
CANADA / JUDGMENT

Henbury v. Egilson

2019 BCSC 215

COURT

Supreme Court of British Columbia

DECIDED

22 February 2019

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2019 BCSC 215 Henbury v. Egilson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Henbury v. Egilson,

2019 BCSC 215

Date: 20190222

Docket: M113288

Registry: Kelowna

Between:

Paul Henbury

Plaintiff

And

Ashaya Egilson and Jacquelin Frederick

Defendants

The text of the judgment was corrected on the face page where changes were made May 13, 2019

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

J.S. Grewal

J.A.S. Gill

Counsel for the Defendants:

G. Ginter

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 14-17; 21-25, 2019

Place and Date of Judgment:

Kelowna, B.C.

February 22, 2019

Introduction

- [1] This is a personal injury action arising out of a motor vehicle/pedestrian collision that occurred during the early evening hours of December 23, 2014 on Milne Road in Summerland, B.C. (the "Accident"). The plaintiff claims general damages, special damages, future care costs, loss of future earning capacity, cost of future care, loss of housekeeping capacity and an in-trust claim on behalf of his wife.
- [2] Liability for the Accident was disputed until the evidence concluded at trial. At that point, it was admitted by the defendants.
- [3] The plaintiff, a physically active and outgoing man, says the Accident injured him physically, psychologically and cognitively. He says it has changed his ability to function recreationally, domestically and at work. In particular, he says that his ongoing cognitive difficulties have affected his ability to be promoted, resulting in a significant reduction in his ability to earn income.
- [4] His main ongoing physical complaint relates to his left knee. He underwent exploratory arthroscopic surgery on it on August 15, 2017. The surgery improved its function, but did not fix it. He says the knee pain is now chronic and permanent.

Plaintiff's Background

- [5] The plaintiff is 45 years of age and resides with his second wife, Ms. Leslie Crowe ("Leslie"), in Summerland, B.C. He grew up in Montreal in a well-adjusted family of 10. His father was a college professor and his mother a stay-at-home parent. He is fully bilingual. He was a good student and excelled in school.
- [6] Throughout his childhood, the plaintiff was active in sports and martial arts (with a 3rd degree black belt in one discipline and a 2nd degree black belt in another). He is also an accomplished musician.

- [7] Following graduation, he moved to Vancouver where he fell in love with the lifestyle, activities, and particularly the weather. He obtained employment in the restaurant service industry where he met his first wife, Ms. Rachelle Dubreuil ("Rachelle").
- [8] In 2001, he returned to Montreal with Rachelle and they both enrolled at Concordia University to pursue their love of music. He has been playing guitar professionally since age 15. He graduated with distinction from his program, earning him a Bachelors of Arts degree with a specialty in jazz performance.
- [9] Through his contacts in the restaurant service industry, he was offered a position with an Okanagan winery and moved to Summerland with Rachelle in 2006. At that point, he did not have much of a career plan.
- [10] He eventually started working at the Red Rooster Winery near Penticton as a chef and kitchen manager. Rachelle worked there as a server. Because his employment was mostly seasonal, he and Rachelle also taught music out of their home.
- [11] In July 2009, he applied for and obtained employment at the Canada Revenue Agency ("CRA") office in Penticton. He has worked there full-time ever since.
- [12] Leading up to the Accident, the plaintiff continued to participate in various activities including martial arts, biking, hiking, motorcycling, skiing, golf and soccer. He was also a member of various bands including an 18-piece jazz orchestra that played at fundraisers and other events.
- [13] He also remained involved in the wine industry and took sommelier courses. During the summer and harvest seasons, he worked weekends at Red Rooster Winery opening and closing its wine tasting room. He also worked as a volunteer at special events in the Penticton area.
- [14] In 2013, he and Rachelle separated. He met and started dating Leslie later that year in September 2013.
- [15] In May 2015, he and Leslie moved in together in a rental accommodation in Peachland, B.C. They were married on July 1, 2017 and now reside in a rental accommodation in Summerland. They hope to be able to purchase a home with a small acreage within the next year or two.

Pre-Accident Health

- [16] The plaintiff enjoyed generally good physical health before the Accident. He was active and enjoyed the outdoors. He was heavily involved in the renovation of the home he and Rachelle owned in Summerland. In 2013, he was involved in a motorcycle accident resulting in an injury to his right hand but has had no ongoing issues.

- [17] Psychologically, he has had some issues pre-accident. In 2009, he was referred to a grief counsellor to help him deal with his mother's death. Likewise, he had a rough year emotionally in the 2013-2014 timeframe due to the dissolution of his marriage with Rachelle, the suicide of a friend, and personal financial issues. In the spring of 2014, he saw his family doctor, Dr. Van Der Vyver, to talk about job stress and dissatisfaction he was feeling at the time. Despite this, he does not believe he had any significant or ongoing psychological issues leading up to the Accident.

The Accident

- [18] The Accident happened on December 23, 2014. At about 7:00-7:30 p.m., the plaintiff went for his usual after-work walk on a hiking trail near Giant's Head Park in Summerland. It was a dry, clear evening. It was dark.
- [19] At the time, the plaintiff was living on Milne Road at the foot of Giant's Head Mountain. He crossed the street from his residence and walked on the gravel shoulder towards the hiking path about thirty yards uphill.
- [20] At about the same time, Ms. Egilson, one of the defendants, had left her boyfriend's residence in the 2012 Volkswagen Jetta ("Jetta") she co-owned with her mother, Ms. Fredrick, a co-defendant. She was driving down Milne Road where the speed limit is 30 kilometres per hour. The plaintiff saw the Jetta's headlights approaching from uphill and instinctively noted that its speed seemed to be well in excess of 30 kilometres per hour. He saw the Jetta begin to fishtail to his right and then veer toward him. The plaintiff saw that he was about to be hit and instinctively tried to jump out of the way onto a small rock formation adjacent to the path. Unfortunately, he was not able to dodge the Jetta and was struck in the knee area. The Jetta then rolled onto its roof and came to a rest on Milne Road.
- [21] The plaintiff says he recalls the impact of his elbow and then his head striking the ground. He thinks at that point he lost consciousness briefly. He then recalls looking downhill and seeing the car on its roof. The driver was attempting to kick the door to get out. He recalls jumping up in what he describes as a "fight or flight" reaction and then sitting on a concrete no-post barrier on the opposite side of the road. Ms. Egilson approached him with concern, asking if she had hit him. He replied that she had.
- [22] The plaintiff then texted Rachelle, who coincidentally lived nearby, for help. The ambulance and fire department arrived followed by the police. He recalls being placed in the ambulance, but not much else. He was transported to the Penticton Regional Hospital for assessment and treatment.
- [23] X-rays disclosed that nothing was broken. He was released later that evening and Rachelle and her new spouse drove him back home.
- [24] Leslie drove from her home in Kelowna to stay with him overnight in accordance with a concussion protocol he had been given at the hospital.

The Plaintiff's Injuries

- [25] The nature and extent of the plaintiff's injuries are disputed.
- [26] In addition to cuts, scrapes and bruises that resolved a few weeks after the Accident, the plaintiff sustained a more significant injury to his left knee. The defendants acknowledge that his knee was injured but the extent of that injury is in dispute.
- [27] The plaintiff also alleges that he is suffering from chronic headaches behind his left eye as well as intermittent neck and back pain.
- [28] Additionally, the plaintiff claims he suffered a mild traumatic brain injury that resulted in ongoing cognitive deficits affecting his employment at CRA. Whether or not the plaintiff sustained a brain injury became the main focus of the trial.

CRA Employment

- [29] As indicated, the plaintiff works for the CRA. He was hired by the CRA in July 2009 after he answered an ad seeking bilingual workers. He had no prior background or experience in accounting or tax matters. After on-the-job education, he started as a GST Collection Contact and Compliance Officer. He did well and after about one year moved into the Informant Leads Program (a hotline for the public to report suspected tax evaders). The centre he was working at shut down in January 2012 and he was transferred back to the collections department in Penticton.
- [30] In 2011, he took a leave of absence to be a stay-at-home caregiver for Rachelle who had health issues at the time. To make ends meet, he worked part-time at a local restaurant.
- [31] In June 2012, he returned to CRA in a "VOCALLS" (a call centre) position.
- [32] There are various pay grades within CRA known as "SP" (for "service and programs") and "AU" (for "audit"). Within each pay grade are pay levels. Each pay grade has increasing education and qualification requirements and the size and complexity of files increase.
- [33] At the time of the Accident, the plaintiff was classified as a SP-4, level 5, earning \$57,830 annually. He also received a small annual bilingual bonus of approximately \$800. His pre-Accident performance reviews were positive and he was meeting all of CRA's expectations.
- [34] Prior to the Accident, he was approached by a CRA's audit department manager who suggested that he would be a candidate to work in audit at an SP-4 entry-level position provided he upgraded his accounting skills. He needed four courses to qualify for the position. He planned to take one evening course per semester. Accordingly, in January 2014, and while continuing to work full-time at CRA, he enrolled at Okanagan College and took the first course, Financial Accounting I, passing with a final grade of 94%. In September 2014, he enrolled in the next course, Financial Accounting II, which he completed just before the Accident. He received a final grade of 81%.

- [35] After the Accident, he was off work for 15 weeks and then began a medically supervised graduated return to work program. He was back to full-time hours by the end of April 2015. Between January 2015 and April 2015 and while he was off-work, he took the Intermediate Accounting I course online. He completed the course but struggled with some concepts and was late with some of his course assignments. His final grade was a 75%, which was average among the students that semester.
- [36] In September 2015, he enrolled in the Intermediate Accounting II course at Okanagan College. By October 2015, he was feeling overwhelmed and struggled to understand the materials. The morning of the first midterm exam, he withdrew from the course.
- [37] At the same time, he was having difficulty keeping up with the SP-4 workload. In December 2015, he took a lateral transfer to a clerical position in CRA's security department as a SP-3 Security Administrator at the same pay. He stayed there from December 2015 to October 2017. He enjoyed the work and by all accounts was very good at it. The security job started out as a temporary posting but in February 2016 it became a permanent assignment. From time-to-time during that tenure, he acted as the Security Officer when his boss was away. His performance reviews in this capacity were glowing, noting that he worked well independently and had successfully managed several security incidents and assisted with emergency management plans. According to a November 21, 2016 performance review: has been the recipient of several commendations regarding his service delivery and interpersonal skills. Paul has proven very capable in meeting shifting priorities, and last-minute deadlines for special projects/tasks".
- [38] In short, he was excelling and exceeding expectations in the Security Department.
- [39] In October 2017, he was approached by an Audit Manager regarding a potential opening in that department. CRA had received an increased budget and were desperate for personnel. He did not have the educational qualifications for audit, but as part of the arrangement he was permitted to work there provided that he took and passed the Intermediate Accounting II course. Accordingly, in October 2017 he left his position in security and started in an entry-level SP-4 audit position performing simple tax return reviews. It was different from other jobs he had done in the past and there was a steep learning curve.
- [40] From January 2018 to April 2018, he took the Intermediate Accounting II course at Okanagan College passing with a final grade of 70%. In order to pass, he stated that he required accommodations.
- [41] In June 2018, he applied for and was accepted as a SP-5 GST Refund Integrity Examiner where he continues to work at the moment.

- [42] He needs some additional courses to meet the educational requirements for CRA's audit department including Advanced Accounting. He says he is not able to take it due to his ongoing cognitive difficulties. His current work as an SP-5 is "fast and furious" and pressure packed. He has trouble with the process and has to follow step-by-step notes on every file.
- [43] He finds that he is mentally exhausted at the end of his work day and has no energy - his gas tank is empty.
- [44] With respect to his cognitive functioning, he indicates that he has trouble retaining and processing new information, keeping things straight, and focussing. He says he is easily confused. Despite receiving various accommodations at the CRA, he says he still struggles to keep up with his workload. He testified that he cannot see himself successfully completing the advanced accounting courses needed to be hired into the higher paying AU auditor stream.
- [45] He is temporarily employed as a GST Refund Integrity Examiner at the SP-5, level 1 salary. He now earns less than he did prior to the Accident when he was at the SP-4, level 5 salary. Whether he is able to keep this position will depend on whether he can meet the standards as required. Failing which, he will be demoted to his SP-3 security job.
- [46] His career plans are to remain employed with CRA and maximize his pension until his retirement at age 71.
- [47] The plaintiff is able, as he always was, to work flexible hours at CRA. He is required to put in 150 hours every four weeks. When he works is largely up to him. He has been able to complete his 150 hours in four days each week by working nine-hour days.

Issues

- [48] These are the issues for determination:
- (1) What injuries did the plaintiff suffer as a result of the Accident?
 - (2) What damages should the plaintiff be awarded?

Analysis

- (1) What Injuries Did the Plaintiff Suffer as a Result of the Accident?
 - i. Plaintiff's Position
- [49] The plaintiff says that while some of his Accident-related injuries resolved quickly, he still suffers from the effects of others. Namely, ongoing chronic left knee pain, intermittent neck and back pain, and chronic headaches. In addition, he asserts that his Accident-related brain injury has caused psychological issues, anger issues, decreased concentration, mental fatigue, noise and light sensitivity, distractibility, and difficulty multi-tasking.

[50] He says that all of these injuries have resulted in his inability to become a qualified auditor at CRA and move into a more lucrative stream of work. Further, they have affected his ability to function recreationally, socially, and at home.

ii. Defendants' Position

[51] The defendants do not deny that the plaintiff was injured in the Accident but maintain that the majority of his injuries healed quickly. To the extent that any issues remain, they argue that they are not as severe or disabling as the plaintiff suggests. They say that his suggestion that he is now restricted from his career, recreational, social, and domestic pursuits is greatly exaggerated.

[52] They say that any ongoing physical issues are minor and restricted to his left knee. They further argue that the plaintiff has not proven that he suffered a mild traumatic brain injury. To the extent that he may have ongoing cognitive issues, the defendants argue that they are treatable psychological issues (meaning they arise from a psychiatric disease) as opposed to organic issues (meaning a dysfunction with the brain that is not psychiatric in nature).

iii. Expert Witnesses

[53] The plaintiff was assessed by several experts. In the field of neurology, he saw Dr. Donald Cameron. In the field of psychiatry, Dr. Raphael Chow. For orthopedics, Dr. James Douglas. And for psychiatry, Dr. Paul Latimer. Each of these experts prepared medical/legal reports that were filed in evidence without issue or debate.

[54] The defendants also arranged for medical assessments by their own experts. In the field of orthopaedics, the defendants sought the opinion of Dr. Michael Bridge. And in the field of psychiatry, Dr. Eugene Okorie. These experts also prepared medical/legal report that were filed in evidence without issue or debate.

[55] Each of these experts also testified.

Dr. Donald Cameron (Neurologist)

[56] Dr. Cameron assessed the plaintiff twice: September 12, 2016 and September 26, 2018.

[57] Based on the plaintiff's self-report, Dr. Cameron's initial impression was that he had either experienced an altered state of consciousness or a loss of consciousness following the Accident and therefore met the clinical criteria for a diagnosis of a mild traumatic brain injury.

[58] Because of ongoing symptoms of anxiety, depression and potentially post-traumatic stress disorder ("PTSD"), Dr. Cameron recommended that the plaintiff be assessed by a psychiatrist or psychologist. Dr. Cameron opined that treatment from a psychiatrist or psychologist might improve his cognitive symptoms, but given the length of time since the Accident, would not resolve them.

[59] Following a review of the plaintiff's clinical records, particularly Dr. Van der Vyver's note that after April 2015 the plaintiff complained of pain and discomfort but not of significant ongoing cognitive problems, Dr. Cameron clarified his opinion:

It is probable, in my opinion, that ongoing cognitive complaints beyond the spring of 2015 are more likely or probably due to the chronic pain condition and the psychological problems that Mr. Henbury has suffered with following this accident. It is possible that Mr. Henbury continues to report ongoing cognitive problems residual to the mild traumatic brain injury that he sustained at the time of this accident until there is an assessment, treatment, and resolution of any psychological problems. One cannot differentiate or discern to what degree ongoing cognitive complaints beyond the spring of 2015 are due to residual effects of the mild traumatic brain injury, due to the chronic pain condition, or due to the psychological problems that develop following this accident. Any residual cognitive problems still present after successful treatment and resolution of psychological problems in my opinion would be residual to the original mild traumatic brain injury. Mr. Henbury may have successful resolution of cognitive problems associated with successful therapy of the psychological problems and following further improvement and possible resolution of his chronic pain present following the accident.

[60] In his follow-up assessment, and based on the plaintiff's self-report, Dr. Cameron noted ongoing cognitive dysfunction, chronic pain and psychological problems. Ongoing post-traumatic headaches were also noted. At that point, he felt the plaintiff's complaints were multifactorial in etiology and would defer to orthopedic, psychological and psychiatric specialists regarding treatment.

Dr. Raphael Chow (Physiatrist)

[61] Dr. Chow is a physiatrist who assessed the plaintiff at his counsel's behest on November 7, 2016. His medical/legal report was dated November 23, 2016. Dr. Chow's assessment predated the plaintiff's surgery in August 2017.

[62] It was clear that the focus of his assessment was the plaintiff's left knee. In cross-examination, he stated:

. Weight bearing and knee bending tasks including standing, walking, crouching, squatting, ladder/stair climbing, sitting with knees flexed at and beyond the occasional-frequent [meaning 50%] rate will create excessive load on his left knee thereby aggravating his pain.

He will not be able to do high impact tasks such as jogging, running, skipping, or jumping.

From a physical perspective, in my opinion, he will be disabled in performing tasks or jobs that require activities at and beyond the occasional-frequent rate in weight bearing and knee bending and physical demand tasks at and beyond the light-medium physical demand level.

- [63] Regarding ongoing cognitive issues, Dr. Chow relied on the plaintiff's self-report and his clinical records. He agreed that he would defer to specialists in the area of cognitive dysfunction. He also agreed that many other psychological conditions can mimic symptoms of mild traumatic brain injury.
- [64] Of interest, the plaintiff did not complain to Dr. Chow that he had any ongoing complaints of pain in his right knee, neck, lower back, or right arm. In fact, in each of those areas Dr. Chow stated that he was "no longer symptomatic".
- [65] Dr. Chow made a series of recommendations to help with his left knee including occupational therapy intervention, physical therapy, pharmacotherapy, joint injection if needed, an exercise program and assistive devices such as a cane when his knee acts up.

Dr. James Douglas (Orthopedic Surgeon)

- [66] Dr. Douglas is an orthopedic surgeon. He was a very impressive witness who coherently explained the mechanics of the human knee. His assessment was focussed on the plaintiff's left knee.
- [67] I take from Dr. Douglas' evidence that the plaintiff continues to experience pain in his left knee. Though the burning and grinding sensation he experienced with movement was corrected by Dr. Bell's arthroscopic surgery in August 2017, general pain still continued.
- [68] The plaintiff's knee remains unstable and he continues to be apprehensive about aggravating it. Activities that require running, jumping, or going down stairs will continue to be troublesome. He will be able to continue with activities that do not load the knee, such as bike riding. He will be able to perform most household activities within moderation. Although sitting or standing for a prolonged time can aggravate his knee, it will not disable him from work.
- [69] While there were no obvious signs of posterior cruciate ligament ("PCL") injury, I accept Dr. Douglas' opinion that he likely has one, either grade 1 or 2 (meaning a partial tear with some laxity). I accept Dr. Cameron's recommendation that the plaintiff should continue to be as active as possible. The PCL injury should not prevent him from continuing his employment or activities that do not require a sudden change in direction of the leg.
- [70] There is also cartilage wear that is not reversible that will advance over time. His symptoms are nowhere near the point of requiring a knee replacement but that is a remote possibility in the distant future. As Dr. Douglas stated:

Eventually if the cartilage wear advances with concurrent severe pain and functional disability, he may require consideration for a total knee replacement. Given the relatively mild degree of cartilage wear currently however, I would not expect him to reach that point for a number of years and possibly not at all.

Dr. Paul Latimer (Psychiatrist)

- [71] Dr. Latimer is a well qualified psychiatrist who assessed the plaintiff on September 28, 2018 for a medical/legal report.
- [72] His opinion was that the plaintiff is suffering from three psychiatric disorders: major depressive disorder, mild neurocognitive disorder due to traumatic brain injury and generalized anxiety disorder, all as defined by the DSM-5 criteria. In arriving at his opinion, he relied heavily on the plaintiff's self-report and on his review of other medical reports and information he was provided.
- [73] His assessment of the plaintiff involved an interview lasting about one hour. He also had the plaintiff fill out various questionnaires. He did not conduct any cognitive screening testing and did not conduct any collateral interviews. His diagnosis of a mild neurocognitive disorder due to traumatic brain injury was based on the assumption that the plaintiff had, in fact, suffered a traumatic brain injury as a result of the Accident. He relied on the diagnoses made by other doctors in that regard.
- [74] He confirmed that persons who have symptoms following a mild traumatic brain injury typically recover within three months. If symptoms continue, there could be other explanations for them, including psychological issues such as anxiety or depression. If so, the symptoms could be amenable to treatment such as counselling or anti-depressant or anti-anxiety medications. He too recommended that neuropsychological testing be conducted to help determine, confirm and quantify any neurocognitive disorder.

Dr. Michael Bridge (Orthopedic Specialist)

- [75] The defendants' orthopedic specialist, Dr. Bridge, also accepted the plaintiff's history. On that basis, he opined that the plaintiff had a grade II whiplash associated disorder and a decreased range of motion in his neck and back.
- [76] Dr. Bridge's opinion was that the knee, neck and back issues have likely plateaued. They are unlikely to show significant improvement or degeneration. He did not feel the plaintiff would need surgery in the future for his knee, neck, or back.

Dr. Eugene Okorie (Psychiatrist)

- [77] Dr. Okorie assessed the plaintiff at the defendants' behest on September 5, 2018. Based on his interview and review of the medical records, it was his opinion that the plaintiff was suffering from PTSD of mild severity. He did not consider him functionally impaired or disabled.
- [78] Dr. Okorie also found it difficult to discern the etiology of the cognitive symptoms and whether they were psychologically or organically based. He felt a neuropsychological assessment would be appropriate "if there is a strong desire to determine the quantity and pattern of his cognitive status." It was his opinion that if the plaintiff had a concussion as a result of the Accident, any symptoms he had would have already resolved completely.

iv. Lay Witnesses

- [79] The evidence of collateral witnesses is often helpful in understanding the differences between a plaintiff before and after an accident. A number of lay witnesses testified in this matter. I will detail their evidence below, as it is relevant.
- [80] The plaintiff's wife Leslie testified that she met and started dating the plaintiff in September 2013. She described his pre-Accident personality as social, happy-go-lucky, active, generous, a listener, thoughtful, attentive, fun and easy to be with. She described him as having a "warm heart". She said he was physically fit and strong with no limitations. He was cool-headed and solved confrontations calmly. She was impressed with his dedication to school and his ability to concentrate. He helped her with yard work at her mother's home and with other home projects.
- [81] She noted that following the Accident, he had difficulty functioning. He liked dark and quiet rooms. He was clearly hurting and was not himself physically or psychologically. While he has improved since the Accident, she says there are lingering issues. If he is tired from work, he can get angry and she has to "talk him down". Getting bumped in large crowds or at stores irritates him. His mood swings have improved, however, and are less frequent in duration and intensity.
- [82] She says that she now does about 75% of the household chores. The plaintiff cannot do certain tasks involving kneeling or crouching for fear of his left knee symptoms flaring. She says he used to love cooking but rarely does it anymore. She described their roles in the kitchen as having been "reversed" from their pre-Accident roles. Now she is the chef and he is the sous-chef.
- [83] Because of her expertise in yoga, meditation and shiatsu massage, she acts as his instructor, coach and masseuse. Ultimately, she says the plaintiff is a damaged version of the person she fell in love with and still adores. The marriage is strong and she intends to walk with him through his ongoing challenges in a "solid and loving relationship".
- [84] Ms. Lisa McDonald, the Penticton CRA Assistant Deputy Director of audit, described the plaintiff as a pleasant positive fellow who was respectful, polite and able to deal with confrontational telephone discussions with taxpayers. In her discussions with the plaintiff, he had indicated a desire to move up the ladder.
- [85] She testified about the job requirements and qualifications to work in the AU jobs at CRA. It is a separate union and has a separate collective agreement than those at the SP level. The SP-4 level in the audit department is fairly entry level without too much complexity. The AU jobs are more complex. In order to qualify, a candidate requires a professional designation, such as a Certified Professional Accountant, or a university degree with specified accounting courses. Without such qualifications, one cannot expect to be hired into an AU position.

- [86] Mr. Pierre L'Esperance was the plaintiff's team leader in collections during his stint in the VOCALLS call centre role. He too described the plaintiff as friendly, outgoing and easy-going and able to handle the stresses of the job. He had the "street smarts" to know how to handle irate taxpayers. He was a team player and socialized with them outside of work. He did the job quite well.
- [87] During his graduated return to work program, Mr. L'Esperance noted that the plaintiff was nervous, easily frustrated and forgetful. He was less jovial and tactful. His discussions with taxpayers were more abrupt. He also did not participate in social activities as much.
- [88] In a November 21, 2016 performance review, Mr. L'Esperance described the plaintiff this way:

Observations confirmed that Paul followed policies and procedures. He demonstrated the CRA values with his communications and his actions. Paul was always professional and polite with tax debtors and co-workers alike; his communications abilities are very good. Paul was patient and understanding while still applying the collection policies appropriately. Paul's average number of calls per month was above SITSO VOCALLS team average.

- [89] In 2018, the plaintiff started seeing Mr. Ivan Trofimoff, a Kelowna based psychologist, for PTSD symptoms. Mr. Trofimoff recommended a number of strategies that the plaintiff is using and confirmed are helping.

v. Discussion

- [90] As is the case in most personal injury cases, the plaintiff's evidence is critical. The medical evidence is based to a significant degree on the plaintiff's self-reporting and it is necessary to assess his credibility and the reliability of his testimony.
- [91] In *Karim v. Li*, 2015 BCSC 498, Abrioux J. summarized the principles to be taken into account in assessing credibility cases such as this one at paras. 88-89:
- [88] As Madam Justice Dillon noted in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) [*Faryna*]; *R. v. S.* (R.D.), [1997] 3 S.C.R. 484

(S.C.C.) at para.128). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Faryna at para. 356).

[89] In addition, the following principles should be taken into account by the trier of fact:

- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
- every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
- where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;
- it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, *aff'd* 2012 BCCA 114; and
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 2011 BCCA 516.

See also *Buttar v. Brennan*, 2012 BCSC 531 at paras. 23-25.

[92] The plaintiff generally presented well as a witness but, in my assessment, tailored his evidence in a way that was favourable to his case. I am not suggesting that there was any deliberate intent to mislead, but I agree with the defence that he was not a reliable historian in a number of areas. I must therefore approach his evidence with caution.

[93] While I am satisfied that the plaintiff was injured in the Accident and has some lingering physical and psychological issues, I am not persuaded that his injuries are as serious or as functionally disabling as he alleges.

- [94] I accept that his left knee continues to bother him from time to time depending on his activities. Respecting this injury, the defendants do not dispute Dr. Douglas' diagnosis (particularly since the diagnosis was confirmed by their expert, Dr. Bridge). I accept that the plaintiff's left knee issues are due an impact bruise to his subchondral bone and a partial injury to his PCL. He will continue to have some pain which will wax and wane throughout his life.
- [95] Respecting the headaches, there is no indication in Dr. Cameron's reports that the plaintiff complained of this issue when first assessed on September 12, 2016. While the plaintiff was not cross-examined on this point, I infer that if the headaches were moderately or highly painful and occurred three or four days each week (as he suggests), then it would have been a priority for discussion with a neurologist and Dr. Cameron would have noted them. I do note, however, that a few months after Dr. Cameron's assessment, the plaintiff complained to Dr. Chow about his headaches. Thus, I accept that he had them intermittently.
- [96] Respecting the plaintiff's claim regarding a traumatic brain injury, I am not persuaded that he suffered such an injury in the Accident. I do not accept his evidence that he lost consciousness or that he was concussed or had an altered state of consciousness. His memory of the event is quite good--there is no gap in his memory. He was struck by the Jetta, fell to the ground and got up immediately. He recalls seeing the Jetta on its roof and Ms. Egilson kicking at the door to get out. His evidence at trial respecting the "gap" in his memory is inconsistent with what he told the doctors. His attempts to explain these discrepancies were not persuasive.
- [97] Ms. Egilson's evidence, which I accept on the point, was that she was able to exit her vehicle very quickly after it came to rest on its roof. She ran over to the plaintiff who did not appear dazed or disoriented. He was able to carry on a conversation with her. She asked if she had hit him and he confirmed that she did. If the plaintiff truly had no recall of the impact (as he later told Dr. Cameron), it is unlikely he would have been able to answer Ms. Egilson the way he did.
- [98] To the extent he has ongoing cognitive deficits, I find they are psychological as opposed to organic. I accept that the Accident was a traumatic event and that it continues to have a psychological impact on the plaintiff. I accept the diagnosis of PTSD. If he is having ongoing troubles retaining new information or multitasking, I conclude it is due to this diagnosis.
- [99] Dr. Cameron assessed the plaintiff in September 2016, eventually diagnosing him with "post traumatic brain injury syndrome following MTBI that he sustained at the time of the accident." I conclude that many of the assumptions that Dr. Cameron relied upon in formulating his opinion (including that the plaintiff was unconscious at the scene, suffered an altered state of consciousness or was disorientated or confused) were not proven.

[100] The medical records from the plaintiff's family doctor (which were reviewed by Dr. Cameron after his initial consultation) do not indicate that he was complaining of significant cognitive problems after April 2015. Instead, they indicate that he was suffering with symptoms of depression and possible PTSD. Dr. Cameron amended his opinion, as I previously noted in para. 59.

[101] Dr. Cameron went on:

[I]f Mr. Henbury has successful resolution of psychological problems following psychological therapy and he has resolution of ongoing cognitive problems it would be therefore my opinion that these residual ongoing cognitive problems are probably predominantly due to the development of psychological problems in the form of depression and possibly post traumatic stress disorder following this accident.

[102] He reassessed the plaintiff on September 26, 2018, again accepting the plaintiff's self-report, and opined:

It is probable that the ongoing cognitive complaints are multifactorial in etiology, i.e. residual to the mild traumatic brain injury that he sustained at the time of the accident, due to the chronic pain that he has developed as a result of the soft tissue and musculoskeletal injuries that he sustained at the time of the accident, and due to the development of psychological problems and psychiatric problems, all present as a result of the injuries that he sustained at the time of the accident

[103] Even if the plaintiff did suffer a mild concussion, I conclude that any cognitive issues he may have had resulting from it resolved very quickly.

[104] Changes in his function have been minimal. Indeed, he excelled at his job as a security administrator at the CRA. And while he may be struggling with the audit department, I am not satisfied he would be doing any better but for the Accident.

[105] Dr. Okorie's opinion is that the plaintiff may have been concussed but it is more likely that his residual symptoms are due to him developing a mild case of PTSD caused by the Accident. He stated in his report:

Mr. Henbury complains of poor concentration, poor memory and noise/light sensitivity - a set of symptoms shared by PTSD and post-concussive syndrome. While PTSD is a psychological reaction to a life threatening event; post-concussive syndrome results from head injuries of variable severity. It is difficult to discern which of the syndromes drive his residual symptoms and they may both be contributory. His MVA was not associated with significant head injury but the acceleration/deceleration movements of the head during the accident and subsequent impairments in balance, reading and writing; documented by Dr. Van Der Vyver, would suggest that he was concussed after the accident. Most concussions would have resolved completely in the interval since his MVA, however the conclusions of ongoing impairments by the audiologist and optometrist could be interpreted as evidence of ongoing post-concussive syndrome.

- [106] He too testified that a diagnosis of mild neurocognitive disorder cannot be made without proper neuropsychological testing.
- [107] The expert witnesses in this case were all refreshingly fair and candid. The impression I got from them is the same I got from the plaintiff - namely, that he continues to be functional and that any observed post-Accident differences are minor and can be explained on a psychological basis.
- [108] It is noteworthy that despite Dr. Latimer's recommendations, the plaintiff has made it clear that he has no intention of taking anti-depressant medication preferring instead to use natural remedies and yoga.
- [109] It is also noteworthy that the plaintiff was able to pass the Intermediate Accounting level II course in April 2015 with a mark of 75% which, according to his instructor, was the average mark among the students taking the course. Further, in September 2016 he told Dr. Cameron that he felt his motivation was normal.
- [110] The plaintiff's work colleagues testified that despite workplace accommodations, he continually struggled with his workload. One of his managers observed that he was not performing at the level expected for someone who had been in the department for over eight months. That manager also noted that the plaintiff struggled to retain information and had difficulty multi-tasking and focussing. He also testified that the plaintiff had an emotional breakdown in November or December of 2018 when he spoke to him about work performance issues. The plaintiff relates these difficulties to the lasting effects of a brain injury. I am not persuaded that they are. Rather, I find that they were more likely due to the intellectually challenging nature of the job duties.
- [111] The burden is on the plaintiff to prove each of his injuries on a balance of probabilities. Here, the symptoms of brain injury are for the most part self-reported. There was no neuropsychological testing performed that would have helped with such a diagnosis. Importantly, all of the experts who examined him and testified, relied to a large degree, if not exclusively, on subjective self-reporting by the plaintiff. They accepted the plaintiff's history and complaints at face value.
- [112] Having had the benefit of listening to the plaintiff under the scrutiny of cross-examination, I cannot do likewise.
- [113] Simply put, the plaintiff has not proven that he sustained a brain injury. I base this finding in large part on the fact that there was no neuropsychological testing conducted to determine what, if any, cognitive deficits he has and whether they are organically or psychologically based.

[114] I am, however, persuaded that he suffers from depression and anxiety and that he was psychologically traumatized by the Accident. These conditions are treatable and he will likely improve over time but I accept that he will need ongoing counselling to return to his pre-Accident psychological function.

(2) What Damages Should the Plaintiff be Awarded?

[115] The plaintiff claims general damages, special damages, past wage loss, future wage loss, future care costs, and an in-trust claim for his wife, Leslie.

i. General Damages

[116] The Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 set out a number of factors for courts to consider in assessing general damages. Those factors are well known and include:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering;
- (f) loss or impairment of life;
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism.

[117] The plaintiff seeks a general damages award of \$150,000. In support, he relies on *Williamson v. Suna*, 2009 BCSC 576; *Mastromonaco v. Moraal*, 2015 BCSC 228; and *White v. Bysterveld*, 2016 BCSC 1952 where general damages of \$115,000, \$160,000 and \$150,000 respectively were awarded for what the plaintiff say were similar injuries and in similar circumstances.

[118] The defendants argue that a proper general damages award should be \$80,000 and refer to *Gutierrez v. Covvey*, 2015 BCSC 369; *Majchrzak v. Avery*, 2013 BCSC 1626; and *Reddy v. Staples*, 2015 BCSC 87 where general damages of \$75,000, \$95,000 and \$80,000 respectively were awarded for what the defendants say were similar injuries and in similar circumstances.

- [119] Any personal injury award should be fair and reasonable for both parties as those concepts are measured against the adverse impact of the particular injuries on the particular plaintiff and on the unique facts of the individual case: *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 198.
- [120] The plaintiff concedes that the injuries from the Accident have had no impact on his musical prowess and he continues to play in three bands and practise three to four days per week. I find that he is restricted to some degree from participating in his previous recreational activities such as martial arts, running, biking and hiking. He is also apprehensive about riding a motorcycle but that apprehension is more so caused by anxiety. The Accident contributed to his inability to ride a motorcycle only to a small degree.
- [121] Though I find that he has ongoing pain issues with his left knee and ongoing psychological issues, I find that neither are debilitating and that he is able to do most, if not all, activities. That said, he will sometimes have pain and anxiety whilst participating in those activities.
- [122] Having considered the Stapley factors, I find that a fair award for general damages in this case is \$100,000.

ii. Special Damages

- [123] At the conclusion of the trial, the parties agreed on special damages of \$8,000. Accordingly, the plaintiff is awarded \$8,000 under this head.

iii. Past Wage Loss

- [124] The plaintiff's claim for past wage loss is broken down between his wage loss from CRA (including a loss of past income earning potential) and his claimed inability to earn an income during his spare time at Red Rooster Winery.
- [125] The plaintiff has the burden of establishing on a balance of probabilities that there is a causal connection between the injuries sustained in the Accident and the wages, net of income tax, that he claims to have lost. Mere speculation is not enough: *Bhatti v. Ethier*, 2018 BCSC 1779 at para. 53.
- [126] I will first deal with his claimed loss of earnings at Red Rooster Winery. On this point, the plaintiff claims that his ongoing knee injury prevents him from standing on the winery's concrete floor for eight hours per day, two days per week at \$14.00 per hour. He says that but for the Accident, he had the capacity to work in the summer tourist season and would have earned the same amount that he earned in 2014 (\$3,510) and in 2015-2018, totalling \$14,010, or about \$8,000 net of tax.

- [127] I am not persuaded that this much loss has been incurred. In my view, the plaintiff's knee injury would not have prevented him from returning to Red Rooster Winery to the degree that he suggests. His evidence was that he worked there in 2014 because it was a tough year financially. Although I have accepted that his knee would bother him to some degree, I do not accept that it was bad enough to prevent him from working there had he been so inclined.
- [128] I will next deal with his claim for past wage loss from CRA. The CRA wage loss is nicely documented. It is for the period of time he was off work following the Accident until April 12, 2015 (approximately four months) when he began the graduated return to work program. He returned to work full-time on April 28, 2015.
- [129] He was off work for two days after he fell down a flight of stairs in June 2015 due his left knee giving out. He also missed 99 further hours after his knee surgery in August 2017. The defendants do not take issue with the plaintiff's claim for income loss, net of taxes (\$1,097 for 2014; \$12,221 for 2015; \$0 for 2016 and \$1,893 for 2017), for a total of \$15,211.
- [130] The balance of the plaintiff's claim for past loss of earnings relates to his earning capacity, namely, his assertion that he would have been promoted to an SP-5 position by January 1, 2016, to an AU-1 position by October 1, 2017 and progress to other AU positions by the trial date.
- [131] I conclude that the plaintiff moved from posting to posting and from pay grade to pay grade within the CRA not because of Accident-related issues, but because those were the jobs available at the time. I find that he voluntarily applied for and accepted these jobs because they suited his interests.
- [132] For example, in April 2014, he told Dr. Van Der Vyver that he was unhappy with his job in the VOCALLS group. He also testified that he did not like giving up his "fun job" in the service industry for a more mundane job in the CRA's office. I infer that his personality is much more suited to one-on-one interactions on a personal level rather than an office/cubicle setting. His security posting performance is certainly in keeping with his personality as a "people person".
- [133] I am not persuaded on the evidence that an SP-5 position would have been available and automatically offered to the plaintiff by January 1, 2016 even if he had completed the necessary educational requirements.
- [134] Firstly, the evidence is that the hiring process at the CRA involves a posting and selection component that is by no means certain. Secondly, there is no evidence that a specific AU posting would have been available. While I accept that the plaintiff had expressed interest in becoming an auditor and had taken basic accounting courses, I am not persuaded that he would have successfully completed the increasingly difficult courses required of him regardless of the Accident.

[135] Notwithstanding my concerns about his Red Rooster Winery earnings, the defendants say that \$20,000, net of tax, is a reasonable sum to award the plaintiff for past loss of income factoring in some allowance for loss of work at the Red Rooster Winery. I accept the defendants' submission and award \$20,000 for past loss of income.

iv. Future Wage Loss/Loss of Earning Capacity

[136] In *Perren v. Lalari*, 2010 BCCA 140 at para. 32 the Court of Appeal identified the plaintiff's burden of proof in establishing future loss:

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

[137] The plaintiff suggests that his ongoing and permanent cognitive issues will prevent him from progressing further in his career with the CRA.

[138] I have earlier found that the plaintiff is not suffering from the effects of a brain injury but has ongoing psychological issues related to PTSD. In my view, these issues will improve with time. I do accept, however, that for now these symptoms affect his work performance and require accommodations.

[139] I also find that at some point, likely within the short term, his symptoms will resolve to the point that he will no longer need accommodations. Precisely how long that will take is unknown. Meanwhile, he will be somewhat held back.

[140] I am not satisfied, however, that the plaintiff has shown a real and substantial possibility that he will be unable to reach his maximum potential in the audit department on account of the Accident. The plaintiff has not established that he had the accounting wherewithal to complete the advanced accounting educational requirements needed to progress into the AU stream. There is no vocational assessment or other evidence before me upon which I can be so satisfied.

[141] The plaintiff will stay with CRA until he retires. The evidence satisfies me that the plaintiff can work at SP-5, level 1 and will continue to move up that pay scale every 15 months or so until he reaches the top level.

[142] Nevertheless, I am satisfied that because of his continued psychological difficulties, there is a substantial possibility that his employment opportunities at CRA and at the Red Rooster Winery will be stalled until his issues resolve.

[143] This calls for an assessment, not a calculation, which I assess at \$80,000.

v. Cost of Future Care

[144] The plaintiff seeks an award of \$257,680 under this head. The defendants suggest that something in the \$9,000-\$10,000 range is more appropriate. The plaintiff's position is based on the future care recommendations of Ms. Carole Kennedy, an occupational therapist, as valued by Mr. Darren Benning, an economist.

[145] Ms. Kennedy conducted a functional capacity evaluation on March 15-16 and April 6, 2018 and completed a cost of future care analysis dated May 16, 2018 that was filed in evidence without debate.

[146] In preparing her report, Ms. Kennedy was provided with and relied upon, inter alia, the medical, psychological and rehabilitation opinions and the diagnoses of Dr. Cameron and Dr. Chow (including: diagnosis of a mild traumatic brain injury, symptoms of PTSD, diagnosis of chronic pain condition, psychological problems in the form of depression, and left knee issues with a risk of developing degenerative changes and possibly needing a total knee replacement).

[147] She too assumed that the plaintiff's self-report and clinical records were reliable. He reported to her that he had continued neck pain, lower back pain, left knee pain, headaches, post-concussion symptoms, general fatigue, symptoms of anxiety and depression, PTSD symptoms and cognitive problems. She stated:

As a result of the constellation of his symptoms, he has had difficulty completing heavier and low level homemaking tasks, participating in social activities (to the same degree) and in most of his usual recreational activities, and finds he is fatigued and has increasing headaches after working.

[148] On the basis of the information she was provided and the functional capacity evaluation results, she made a series of cost of future care recommendations.

[149] The upshot of the functional capacity evaluation was that the plaintiff is able to perform work requiring light to medium physical demands but is limited to lifting from above the knee level. He had a decreased tolerance for a number of tasks including repetitive bending, crouching and stairclimbing.

[150] My takeaway from the functional capacity evaluation as well as the plaintiff's testimony is that he can perform all of his normal day-to-day tasks but some may cause him pain or discomfort. I took from his evidence that he paces himself and tries not to overdo it.

[151] The plaintiff testified that he would like to continue seeing his counsellor, Mr. Trofimoff, who has provided him with coping strategies and techniques. He would also like to see a kinesiologist and a physiotherapist. He uses prism glasses daily and is open to being assessed at Okanagan Vision Therapy in relation to his headaches. He is also interested in a gym pass and Botox therapy, which has been recommended.

[152] In addition, he uses office aids to help him function at work. These include a sit/stand desk, a shock mat, an ergonomic chair, and ear plugs.

[153] With the plaintiff's evidence in mind and considering the various recommendations made by medical professionals in this case, I have considered each of the claimed future care costs individually.

[154] The following table breaks down the future care costs with Mr. Benning's valuations and the parties' positions regarding them:

Item

Plaintiff's Position

Defendants' Position

A.

Allied Health Interventions

Psychological Counselling Services (\$3,758-\$4,290)

\$ 4,243

\$2,314

Occupational Therapy

\$ 1,260

\$ 110

Initial Kinesiology

\$ 756

0

Follow-up Kinesiology

\$ 3,642

\$ 356

Initial Physiotherapy

\$ 1,523

\$1,523

Follow-up Physiotherapy

\$ 20,635

0

Vestibular Physiotherapy

\$ 396

0

Tinnitus Processing Assessment

\$ 242

0

Vision Therapy

\$ 3,709

0

Prism Lenses

\$ 11,448

0

VEMP testing

\$ 346

0

Living with Chronic Dizziness Workshop

\$ 146

0

B.

Medications/Potential Injections

Advil

\$ 1,744

\$1,744

Botox Injections

\$ 40,887

0

Plasma Rich Platelet

\$ 915

\$ 915

C.

Equipment/Adaptive Aids

Heating Pad

\$ 606

0

Body Pillow

\$ 741

0

Robotic Vacuum

\$ 2,471

0

Knee Brace

\$ 1,516

\$1,516

Self-Propelled Lawn Mower

\$ 1,015

0

Fitted Ear Plugs

\$ 2,189

0

Fitbit

\$ 1,516

0

D.

Health Maintenance

Gym Pass - Adult

\$ 7,137

\$ 904

Gym Pass - Senior

\$ 3,566

0

E.

Home Support Services

Heavier Housekeeping

\$ 41,215

0

Spring/Fall Housekeeping to age 75

\$ 5,936

0

Spring/Fall Housekeeping to age 76

\$ 88

0

Spring/Fall Housekeeping to age 77

\$ 62

0

Spring/Fall Housekeeping to age 78

\$ 39

0

Spring/Fall Housekeeping to age 79

\$ 19

0

Yard Maintenance to age 75

\$ 44,943

0

Yard Maintenance to age 76

\$ 664

0

Yard Maintenance to age 77

\$ 472

0

Yard Maintenance to age 78

\$ 298

0

Yard Maintenance to age 79

\$ 140

0

General Labour for Home Maintenance to age 75

\$ 48,231

0

General Labour for Home Maintenance to age 76

\$ 708

0

General Labour for Home Maintenance to age 77

\$ 498

0

General Labour for Home Maintenance to age 78

\$ 320

0

General Labour for Home Maintenance to age 79

\$ 120

0

Potential Future Care Needs

F.

Equipment/Adaptive Aids

Cane

\$ 54

0

Bathroom Safety Equipment

\$ 192

0

Mobility Aids

\$ 192

0

G.

Allied Health Interventions

Physiotherapy

\$ 840

0

Total

\$257,680

\$9,382

[155] For the most part, I am in agreement with the defendant's submissions. Given my findings regarding the plaintiff's injuries, I am not satisfied that the majority of items claimed by the plaintiff have been proven as reasonable. I will detail my findings below with respect to each category in the above chart.

A. Allied Health Interventions

- [156] Regarding psychological counselling: given my findings that the plaintiff probably suffers ongoing symptoms of PTSD, I allow 20 further psychological counselling sessions with Mr. Trofimoff as recommended by Ms. Kennedy, at \$190 per session: \$3,800.
- [157] I am likewise persuaded that the plaintiff would benefit from occupational therapy as recommended by Mr. Kennedy. This claim is allowed at \$1,260.
- [158] Regarding kinesiology services, the plaintiff is not currently going but says he would like to. It is not clear to me what the recommendation for kinesiology is based on. Dr. Bridge has recommended such services to target his range of movement in his left knee and stretching to reduce myofascial discomfort and improve stamina and muscle function. This claim is allowed for 12 sessions for the first year at \$60 per session. I am satisfied that by then, he will be equipped with enough knowledge to manage on his own. This claim is allowed in the amount of \$720.
- [159] Regarding physiotherapy, Dr. Douglas recommended a course of physiotherapy focussing on strengthening the quadriceps without aggravating the patella-femoral cartilage wear. Additionally, Dr. Douglas has recommended strengthening exercises to help offload the patella femoral joint cartilage. While I am persuaded that he would benefit from an initial course of physiotherapy and thereafter from time to time, I am not satisfied that he will need the number and duration of sessions Ms. Kennedy suggests. Physiotherapy is allowed at \$5,000.
- [160] Regarding the tinnitus processing assessment, I am not persuaded that it is required nor has its need been proven. Similarly, I am not persuaded that vision therapy has been sufficiently linked to his injuries, nor has VEMP testing or the need for the Living with Chronic Dizziness Workshop. Those claims are disallowed.

B. Medications/Potential Injections

- [161] Regarding medications, Dr. Cameron opines that the plaintiff is a candidate for prophylactic pain medications as prescribed by his doctor or neurologist. The plaintiff made it clear that he does not like taking prescription medication. He tried taking Tylenol 3 following the Accident and described it as "horrible". I am satisfied that if any award was made for prescription medication he would likely not be inclined to fill the prescriptions. Respecting the recommendations for Botox injections for his headaches, I conclude that the plaintiff would decline to follow such treatments if they were awarded most likely because his headaches are manageable through over-the-counter pain medication. I therefore decline to make an award.
- [162] While the plaintiff testified that he continues to take over-the-counter Advil and Aleve, the only evidence in this regard is that he takes it as needed up to six times per week. There is no evidence before me about the cost of that medication. Additionally, Dr. Cameron's

opinion is that continuing to take anti-inflammatory medication if used chronically can have adverse effects and is not recommended nor appropriate. Despite Dr. Cameron's advice, the plaintiff says he continues to use them. I suspect that if he does, and given his testimony about his aversion to medications, it is not on a chronic basis. Nevertheless, the defendants do not take issue with this item. Therefore, it is allowed at \$1,744.

C. Equipment/Adaptive Aids

[163] Regarding equipment and adaptive aids, the plaintiff seeks an award for the cost of a heating pad, body pillow, robotic vacuum, knee brace, prism lenses, self-propelled lawn mower, fitted ear plugs, and a Fitbit. In my view, these items are not required nor reasonable. I decline to make any award for them.

[164] Dr. Douglas recommended that the plaintiff be fitted for a custom posterior cruciate ligament stabilizing knee brace, which he should wear when engaged in cutting and shifting activities or when walking on uneven ground. I agree that such a brace is reasonable and award \$1,516.

D. Health Maintenance

[165] The plaintiff seeks the cost of an annual gym pass for life. I am satisfied that he should have access to a gym for two years so that he can work with a kinesiologist on a proper exercise program that will help build up his knee muscles. The amount proposed by the defendants is reasonable. This item is allowed at \$904.

E. Home Support Services

[166] The plaintiff seeks an award for the cost of heavier housekeeping services, spring/fall cleaning, yard maintenance services, and general labour for home maintenance up to age 79.

[167] Given my earlier findings about the plaintiff's knee issues, I am persuaded, but just barely, that he will need some assistance in the future for the heavier home and yard maintenance chores. I award \$15,000.

F. Potential Future Care Needs

[168] The defendants argue that the plaintiff's potential future care requests (namely, for bathroom safety equipment and mobility aids) are speculative and have not been proven. I agree.

[169] In summary, the award for future care cost is as follows:

1.

Psychological Counselling

\$ 3,800

2.

Occupational Therapy

\$ 1,260

3.

Kinesiology

\$ 720

4.

Physiotherapy

\$ 5,000

5.

Advil/Aleve

\$ 1,744

6.

Knee Brace

\$ 1,516

7.

Gym Pass

\$ 904

8.

Home Support Services

\$15,000

Total

\$29,944

iv. In-Trust Claim

[170] The plaintiff seeks an in-trust claim of \$20,000 on behalf of Leslie for housekeeping, cooking, yoga and shiatsu massage services. He says these forms of assistance were helpful in the management of his symptoms and that if Leslie did not provide them, he would have paid for external services to replace them.

[171] I am not persuaded that this is the case.

[172] In any event, in-trust claims are reserved for care provided by a spouse or family member over and above what would be expected from the relationship: Huang v. Canadian National Railway Company, 2018 BCSC 1235 at para. 526. My impression from Leslie's evidence was that she loves the plaintiff and would have performed these services as part of their relationship and in any event of the Accident. The in-trust claim is denied.

Summary

[173] The plaintiff has proven that the defendant Egilson is 100% to blame for the Accident. Because Ms. Frederick was a co-owner of the vehicle, she is liable as well.

[174] The plaintiff is awarded the following damages:

i.

General Damages

\$100,000

ii.

Special Damages

\$ 8,000

iii.

Past Wage Loss

\$ 20,000

iv.

Future Loss of Earning Capacity

\$ 80,000

v.

Future Care Costs

\$ 29,930

vi.

In Trust for Leslie

nil

Total

\$237,930

Costs

[175] The parties are at liberty to make submissions on costs provided arrangements are made through trial scheduling within 30 days. If no arrangements are made, the plaintiff is entitled to costs.

"Mr. Justice G.P. Weatherill"

The Honourable Mr. Justice G.P. Weatherill

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