accept that a fair starting point for assessing the amount of 2016 without-accident earnings is to assume annual income of approximately \$85,000 (i.e., the average of his 2012 and 2013 earnings), because I think it likely that Mr. Hastings would have sought out full-time work in his trade if the MVA had not occurred. However, I think it is appropriate to discount the 2016 income loss claim more heavily than the 15 percent urged by the plaintiff. The impression I gathered from Mr. Hastings' evidence is that during 2016 he focused on his treatment and trying to achieve recovery rather more than on finding employment, and I find that the evidence does not sufficiently support his absence from the work force in the latter few months of the year. I also take account of the fact that Mr. Hastings looked for three months in early 2014 for work that was a "good fit" before giving up and taking the job at Adrian's -- absent the MVA, there is every chance that it would have taken him some time to find work. I also bear in mind the absence of affirmative evidence that employment in his trade was available in Nanaimo after the MVA, but in doing so I recognize that Mr. Hastings was employed in his trade over many years with a good deal of consistency and some of these jobs were in the Nanaimo area. This is not a case in which absence of evidence about specific projects or opportunities is fatal to his claim.
- [33] For 2016, I assess the loss of capacity to earn income by taking one-half of the \$85,000 average of his 2012/2013 earnings (i.e., applying a 50 percent discount), and then subtracting the agreed-upon amount of \$25,554 for EI benefits and pay for odd jobs. This comes to the rounded sum of \$17,000. (*Kristan v. Lind*, 2017 BCSC 1205 at para. 37, was cited in support of EI benefits being accounted for in the assessment; because the parties agree to the deduction of EI benefits received by the plaintiff, I need say no more on this point.)
- [34] In 2017, Mr. Hastings returned to construction work, and since then he has done business through a proprietorship, Coastline Installations. This new business has achieved gross profits of \$68,211 in 2017; \$48,792 in 2018; and \$57,637 in 2019.

- [35] In 2017 and 2018 he worked as a subcontractor on a large project doing bits and pieces of framing. His work on this project involved working with small pieces of wood. As the work on the project progressed to occupancy permit stage, Mr. Hastings was able to move into the position of superintending the deficiency work. This remained hands-on work, but his position allowed him to manage the work of the day around how his back was feeling from time to time.
- [36] Since this project came to an end, Mr. Hastings has been engaged in insurance restoration and home renovation work. He has found steady work with the exception of a recent three-month COVID-19 shutdown. The evidence I heard from one of his home renovation customers supports my impression that Mr. Hastings does work of very high quality. The customer's evidence also supported Mr. Hastings' assertion that he moves carefully and avoids certain tasks. He does this to guard against attacks of back pain that would put him out of commission for a few days. I think Mr. Hastings' decision to do home renovation and insurance restoration work since the large 2017-2018 project came to an end was a sensible one, and I do not understand the defendants to disagree. It has given him flexibility to work at his own pace and to work on what he is capable of doing from day-to-day or hour-to-hour.
- [37] Mr. Hastings works by himself or with the help of the customers who have hired him to do renovations. When doing work on one large and ongoing home renovation, Mr. Hastings has used labour hired by the customer. To this point, Mr. Hastings has not hired employees, although he hopes to grow his business to the point where it makes financial sense to hire an apprentice.
- [38] For the period from 2017 to date, the plaintiff's claim starts with a without-accident earnings figure based on his 2012/2013 earnings and then deducts income actually earned -- principally the business income shown on his income tax returns, after adjusting to add back some of the business deductions to account for personal benefit received from deduction items such as telephone, motor vehicle, and business use of home. This add-back analysis is consistent with the approach adopted in *Basra v. Masood*, 2019 BCSC 2156 at para. 80, wherein Justice Warren recognized that the earnings outcome fell somewhere between the gross and net income generated by Mr. Basra's tile-setting proprietorship because of the personal benefit he received from some deducted expenses.
- [39] Assuming earnings of approximately \$85,000 per annum, the without-accident earnings on this scenario would be approximately \$310,000 for the period from January 2017 to trial. From this figure, the plaintiff subtracts his estimate of the actual earnings after add-backs (approximately \$104,000), and then deducts a further 15 percent to account for contingencies, arriving at a before-tax figure of about \$175,000. [I note an arithmetic error at para. 119 of the plaintiff's argument which accounts for the slight difference in the claim advanced in the argument and the figures recited in this paragraph.]

- [40] Subject to making allowance for contingencies, I agree that \$85,000 per annum is a proper starting point for assessing without-accident earnings. The plaintiff's suggested contingency deduction for this period is not sufficient given the state of the evidence on the availability of work, although I think it likely that by 2017 Mr. Hastings would have returned to his trade and probably been casting his net outside of the Nanaimo area if necessary to find work. Regardless, I think it likely that if Mr. Hastings returned to his trade, it would have taken him some time to acquire work and in the beginning he may not have been steadily employed. Further, the COVID-19 outbreak would probably have negatively affected his earnings for 2020. I apply a 25 percent contingency deduction to the plaintiff's figure of \$310,000 earnings for this period; this yields hypothetical without-accident earnings of \$232,500 for the period from 2017 to trial.
- [41] Turning to an accounting of Mr. Hastings' actual earnings to be deducted from his postulated without-accident earnings, I do not agree with the defendants' position that all of the deductions for telephone, motor vehicle, and business use of home should be added back. However, the add-backs proposed by the plaintiff are too conservative. For instance, the plaintiff argues for an add-back of only 50% of the telephone expense on the basis of his evidence that he would not need a cellphone that "operates like a computer" if he did not have his business. For many years now the most widely used phones have operated as computers. I also think his position on the motor vehicle add-back likely does not account enough for personal use, and that part of his business use of home deduction ought to be added back notwithstanding his evidence that he needs a place to store his service trailer, flat deck, and tools. The defendants seek to add-back approximately \$44,000; the plaintiff's calculation adds back approximately \$20,000 (including an inventory adjustment for 2019). I conclude that adding back \$30,000 results in a fair measurement of the plaintiff's actual earnings.
- [42] In the result, the total of Mr. Hastings' actual earnings for 2017 to date is \$120,000. This rounded figure is derived from adding his net business income for 2017 to date to the \$30,000 in add-backs referenced above and to the \$6000 CERB benefits he has received. His net business income figures are \$29,787 for 2017; \$15,797 for 2018; \$21,397 for 2019; and \$17,000 in 2020 to date. The latter figure is a rough approximation given the state of the evidence of 2020 income and expenses.
- [43] Subtracting Mr. Hastings' actual earnings of \$120,000 from his postulated without-accident earnings of \$232,500 yields a loss of \$112,500. Adding this loss for 2017 to date to the \$17,000 loss for 2016 makes a sum of \$129,500. Using the income tax table provided by counsel, I assess the past loss of earning capacity at \$97,000.

Future Loss of Capacity to Earn Income

- [44] A plaintiff is required to prove a substantial possibility of a future event resulting in a loss in order to recover damages for loss of future earning capacity. If such an event is proven -- and there is no doubt that it has been proven in this case -- then the loss may be quantified

according to the earnings that he will lose (the "earnings approach"), or by the harm that has been caused to his capacity as a capital asset in the working world (the "capital asset approach"): *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach will be appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64.

- [45] The capital asset approach involves considering factors such as: (1) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (2) whether the plaintiff is less marketable or attractive as a potential employee; (3) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (4) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at 356 (S.C.); *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53, 56.
- [46] The plaintiff urges an award based on an earnings approach that makes use of a future income loss present value multiplier of approximately 21 (to age 65) applied to an annual loss of \$50,000. Because the multiplier does not account for labour market or other contingencies other than survival probability, the plaintiff submits that a substantial contingency deduction is appropriate, and that \$700,000 would fairly compensate him for his loss of capacity.
- [47] The defendants' submission is based on a capital asset approach. They argue that one year's earnings, using the year immediately prior to the MVA, is an appropriate award; in the alternative, they submit that an award of two years' earnings at this rate is reasonable. The defendants' approach would result in an award in the approximate range of \$50,000 to \$100,000.
- [48] I prefer the capital asset approach. The loss is not easily measurable. There is no evidence of the quantum of earnings before 2012 and Mr. Hastings had altered his career course in the year before the MVA to be close to his young, growing family. While I think it probable that he would have returned to his trade, and likely that he would have ventured outside of the Nanaimo area for work if necessary, there is substantial uncertainty surrounding these matters. All of this makes for a shaky baseline of without-accident earnings. Mr. Hastings is in the early years of a new business venture and it is difficult to confidently predict his future earnings. This makes the "with accident" scenario not readily amenable to an arithmetic-based approach. To make use of the comparison of two highly uncertain arithmetically derived numbers, even as a starting point as one looks into the crystal ball, would be an unhelpful and perhaps misleading exercise.
- [49] While I agree with the defendants that the capital asset approach is appropriate, I cannot agree that Mr. Hastings would be properly compensated by one year's or two years' pre-MVA earnings, especially with annual earnings at Adrian's forming the base. His lower back injury and chronic pain leaves him with restrictions in his capacity to do all aspects of heavy work -- indeed, it is apparent that each of the *Brown v. Golaiy* considerations point to a

significant loss. Taking account of all of the circumstances including his degree of disability, all of the uncertainties that I have mentioned as reasons that an earnings approach is problematic, and labour market and other contingencies, I think a multiple of three years' earnings in his trade (i.e., using his average earnings from 2012 and 2013) leads to a proper assessment of his losses arising from the impairment of his future earning capacity. I think it is appropriate to use his earnings as a wall and ceiling installer, rather than his earnings at Adrian's, because his earnings in his trade are more representative of how the plaintiff customarily made use of his income earning capacity and are more representative of how the plaintiff would likely have continued to make use of his earning capacity but for the MVA.

- [50] This approach results in an award of approximately \$250,000. I think this sum, although a somewhat arbitrary assessment of the loss, properly compensates the plaintiff and is fair to the defendants.

Impairment of Domestic Capacity

- [51] The parties agree that this is an appropriate case for making a standalone loss of domestic capacity award. Such an award is to be assessed generally and not calculated precisely: *Campbell v. Banman*, 2009 BCCA 484 at para. 26. The plaintiff urges an award of \$60,000. The defendants argue that this would be far in excess of a reasonable award, but decline to make a more specific submission.
- [52] In 2012, just before birth of their elder son, the Hastings purchased a 2000 square foot "fixer-upper" on a half-acre lot. The home is wood-heated. Before the MVA, Mr. Hastings used to buck and split the firewood but now he buys it. Before the MVA, Mr. Hastings had put his construction knowledge and skills to good use at home. In the evenings and on weekends, with some help from friends and family, he built a new roof, rebuilt the deck, erected new walls in all three bedrooms, put new fixtures in, built a secure room in the basement for his hunting rifles and ammunition, and installed perimeter drainage. Mr. Hastings testified that that much remains to be done. A shed remains half-built. The basement space needs to be renovated, and the planned bridge across a creek in the back of the property remains on the drawing board. The bathrooms and kitchen need remodelling. I accept that Mr. Hastings' chronic pain has limited his capacity to complete these projects.
- [53] Mr. Hastings' neighbour helps out with the yard work, and has lent a hand from time to time with heavier tasks on the Hastings property including work on a retaining wall, and removal of a stump. This neighbour testified that he was mowing his grass one day a few years ago, and noticed that the Hastings' lawn had not been mown for some time. He decided to do the neighbourly thing, and since that time has carried on with the mowing. He has also cleaned out the Hastings' gutters, blown off the roof, helped to rake leaves, and shoveled the driveway when it snows. He does these chores because he sees the pain that doing these chores causes Mr. Hastings if he tries to do them. In return, Mr. Hastings provides his neighbour with supervisory assistance on home renovation projects.

- [54] I recognize that a degree of restraint has characterized awards under this head of damages, and that Mr. Hastings retains some capacity to do chores and home renovations. I find that \$35,000 reasonably compensates him for impairment of domestic capacity.

Cost of Future Care

- [55] Damages for cost of future care compensate for expenses to be incurred to sustain or promote mental or physical health. The services and items must be reasonable -- both in the sense of being medically required or justified, and in the sense that the plaintiff will be likely to incur them. See *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 28-30; and *O'Connell (Litigation Guardian of) v. Yung*, 2012 BCCA 57 at paras. 55-56. There must be a link between a physician's assessment of pain, disability, and recommended treatment, and the recommended future care item: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 39; *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68-70.
- [56] Mr. Hastings seeks an award of approximately \$2500 for a further course of IMS therapy, the treatment that he testified has provided him with the most relief. I am satisfied that this care item is sufficiently rooted in the medical assessments of Mr. Hastings' pain, disability and recommended treatment, and I allow this claim.
- [57] The plaintiff also seeks a "nominal amount" for treatment at an interventional pain clinic, and a \$5000 allowance for treatment and medication that would be required in the event that Mr. Hastings undergoes spinal fusion surgery. The medical evidence supports referral to a multi-disciplinary pain clinic. The evidence is that some of these clinics are publicly funded, some are not. Counsel for the plaintiff argued for a nominal sum on the basis that an anticipated s. 83 Insurance (Vehicle) Act application will cover this item. In these circumstances, I award \$1000 for pain clinic treatment. Because I conclude that the prospect of spinal fusion surgery is very slight, I allow only \$500 to account for what are highly contingent treatment costs associated with the surgery.

Special Damages

- [58] The parties agree on \$2200 for special damages.

Summary

- [59] I am satisfied that this award of damages, taken as a whole, is fair to the plaintiff and the defendants:

Non-pecuniary damages

\$ 95,000

Past loss of earning capacity

97,000

Future loss of earning capacity

250,000

Loss of domestic capacity

35,000

Cost of future care

4,000

Special damages

2,200

Total

\$ 483,200

The plaintiff is also entitled to court order interest on his past pecuniary losses.

[60] Unless there are matters of which I am unaware, Mr. Hastings is entitled to his costs of the action on Scale B. The parties have liberty to apply if they seek a different order.

"Thompson J."

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