

CANADA / JUDGMENT

Holdershaw v. Summers

2020 BCSC 1317

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Supreme Court of British Columbia

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2020 BCSC 1317 Holdershaw v. Summers

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Holdershaw v. Summers,

2020 BCSC 1317

Date: 20200908

Docket: M167076

Registry: Vancouver

Between:

William Richard Holdershaw

Plaintiff

And

Winston Ernest Summers

Defendant

Before: The Honourable Madam Justice Russell

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

January 13-14; 16-17; 20-23, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 8, 2020

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Introduction

- [1] Mr. Holdershaw, the plaintiff, was injured in an accident on November 15, 2015.
- [2] He was in the process of turning right from 104th Avenue in Surrey onto City Parkway. He was wearing his seatbelt.
- [3] He was moving slowly towards the corner when his 2012 Dodge Ram was struck from behind by Mr. Summers, in the defendant's Ford F250 truck. The plaintiff described the impact as hard enough to push his truck forward about 10-15 feet. He felt his body jolt from the impact but did not hit his head.
- [4] When his truck was hit, it was pushed towards a SkyTrain pier. He hit his brakes and managed to steer away from the column, successfully avoiding it.
- [5] The plaintiff's airbags did not deploy.
- [6] He got out of his truck to obtain the defendant's information. He was able to exchange information with the other driver and to drive home, since the damage to his truck did not prevent him from continuing to drive it.
- [7] No first responders attended the scene.
- [8] The plaintiff did not suffer any loss of consciousness as a result of the accident.
- [9] He began to suffer pain in his head and neck within about 20 minutes of the impact.
- [10] Liability is admitted for the accident.
- [11] The plaintiff claims for non-pecuniary damages, past loss of wages, future loss of capacity, cost of future care and special damages.

The Evidence

The plaintiff before the accident

- [12] Mr. Holdershaw was moderately active before the accident. He enjoyed being outside and took care of the grounds surrounding his house himself. He did the normal maintenance to his house required of a homeowner. He washed the family cars and did simple repairs to them including tune-ups and oil changes.
- [13] With respect to garden maintenance, in addition to mowing the lawns, he would trim the hedges around his yard, a relatively major task.
- [14] It was his desire to do all the maintenance of his house and garden without having to hire someone.
- [15] The majority of the housework inside the house fell to his wife to perform. He helped with laundry occasionally and took care of loading the dishwasher. He prepared meals on the weekend.

- [16] As far as activity was concerned, he had played hockey during his adult life until his two sons' athletic commitments required him to take them to and from their sports. He planned to return to his own sports once the time the sons required of him declined. He mentioned that he would have returned to his Monday night hockey in 2016 or 2017 but for the accident.
- [17] He attended a gym about twice a week mainly to try to keep his weight in check.
- [18] He had suffered two earlier motor vehicle accidents in 1992 and 2011. The injuries he suffered in the 1992 accident were serious but he recovered completely from both. In addition, he had two workplace injuries in 2009 and 2012 but did not require any time off work for either incident.
- [19] Camping was an activity he enjoyed with his family.
- [20] Occasional water skiing, snow skiing and golf were other activities he took part in.
- [21] His social life revolved around his wife and her friends and they would meet on weekends for dinners, parties, and movies.
- [22] He considered himself to be in good health and fully capable of performing his job and his home responsibilities without difficulty. The only health issue he had was that his doctor told him to lose some weight.
- [23] His family life was positive. His relationship with his wife was good. He had custody of his sons on a week on/week off basis and he tried to maximize his time with them.
- [24] He felt his life was going well.

The plaintiff's employment

- [25] At the time of the accident and to date, the plaintiff was employed by Centreville Construction, the construction arm of Concord Pacific.
- [26] Centreville is a separate corporation within the Concord Pacific operation. It builds high-rises and townhouses.
- [27] With Concord, the plaintiff has progressed from the position of assistant superintendent, the position he held when he joined Concord in 2008, to a site superintendent position in 2013.
- [28] As a site superintendent, the plaintiff was responsible for the whole project to which he was assigned. Each project takes about two and one-half years to complete to the stage where an occupancy permit can be obtained.
- [29] His job required him to be on site about 80% of the time, not to be doing the actual physical work of construction, but to oversee the trades and perform inspections as the work progressed. He is responsible for the quality of work performed and for keeping the work on schedule.

- [30] On site, he is required to wear a hard hat, steel-toed boots, a safety vest and a tool belt.
- [31] The job site is noisy and busy with debris and machinery around. Workers must walk through and over gaps, and around debris. Floors go up one on a weekly basis.
- [32] The floor begins with a plywood deck followed by the layout and bottom steel, and placement of the core lines for plumbing and venting. Stair soffits are placed to allow access to the next floor. These require walking up on rebar although there are times when one could walk up on cleats.
- [33] Having good balance is an essential part of the skills required of the superintendent position. Before concrete is poured to bury the lines, rebar must be installed and he would have to walk on it to check the work. Walking on rebar is not a daily occurrence but occurs regularly.
- [34] Top steel must also be installed before the concrete can be poured. There is usually about a four-foot gap between the top and bottom steel. Walking over the top steel requires both balance and caution.
- [35] Checking the sufficiency of the reinforced steel is a necessary activity that must take place before the concrete can be poured. This inspection requires the plaintiff to walk on the rebar. If the rebar is insufficient or incomplete, the concrete pour must be cancelled and the trades connected with the pour must be postponed.
- [36] There can be as many as 300 people on the site at one time.
- [37] There is machinery on site at all times. Concrete trucks pumping from the street below, or supplying concrete brought up by the bucket through the use of cranes, oversize forklifts, vehicles offloading materials, and swing stages all surround the site. A superintendent must be a good traffic manager to keep the site organized and functioning, all with a view to maintaining the schedule set for completion.
- [38] The hours of work required of a site superintendent are 7.5 hours per day and 37.5 hours a week. These hours are not set out in a contract but are the basic expectation of Concord. The reality is that most site superintendents work 10-12 hours a day and several hours on Saturday to be able to keep up with the work performed by the trades, and supervise tradesmen performing work outside regular work hours so that the all-important schedule can be maintained. The plaintiff routinely works long hours and Saturdays.
- [39] The plaintiff is not compensated for overtime. He does receive year-end bonuses and end of project bonuses. These bonuses are entirely at the discretion of Concord and are based on the performance of the individual and for the year-end bonus, based on their level of responsibility. Annual raises are also discretionary and based on the quality of the individual's performance.

- [40] In addition, the plaintiff has the benefit of a 4.5% annual matching program for an RRSP, a benefit he has always taken advantage of.
- [41] The sick leave benefit granted by Concord consists of a 10-day a year allowance to make up for time missed due to illness so that no employee suffers lost wages due to absence from illness. The employee is permitted to carry over unused days from year-to-year to a maximum of 60 days. The employee cannot accrue additional days to the 60-day cap and any extra days are not paid out. Employees are not required to repay Concord for any days taken and there is no subrogation policy. However, an employee may choose to repay his sick days to replace those days taken in his sick bank.
- [42] However, if an employee who has the 60 maximum sick days banked, and then needs to take them all in one year, he will begin to accrue another 10 days in the next calendar year. Subject to the need to take sick days, the employee would rebuild his bank in 6 years.
- [43] There is no mandatory retirement policy at Concord. There are several employees working beyond the age of 65 and some beyond 70. Their ability to continue to work past 65 is entirely dependent on their capacity to perform their jobs.
- [44] There is also no formal duty to accommodate policy at Concord. But the company is bound by the laws of British Columbia and must accommodate an injured employee up to and including the level of undue hardship. Of course, a handicap that puts the employee or his/her fellow employees at risk would not be permitted on an active construction site.

The expert evidence

Dr. Spacey

- [45] Dr. Sian Spacey is a neurologist retained by the plaintiff. She provided a report dated September 5, 2018. Dr. Spacey attended at trial.
- [46] In the independent medical examination ("IME") requested by the plaintiff, Dr. Spacey performed a number of tests on the plaintiff including one that examined the possibility the plaintiff suffered from benign positional vertigo that had caused his dizziness. The plaintiff was negative for this condition, leaving Dr. Spacey to conclude that his balance issues were the result of vestibular dysfunction.
- [47] Dr. Spacey found that the plaintiff suffered from traumatic injury to the head and/or neck that caused the plaintiff's headaches. She is a headache specialist and sees and has seen thousands of cases. She also found that the plaintiff had suffered a concussion as a result of the accident. Her finding was based on the group of symptoms the plaintiff displayed post-accident such as dizziness, light and sound sensitivity, and vision disturbances although she pointed out that the plaintiff did not meet the diagnostic criteria in DSM IV for concussion.

- [48] She also found that the plaintiff suffered from post-traumatic vestibulopathy although she stated that she would defer to an otolaryngologist whose expertise involves more specific testing for balance and vestibular issues.
- [49] In her prognosis, Dr. Spacey opines that the plaintiff's low grade neck pain and headaches would likely continue long term but may become intermittent with time.
- [50] She was clear that the injuries she diagnosed in the plaintiff were caused by the accident but that his mood disturbance could be contributing to the continuing headaches.

Dr. Eytan David

- [51] Dr. Eytan David is an otolaryngologist retained by the plaintiff to perform an IME. He provided a report dated February 14, 2018 and attended at trial.
- [52] Dr. David's expertise is in the medical and surgical treatment of complaints of dizziness, balance, hearing loss, and tinnitus. The defendant did not challenge his qualifications.
- [53] Dr. David's clinical and objective tests revealed numerous abnormalities suggestive of inner ear balance weakness. The gold standard of objective testing of balance function is the bithermal videonystagmography. It involves the administration of warm water and cold water to the ear.
- [54] As a result of his tests on the plaintiff, Dr. David found abnormalities that indicate the plaintiff has a right inner ear hearing and balance injury due to the accident. This injury is moderate to severe, likely permanent and affects the plaintiff's inner ear balance system.
- [55] Tinnitus formed another part of his diagnosis and he described it as moderately severe.
- [56] The ability to compensate for an inner ear balance injury is likely what has kept the plaintiff functional to date despite his balance issues. However, with age, this compensatory ability decreases. People who have an inner ear injury are known to have more complications with their balance on aging than had they not had that injury. It is not the injury that worsens, it is the ability to compensate for the injury that decreases with age.
- [57] Dr. David opines that the plaintiff's overall balance is expected to get worse as he ages.
- [58] He did not opine as to when this decline would become evident or how rapidly it would occur. He also did not offer an opinion comparing the expected age-related decline of the plaintiff with a person who does not suffer from an inner ear injury.
- [59] In response to a question in cross-examination, Dr. David agreed that there is a possibility the plaintiff's current balance situation could remain the same. This appears to be in conflict with the inevitability of aging and the probability of system declines.

- [60] Dr. David also pointed out that the plaintiff is very fortunate not to have suffered injury at his worksite considering the "challenging visual environment" he works in. He also stated that the plaintiff's symptoms would likely worsen in a poorly lit or uneven surface environment. He stated that the plaintiff's current functionality is not an indication that it is safe for him to work in those surroundings.
- [61] He concludes that the plaintiff has a moderate to severe ongoing clinical balance impairment and that his test results make it clear that his ability to work will be restricted and clearly rule out working at elevations and around heavy machinery. Rapid head position changes and busy visual environments will likely exacerbate his symptoms. A sedentary work environment would be preferable for him.
- [62] Once again, Dr. David does not say when the plaintiff should leave his current work environment or when it will become seriously dangerous for him.
- [63] Perhaps the only "light in the tunnel" is his statement that the plaintiff's ability to perform his job demonstrates his current ability to compensate for his vestibular problem.
- [64] To assist with the tinnitus from which the plaintiff suffers, Dr. David recommends bilateral hearing aids. However, he agreed that those who are recommended to use bilateral hearing aids for tinnitus may have a lower compliance rate than those who need hearing aids for actual hearing loss.
- [65] To accommodate the balance issues in his home, Dr. David suggests the plaintiff use "assistive devices and ramps".

Dr. John O'Brien-Bell

- [66] Dr. John O'Brien-Bell is a general practitioner who provided two reports dated November 19, 2016 and December 17, 2016. He attended at trial. However, I cannot give weight to his reports as they were of very little assistance to me. They simply recount the plaintiff's visits to him and to various experts. They do not contain enough independent opinion to be of use and they do not list the records on which he relied to make his report. As the defendant points out, Dr. O'Brien-Bell also failed to provide the basis he relied on in concluding that the plaintiff is partially disabled.
- [67] I will not be referring to Dr. O'Brien-Bell's reports. In holding as I have, I mean no disrespect to Dr. O'Brien-Bell, whom the plaintiff was fortunate to have as his medical coordinator at a time when the plaintiff was unable to find a general practitioner.

Dr. Gabriel Hirsch

- [68] Dr. Gabriel Hirsch is a physiatrist retained by the plaintiff who provided a report dated April 20, 2017. He attended at trial.

- [69] His expertise is in physical medicine and rehabilitation with a focus on musculoskeletal and neurological injuries. His qualifications were not challenged.
- [70] The plaintiff advised Dr. Hirsch that his balance issues were 80% resolved but Dr. Hirsch did not canvass further with the plaintiff what particular areas of his balance had improved.
- [71] Dr. Hirsch's testing of the plaintiff noted "extensive truncal swaying when he was tested standing on his left leg only. He found a compromise of the plaintiff's higher balance skills, determined even though the tests took place on flat, even ground. With a normal inner ear, the test subject would be able to stand on one leg.
- [72] Upon review of the plaintiff's history and his medical records, Dr. Hirsch could not conclude he had suffered a mild traumatic brain injury. As well, he did not find signs of a cognitive deficiency in the plaintiff.
- [73] He stated that such confounding factors as emotional distress, sleep disturbance and pain can compromise memory and are a possible explanation for the plaintiff's cognitive difficulties.
- [74] Despite not finding any contraindications to the plaintiff being able to continue as a site superintendent, he agreed that he would defer to Dr. David in relation to an inner ear hearing and balance injury as it would relate to a vocational disability.
- [75] Dr. Hirsch also diagnosed the plaintiff with mechanical neck pain and cervicogenic headaches "causally related to the subject motor vehicle accident."

Dr. Paul Marks

- [76] Dr. Paul Marks is an orthopaedic surgeon retained by the defendant. He provided a report dated November 9, 2017. He did not attend at trial.
- [77] He found the plaintiff to have suffered a cervical strain with an excellent prognosis for resolution within six to ten weeks. He found no permanent disability that would keep the plaintiff from continuing at his current job. He also found that the plaintiff did not require any additional treatment or medication or further assistance.
- [78] He states that "vestibular or other related issues are outside my area of expertise."
- [79] Clearly, Dr. Marks would defer to greater expertise on such issues.

Dr. Nikolakis

- [80] Dr. Nikolakis is an expert in neurosurgery, diseases of the nervous system and spine surgery and was retained by the defendant. His particular specialty is in spinal cord and traumatic brain injury and in the diagnosis of soft tissue injury and concussions. He provided a report dated February 5, 2018. His qualifications were not challenged by the plaintiff.
- [81] Dr. Nikolakis diagnosed the plaintiff as suffering a soft tissue injury of his cervical spine.

- [82] He stated the Romberg test is a test of balance performed by having the subject stand with eyes closed. If there is excessive swaying, the test is said to be positive and could indicate a neurological injury affecting balance. The plaintiff did not lose his balance during this test.
- [83] Dr. Nikolakis did not find that the plaintiff had suffered a concussion and stated that the plaintiff's symptoms of lack of concentration and memory problems are more related to psychological stress.
- [84] He agreed in cross-examination that clinicians can disagree on issues of causation and diagnosis, in particular in the area of concussion. It is an evolving field. Concussion lacks a standalone definition and has no one set of diagnostic criteria. He also agreed that a patient's symptoms should also be considered when attempting to diagnose concussion. Symptoms such as memory problems, lack of concentration and light sensitivity are equally consistent with psychological distress and concussion.

Dr. Dana Wittenberg

- [85] Dr. Dana Wittenberg is a neuropsychologist retained by the defendant. She provided a report dated October 17, 2017 and she attended at trial.
- [86] The tests that Dr. Wittenberg administered to the plaintiff did not reveal any deficit in his neurocognitive status. The testing did show that he met the criteria for Major Depressive Disorder and Generalized Anxiety Disorder likely related to the accident. She stated that the attention memory and processing speed problems the plaintiff experiences daily are likely related to his depression and anxiety.
- [87] She recommended he receive a psychiatric assessment with a focus on medication management. She also recommended that the plaintiff undertake a course of 8-12 sessions of Cognitive Behavioural Therapy ("CBT").
- [88] She reported that the plaintiff said he was open to participating in psychotherapy.
- [89] I understand that such therapy is used to attempt to address negative patterns of thought and to focus on problem-solving with a view to teaching a subject how to manage stress and anxiety.

The plaintiff's injuries and experience post-accident

- [90] The parties agreed that there is no issue with respect to Mr. Holdershaw's credibility. I assume that this agreement extends to his account of his injuries.
- [91] These injuries are listed by the plaintiff as the following:
- i. balance impairment due to a vestibular injury;
 - ii. dizziness and blurred vision;
 - iii. bilateral tinnitus;

- iv. difficulty with sleeping;
- v. mechanical neck pain;
- vi. headaches;
- vii. cognitive issues respecting memory and concentration,
- viii. mood issues including anxiety related to work;
- ix. visual disturbance; and
- x. possible concussion

[92] The defendant takes the position that the plaintiff has suffered the following injuries:

- i. a whiplash injury to his neck;
- ii. related headaches;
- iii. right inner ear "weakness";
- iv. sleep disturbances;
- v. mood disturbances; and
- vi. anxiety related to work.

[93] Of this list of injuries, I am satisfied the evidence shows he still suffers somewhat from loss of balance (a vestibular injury), dizziness, tinnitus, sleeping problems, mechanical neck pain and related headaches, loss of concentration and memory, and anxiety and depression. His visual disturbances have receded to some degree but he has spots in his vision on occasion. The effect of his head and neck injury or possible concussion likely contribute to his cognitive and mood issues.

[94] Dr. Sian Spacey found a concussion on the basis of the plaintiff's sensitivity to light, and to sound and dizziness, and attributes the plaintiff's long term low-grade neck pain and headaches to injury to his head and/or neck and which may become intermittent with time.

[95] Put briefly, the most significant of these injuries, in my view, is what appears to be an injury to his inner ear, his vestibular function, which has caused him recurrent tinnitus and affects his balance on uneven surfaces.

[96] Dr. Spacey tested the plaintiff for benign positional vertigo and he was negative for this condition. It is her view that his balance issues are attributable to post-traumatic vestibulopathy.

- [97] The tinnitus from which he suffers can be assisted by bilateral hearing aids, according to Dr. Eytan David, the otolaryngologist consulted by the plaintiff. Dr. David suggests further vestibular therapy and the purchase of hearing aids every two years for both ears. If I accept this recommendation, it will sound in the cost of future care that I will deal with further in my Reasons.
- [98] Of course, the tinnitus, the possibility of concussion and some cognitive problems will form part of my assessment of non-pecuniary damages and potentially, at least, part of the cost of future care analysis.
- [99] The part of Dr. David's opinion that is particularly significant for the assessment of loss of future capacity is his view that the plaintiff's difficulty with balance will likely worsen with age as the plaintiff's current ability to accommodate this issue will diminish.

Damages

Loss of earning capacity

- [100] The plaintiff has so far managed to cope with this problem by delegating some of his inspection functions that would require him to walk the perimeter of a floor on rebar where there may not be structures he can hold on to as he walks. He likely also performs some of his functions less expeditiously than he was able to pre-accident.
- [101] As noted earlier, the plaintiff's actual hours of work have always far exceeded the standard hours of 7.5 hours per day and 37.5 hours per week. He regularly puts in 10-hour days and 4 hours on Saturdays to be certain he is keeping up with his duties.
- [102] However, his employer, in the person of the vice-president of Construction, Jason Ha, and his direct boss, George Vieira, the plaintiff's construction manager, both testified that the plaintiff is a hard-working and thorough site superintendent about whose performance they had no concerns.
- [103] I note as well that he has continued to enjoy salary increases annually as well as end of year bonuses and when projects complete, substantial project completion bonuses. This is the case even following the accident and his time off work.
- [104] The plaintiff has testified to his trepidation about walking on uneven surfaces.
- [105] While the site may not have top steel to walk on every day, it is an extremely common condition with which he must cope. He must also on occasion cope with gaps as, for example, when the elevator core is being formed and he must cross the open portion around the concrete core.
- [106] The plaintiff has not had a fall at work since the accident. Mr. Vieira was asked if there were many falls on rebar on site and he replied that they happened but were not common. Nonetheless, the risk of falling is a legitimate concern of the plaintiff.

- [107] Ms. Kirstiuk, the Human Resources manager, testified that if Concord were to be informed that a site superintendent suffered from balance issues and was either a risk to himself or others on site, that superintendent would not be permitted to continue with his work until a doctor provided a medical note that advised the superintendent was able to continue.
- [108] She also testified that Concord has no formal duty to accommodate protocol.
- [109] That may well be the case but as I have noted, if the accommodation were not to amount to undue hardship for Concord, the law would require that Concord accommodate the plaintiff and I have no doubt that as the responsible employer it is, it would do so.
- [110] That accommodation might well require that he be given the opportunity to continue doing what he is doing but with more frequent breaks to remove his hard hat and tool belt to reduce his neck pain and headaches and with some assistance from someone like Mr. Viera to do inspections when the plaintiff is required to walk on rebar or around the perimeter. Certainly he has been able to cope so far, but the plaintiff argues that as he ages, his coping ability may diminish.
- [111] This is essentially what Dr. David has opined.
- [112] The timing of the diminution of his balance is not predictable and the defendant argues that that uncertainty could as easily mean that he could continue to work as he is doing with perhaps some accommodation in place until his retirement.
- [113] In cross-examination, Dr. David agreed that it is possible the plaintiff could remain at the same point of his loss of balance as he is currently.
- [114] The fact remains that the plaintiff has suffered a diminution of his balance and, according to Dr. David, that loss was caused by the accident. Most importantly, it is not an injury that will improve with time but the plaintiff has probably reached the maximum level of his ability to compensate for his balance issue,
- [115] As a site superintendent, it is important the plaintiff be able to fulfill the expectations of his employer on a continuing basis. While he has been able to do so to date, there remains the spectre of increasing balance dysfunction.
- [116] In my view, the probability of increased loss of balance and the timing of the increased loss can be assessed with a contingency attached to the damages for loss of future capacity. The plaintiff suggests that the loss of three years' salary subject to a 20% contingency would be reasonable as it is the plaintiff's position that the probable effect of the balance problem would be to force him to take early retirement rather than to continue to work as he plans to age 70, based on financial advice he has received.
- [117] I should note that the financial advisor did not testify at trial.

- [118] My difficulty in accepting the plaintiff's position entirely stems from the nature of his attachment to his job and from the way he has managed following his return to work. I am in full agreement that a stoic plaintiff should not be punished but the plaintiff is not so much a stoic as a man completely committed to his job. He appears to find meaning in working hard and certainly his hard work has attracted substantial compensation and bonuses.
- [119] I do not have anything other than the plaintiff's assertion that were it not for the accident, he would have continued to work to age 70 due to his mortgage situation and the fact that his wife will not have any entitlement to Canada Pension until she is 60. She is 10 years younger than he is and thus, they could retire when he reaches age 70 with the assurance of her receipt of Canada Pension and he says, his mortgages would also be paid off by that time.
- [120] The plaintiff's salary has continued to increase since the accident, as have the bonuses he has been awarded. It is possible that he will not suffer substantial loss due to his balance issue and that he will maintain his current level of productivity until such time as he decides to retire to enjoy his property in Thailand.
- [121] As well, Dr. David's report lacks a foundation for his opinion that the plaintiff is at a greater risk of a deterioration in his balance than a comparable non-injured cohort. While this might seem like a common sense inference to draw, it seems somewhat circular. At the same time, I am aware that a medical opinion need not rise to a level of certainty.
- [122] Assessment of the loss of future earnings is determined on a balance of probability.
- [123] On the whole, I find Dr. David's opinion persuasive.
- [124] In analyzing his future loss of earning capacity and, to as far as possible, arrive at a conclusion that is as close as possible to restoring the plaintiff to his/her pre-accident status quo, the court proceeds by measuring the effect of the accident on the plaintiff's future earning ability.
- [125] To do so, there are two approaches: the earnings approach and the capital asset approach.
- [126] The earnings approach takes a more mathematical approach by assessing an annual income loss for the remaining years of work and multiplying the projected annual loss by the number of remaining years and calculating a present value or by awarding the plaintiff the value of income for a year or two: *Gilbert v. Bottle*, 2011 BCSC 1389.
- [127] The capital asset approach is more of a multi-factorial approach and looks to what have come to be known as the *Brown v. Gola* factors ((1985), 26 B.C.L.R. (3d) 353).

- [128] These factors include whether the plaintiff has suffered the impairment of his or her earning capacity as a result of the accident-caused injuries and thus is less capable of earning income from all types of employment, is less attractive as a potential employee to new employers, is unable to take advantage of all opportunities that may have been open to him, and is less valuable to himself as a person capable of earning income in a competitive labour market.
- [129] Neither analysis should result in an assessment of damages based on calculation alone: the assessment is a matter of judgment: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.
- [130] I find that the capital asset approach is the more relevant approach to an analysis of the plaintiff's loss of future earnings.
- [131] That there is a real and substantial possibility of a loss of the plaintiff's earning capacity is clear. If his balance issues do worsen, there are few alternatives to employment with Concord that would not attract a substantial diminution of salary and correspondingly, of bonuses and RRSP matching. The plaintiff is not qualified for promotion to a General Superintendent's position which would have more work in the office and less on-site attendance.
- [132] While he has continued to perform at a consistently high standard as a site superintendent since his return to full-time hours on March 1, 2017, he has only done so by dint of extraordinary effort. It is probable that he will not be able to maintain this degree of physical and mental effort for all of the remaining years of his career.
- [133] In sum, I find that the plaintiff has suffered a loss of a capital asset. It is probable that his future earning capacity is impaired by even the current standard of his performance. It is extremely difficult to make a determination of this nature with any degree of certainty and the damages to be attributed to it but when I consider in addition to the balance issue his accident-caused neck pain, headaches and tinnitus, all of which could precipitate a decision to leave the workplace earlier than he might have otherwise, I find that the amount of \$400,000 based on two years' salary plus annual bonus, RRSP matching and a project completion bonus, less a 20% contingency is a reasonable assessment of his loss of a capital asset. The award is thus \$320,000.

Past loss of wages

- [134] The plaintiff's work was interrupted after the accident as follows: he missed 5 days in November 2015, 14 days in December 2015, and 5 days in January 2016. He commenced a graduated return to work on January 11, 2016 and recommenced full time hours on March 1, 2017.
- [135] He did not personally suffer any lost wages from his work absences. Concord topped up his sick pay.

- [136] As well, there is no subrogated claim made.
- [137] The value of the sick leave he took is \$28,795.14 equating to 67.1 sick days used.
- [138] Concord does not require that he repay the value of the sick pay he used but would accept repayment if offered.
- [139] The way in which the sick bank policy works is that each employee commences the year with 10 days in his or her sick bank. These days carry over from year-to-year to a maximum accumulation of 60 days. There is no payout for sick days not used.
- [140] If an employee uses sick days during the year, Concord pays the employee the same amount as his regular salary. However, his bank of sick days diminishes if he uses more than the 10 days he is granted at the beginning of the year. For example, in 2017, the plaintiff used only 3 days of sick leave. That means that he accumulated 7 days of sick leave to carry over to 2018. In 2018, he again had 10 days of sick leave at the beginning of the year but did not take any sick leave. These 10 days added to his existing bank of unused sick days from the previous year and his bank of sick leave added up to 33 days. In 2019, once again he started the year with an additional grant of 10 days' sick leave. He did not use any of this time so that at the end of the year, his sick leave totalled 43 days.
- [141] Because he was forced to take sick leave and that sick leave exceeded the 10 days he was credited at the beginning of the years of 2015, 2016 and 2017, he has begun to repay his bank of sick leave to the maximum of 60 days. Provided he is not ill in the years 2020 and 2021, he will have replaced his entire bank of sick leave to the maximum allowed of 60 days.
- [142] The defendants point out that by the time of trial, his sick bank was still in deficit of 17 days since the plaintiff had not been able to carry over the full 10 unused sick days each year since the Accident in 2015. The defendant argues that the plaintiff should be compensated for these 17 days only since to award the entire amount of sick days he used would in effect overcompensate him since he cannot accumulate more than 60 sick days in his sick leave bank.
- [143] The value of 17 days' sick leave is calculated as follows:
- a) Base salary in 2019: \$139,200
 - b) Weekly gross salary: \$139,200 divided by 52 weeks: \$2,676.92
 - c) Daily gross salary: \$2,676.92 divided by 5 = \$535.38
 - d) 17 sick days: \$535.38 multiplied by 17 = \$9,101.46.
- [144] The plaintiff argues that he was forced to deplete his bank of sick leave due to the accident and should thus be reimbursed for the entire 67 days he took.

[145] I am left with the difficulty that to award the plaintiff the full value of the 67 days he took would essentially better his position because he cannot accumulate more than 60 days in his sick leave bank.

[146] To put the plaintiff back to the status quo would require that he have available the full 60 days' sick leave in his sick leave bank.

[147] I therefore award him the amount of \$9,101.46 so that he may refill the days he actually lost and to the date of trial had not yet replaced to the maximum of 60 days.

Non-pecuniary damages and loss of housekeeping capacity

[148] To be entitled to damages, the plaintiff must establish legal causation in addition to factual causation. The plaintiff's injury must be a reasonably foreseeable consequence of the defendant's negligence. Reasonableness is assessed by examining whether it was foreseeable that a person of ordinary fortitude would suffer the injury at issue: *Mustafa v. Culligan*, 2008 SCC 27 at para. 18. Neither the exact damage nor the exact manner of its occurrence need be foreseeable; one need only be able to foresee in a general way the class or character of injury which occurred: *Millette v. Cote*, [1976] 1 S.C.R. 595 at para. 8. In the circumstances of this case, it is reasonably foreseeable that a rear end collision, caused by the defendant's inattention for which liability is admitted, would cause injury to the plaintiff's neck and back, including concussive symptoms.

[149] The fact that the most significant damage issue is the effect on the plaintiff's vestibular system and thus his balance, is foreseeable in the broad sense because it is consequential from the back and forth movement of the plaintiff's head on impact.

[150] Non-pecuniary damages compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. This type of compensation must be fair to all parties. This is done in part by comparing the circumstances at issue with other cases of similar circumstances.

[151] A non-exhaustive list of relevant factors to consider when determining an appropriate award for non-pecuniary loss was developed by Madam Justice Kirkpatrick in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100:

[46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

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

(f) loss or impairment of life;

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

(g) impairment of family, marital and social relationships;

(h) impairment of physical and mental abilities;

(i) loss of lifestyle; and

(j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[152] However, a non-pecuniary damages award will ultimately turn on the particular circumstances of the case.

[153] The plaintiff is 56 years old and had plans to work for another 14 years.

[154] He loves his job as site superintendent. He has worked hard to achieve this level and puts in unpaid hours well in excess of those required by his employment contract.

[155] While he remains well-respected by his employer, the sense of security he has with respect to his ability to perform his job at the level he requires of himself has been undermined by the injuries he has suffered.

[156] I accept that the injuries set out above at paragraph 91 are established.

[157] The defendant does not seriously dispute any part of the list except to argue that the finding of concussion is not conclusive. As I see it, the plaintiff does have a constellation of symptoms that are more consistent with concussion than not. I am satisfied that Dr. Spacey's report establishes that the plaintiff suffered a concussion in the accident.

[158] The plaintiff has seen some improvement in his injuries and he has also taught himself how to live with the daily pain he experiences. His headaches, probably generated by his neck injury, remain problematic. As noted above, he still has some dizziness, although it has improved somewhat, tinnitus, sleeping problems, loss of concentration and memory, and anxiety and depression. His visual disturbances have receded to some degree but he has spots in his vision on occasion. The effect of his concussion likely contributes to his cognitive and mood issues although they may also be related to the psychological stress he has suffered. It appears that somewhere along the line he was told his mild traumatic brain injury could be a causative factor for Alzheimer's disease. He is afraid that this could be another consequence of the accident.

[159] He reports that he suffered a fall at home when he stood up suddenly from watching television.

[160] The anxiety he suffers relates to his concern about being able to continue in his job. As the chief source of income for his family, he is fearful of his future.

- [161] This fear has affected his enjoyment of life. It is not unreasonably based.
- [162] He has coped well with his loss of concentration by adopting many of the measures suggested by the occupational therapist, Ms. Gill. However, even with her strategies, the plaintiff is conscious of the effect of the injuries from the accident on his memory. He has episodes of forgetting everyday actions such as calling his grandmother or texting his wife. Even with a grocery list, he has forgotten to pick up items his wife has asked for.
- [163] Because the plaintiff was highly involved with his sons' athletic activities, he was not so much a participant himself. Absent the accident, he says he would likely have rejoined a Monday night hockey league since his sons can now drive themselves to their activities.
- [164] In the past, he did some snow and water skiing but it did not appear to me that these activities were either frequent or central to his life. It seems clear that athletic activities that call on his balance skills are likely no longer available to him.
- [165] He does not perform tasks that require him to go up on a ladder such as taking down his Christmas lights and power-washing the gutters.
- [166] He has always done the work to maintain the family vehicles himself. He did simple mechanical tasks such as changing the oil and he kept the family cars clean. Now, he takes the cars to the local carwash and gets the oil changes done at a shop.
- [167] His gardening tasks included trimming the hedges that surround his corner lot. He would perform this task himself several times each summer. Now he simply leaves the hedges and may do the trimming over several days once a summer. His garden is no longer as immaculate as it once was.
- [168] I infer from his evidence that when he comes home from work he is too fatigued to undertake the household work on the cars and in the garden, and raising his arms above his head causes him pain. He has not hired anyone to come in to do the gardening. He just does the minimum.
- [169] In the winter, if it snows, he is obligated to shovel his walks. If he cannot persuade his sons to do this or they are not present, he does it. The result is that he has neck pain and headaches and is exhausted.
- [170] The fact that the plaintiff is now 20 pounds heavier than he was is a concern to him. He blames this on his inability to keep his fitness up due to pain caused by exercise .
- [171] The defendant argues that I should consider the plaintiff's current functionality to quantify non-pecuniary damages. As I have noted, the plaintiff has returned to his more than full-time hours of work and has maintained the respect of his employer for the quality of his performance. I consider that this is more due to his driven nature and his attachment to his job than it is to the resolution of his symptoms.

- [172] He pays for his devotion to his job with the continuing headaches and fatigue while his anxiety over being able to remain functional causes him depression. Fortunately, his depression has not cost his relationship with his wife but he continues to worry about his ability to be able to provide for her in the future.
- [173] It is true that the experts are not in agreement about his having incurred a mild traumatic brain injury as a result of the impact of the rear end accident. Dr. Nikolakis, a neurologist called by the defendant, opined that the plaintiff's reports of cognitive issues are more related to psychological stress than to a concussion. On the other hand, Dr. Spacey states that the constellation of symptoms the plaintiff suffered post-accident are consistent with post-concussive symptoms.
- [174] However, it is my view that whether the plaintiff suffered a mild traumatic brain injury or the pain and insomnia from his head and neck pain have caused his depression and anxiety is not particularly material. The chronic head and neck pain are a result of the accident and continue to plague him and interfere with his enjoyment of life. As well, the functional effect of the injury matters more than a precise medical diagnosis.
- [175] In making a determination of the plaintiff's entitlement to non-pecuniary damages, I have considered the case law provided by both parties.
- [176] Of the cases provided by the plaintiff, I find the case of *Kijowski v. Scott*, 2015 BCSC 2335 to be most apposite. However, in that case the consequences of the plaintiff's injuries transformed his life in every respect. From being an active person in his recreational pursuits, he was no longer able to enjoy his activities. As well, the dizziness from which he suffered resulted in falls. The expert evidence supported an opinion that his balance issues and his dizziness would be permanent and continue into the future and he would be more likely to fall and injure himself as he aged. He was awarded non-pecuniary damages of \$140,000. I consider his injuries to be more serious than those of the plaintiff in this case.
- [177] Of the cases provided by the defendant, the case of *Moukhine v. Collins*, 2012 BCSC 118, would seem apposite. In this case, the plaintiff's occupation was very directly affected by his injuries to the extent that he was never able to resume his full-time position as a computer programmer. The court did not find that the plaintiff had suffered a concussion but found that his vestibular injury was permanent. He also suffered headaches, dizziness, nausea, vertigo, tinnitus, pain in his neck and upper back, lack of balance, and inability to concentrate but with improvements noted in some of these concerns. He had been a very active man with interests in many sports, none of which he was able to resume. Justice Watchuk awarded \$90,000 in non-pecuniary damages for a current equivalent of \$100,000 in 2019. I assume it would be slightly more than that in 2020. Justice Watchuk did not refer to an award for loss of housekeeping capacity so I accept her figure at a 2020 value but include in my award an additional amount for loss of housekeeping capacity.

[178] In the course of reviewing the case of *Partridge v. Buskop*, 2019 BCSC 459, at para. 164, I note a quote from *Moskaleva v. Laurie*, 2009 BCCA 260. It reminds the court that the amount of the non-pecuniary award should compensate for more than direct injuries:

[95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries. In *Lindal* at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:

Thus the amount of an award for the non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded, the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury." In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case to "meet the specific circumstances of the individual case".

[179] In the circumstances of this case, the overall quality of the plaintiff's life has been detrimentally affected by the injuries he suffered in the accident and the non-pecuniary damages to which he is entitled should make his life more endurable.

[180] In making this award, I am including an amount for loss of housekeeping capacity as it appears to me that many of the maintenance tasks performed by the plaintiff before the Accident will become less and less manageable for him as he ages. He has already had to give up some of these tasks and they will not become easier for him over his lifetime.

[181] I award the amount of \$120,000 in non-pecuniary damages.

Cost of future care

[182] Claims for the cost of future care must be medically justified and reasonable. The award of damages must be moderate and fair to both parties: *Milina v. Bartsch*, (1985) 49 B.C.L.R. (2d) 33 (S.C.) at para. 210, *aff'd* (1987) 49 B.C.L.R. (2d) 99 (C.A.).

[183] When assessing an amount of damages for the cost of future care, the court is once again in the business of making a prediction. Such a prediction is not a mathematical exercise that results in a precise accounting.

[184] As part of the exercise of prediction, the court must consider such negative contingencies as fluctuations in treatment and medication and whether the plaintiff will participate in a particular treatment, and a common sense determination of the reasonableness of the recommendations of the experts.

[185] The expert evidence sets out some categories of future treatment for the plaintiff.

- [186] The plaintiff summarizes the recommendations of the various experts at pp. 52 - 56 of his argument.
- [187] Dr. David, the otolaryngologist, recommends the use of bilateral hearing aids for treatment of the plaintiff's tinnitus. The hearing aids serve to mask the tinnitus. In his recommendation, he states the approximate cost of \$3,000-5,000 for each purchase of hearing aids with the necessity to renew them every three to four years to take advantage of improvements to technology.
- [188] The defendant agrees to a one-time purchase of hearing aids and says there is an issue with the willingness of the plaintiff to wear hearing aids such that an award for the substantial cost of purchasing hearing aids every three to four years to the end of the plaintiff's life expectancy at age 85 is not reasonable.
- [189] The plaintiff's evidence about the use of hearing aids was that he was "open to trying them." In my view, that less than enthusiastic endorsement of hearing aids does not support the very sizeable award claimed by the plaintiff.
- [190] I will award the plaintiff the cost of bilateral hearing aids for a period of 7 years which should allow for 2 sets of hearing aids since they are changed every 3.5 years. This should allow the plaintiff a genuine opportunity to try them to see if they will resolve his tinnitus. The amount for this award will be $\$8,000 \times 2 = \$16,000$. I will leave it to the parties to calculate the present value of this part of the award.
- [191] Dr. David also suggests the use of assistive devices and ramps in his house to meet the needs of his "injured balance system."
- [192] I do not recall the use of such devices being discussed with the plaintiff. As well, I do not have evidence of what assistive devices Dr. David suggests. I have no evidence about the existence of stairs in the plaintiff's house that would require a ramp or of any difficulty with them. I find the recommendation insufficiently specific to meet the requirement that it be moderate and fair to both parties to award compensation for this category.
- [193] Dr. Spacey, the neurologist, recommends the use of a prescription medication nortriptyline, to deal with the plaintiff's headaches. She suggests a 12-week trial to determine its efficacy. She did not describe any side effects but the plaintiff's evidence was that he had tried amitriptyline and could not tolerate the side effects. I will allow him the cost of a 12-week supply to try this medication. The cost of this medication is set out in a table on page 55 of the argument. The cost for 12 weeks would be \$60.00.
- [194] She also suggests three over the counter supplements for a 12-week trial. The plaintiff does not claim for these.
- [195] Her final suggestion is that the plaintiff would benefit from counselling and CBT to address his depressed mood and to learn skills to address and modify his chronic low grade pain.

- [196] Once again, the plaintiff has said he would be "open to trying it" with respect to the psychotherapeutic approach of CBT. However, he did attend two sessions with Dr. Devlin, a psychiatrist, and found that he did not benefit from them. As he put it, he was taught to deal with his problems himself and not to talk about his feelings.
- [197] I would allow him a period of six months to try CBT. According to the plaintiff's table, the cost of six months of CBT would amount to \$1,850.
- [198] Dr. Wittenberg also recommends psychotherapy and pharmacotherapy to deal with the plaintiff's anxiety and depression. This would be duplicative, in my view, and in the six months of CBT the plaintiff will have funding for, he could certainly request assistance with any medications he would be willing to try.
- [199] Dr. Hirsch, the physiatrist, recommends a specialist exercise program to deal with the plaintiff's neck pain. These would take place with either a kinesiologist or a physiotherapist at a cost of \$3,000 for one year and I award this amount. He does not suggest that sessions with both a kinesiologist and a physiotherapist are needed. These sessions could also address the plaintiff's need for increasing his activity under professional guidance.
- [200] The defendant accepts that further vestibular therapy is merited to attempt to address the plaintiff's balance issues. Such therapy is performed by a specialist occupational therapist. Mr. Hirji performed this therapy on the plaintiff in the past and recommends further efforts in this respect. I will award the amount of \$2,280 for two sessions a month for a period of one year.
- [201] I accept that the plaintiff will have to use Advil or naproxen to deal with his headaches. I do not have evidence on the costs of the medications and will thus grant a nominal award of \$300 for their purchase.
- [202] With respect to an additional claim for occupational therapy recommended by Ms. Johal (Gill), I do not have sufficient evidence to accept this claim.
- [203] The award for the cost of future care is \$23,490. There may be some items that are subject to calculation of a present value. I leave that matter in the hands of counsel.

Special costs

- [204] Special costs in the amount of \$1,703.66 are agreed.

Conclusion

- [205] The plaintiff is awarded the following damages:

Non-pecuniary damages

\$120,000.00

Past income loss

9,101.46

Loss of future earning capacity

320,000.00

Cost of future care

23,490.00

Special damages

1,703.66

TOTAL:

\$474,295.12

[206] The plaintiff will have his costs throughout.

"Russell J."

The Honourable Madam Justice Russell

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