

CANADA / JUDGMENT

Jones v. Colonna

2021 BCSC 1175

COURT

Supreme Court of British Columbia

DECIDED

16 June 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 1175 Jones v. Colonna

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jones v. Colonna,

2021 BCSC 1175

Date: 20210616

Docket: M200422

Registry: New Westminster

Between:

David Arthur Jones

Plaintiff

And:

Coral Faye Colonna

Defendant

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Plaintiff:

M.A. McDonald

K.S. Pechet

Counsel for the Defendants:

V. J. Anderson

Place and Dates of Trial:

New Westminster, B.C.

February 1-3 and 5, 2021

Place and Date of Judgment:

New Westminster, B.C.

June 16, 2021

Introduction

- [1] The plaintiff David Jones seeks damages in connection with personal injuries sustained in a motor vehicle collision that took place in Maple Ridge, B.C. on 4 April 2016. The defendant Coral Colonna admits liability for the collision. The trial in this matter was therefore focused on the nature and extent of the injuries suffered by Mr. Jones, and the quantum of damages to which he is entitled.

Pre-Collision Lifestyle

- [2] At the time of the collision, Mr. Jones was 59 years old. He was relatively active for a person of his age, with no significant physical or cognitive limitations. He had occasional headaches and minor neck pain from a vehicle collision in 1979. He also had pre-existing degenerative disc disease, which was asymptomatic prior to the subject collision.
- [3] Mr. Jones was a full-time musician, playing as a drummer in four separate bands, namely a brass band, a swing band, a blues band, and a cover band. The first three of these were non-professional yet demanding commitments. The fourth, the cover band, was described by Mr. Jones as a "working" band that played gigs under contract at local bars and clubs. Mr. Jones's pursuits as a musician involved a minimum of five rehearsals per week and an average of one or two performances per week. All of this was fairly labour intensive, because Mr. Jones had to set up and break down his 10 to 20 piece drum kit for each rehearsal and performance. It also goes without saying that performing as a drummer in four separate bands, playing four different styles of music required both physical and mental acuity.
- [4] Since the mid 2000s, Mr. Jones, his wife Ms. Pechet, and their son had been living on a 20-acre property in Maple Ridge. The lower level of the house contained a music and dance studio, designed and constructed by Mr. Jones, and shared between Mr. Jones and Ms. Pechet. Mr. Jones used the space to rehearse and record music, and Ms. Pechet used it for dance and yoga classes. The property also included 18 acres of fruit trees, tended to by Mr. Jones and Ms. Pechet. This required daily or semi-daily attention in terms of pruning, along with more intensive periods of picking and harvesting during the fruit-bearing season. Prior

to the collision, Mr. Jones and Ms. Pechet shared these responsibilities. In addition to his work around the property, Mr. Jones enjoyed archery and riding ATVs.

The Collision

- [5] The collision which is the subject of Mr. Jones's claim occurred some time past midnight on 4 April 2016. The defendant Ms. Colonna has admitted liability, based upon the circumstances as set out in an agreed statement of facts.
- [6] Mr. Jones was driving his Ford F150 pickup truck south on 232 Street in Maple Ridge, on his way home from a social engagement. As he entered the intersection of 232 Street and Abernathy Road on a green light, his truck was broad-sided by a Ford Taurus driven by the defendant Ms. Colonna. The car entered the intersection from the west, on a red light, and hit Mr. Jones's truck on the driver side. The truck spun around and came to rest wedged between a bus stop sign and a tree.
- [7] Mr. Jones testified that he banged his head during the collision. He remembered the truck spinning and seeing orange. He felt stunned by the impact. When he regained his faculties he realized the truck was stuck between the bus stop sign and the tree. He sat in the truck for five to ten minutes. He could not open either door. He testified that he had to break a window to get out. In his trial testimony, he said it was the passenger side window, but that cannot be correct because the photographs of the collision scene show that the passenger side window was intact.
- [8] Mr. Jones testified that after extricating himself from the truck, he spoke briefly with the driver of the other vehicle, Ms. Colonna. Thereafter, he remained at the scene for some 60 to 90 minutes. He was assessed by an ambulance attendant, who said it was not necessary for him to go to the hospital that night. His wife and son attended the scene and drove him home. His truck was written off as a total loss.

Injuries

- [9] In the immediate aftermath of the collision, Mr. Jones had injuries to his head, upper back, left shoulder, arms, and right hand. His arms, neck, and hand were sore and he had little strength. His right hand had been badly banged causing significant pain and a feeling of pins and needles. His ring finger was bent. He could not make a fist, and could not grab anything, including his drum sticks.
- [10] Mr. Jones and his wife both testified that in the days following the collision, he seemed to have impaired cognitive functions. His speech was occasionally slurred, and he experienced bouts of dizziness or crooked vision when looking at his phone. He also became forgetful, unable to maintain focus, and unable to complete tasks.

- [11] Mr. Jones tried to resume practicing and playing music as soon as possible, but he found it a struggle. He had difficulty remembering music, remembering set lists, and distinguishing one song from another. He also found it difficult to maintain rhythm and to hit the drums with the proper amount of force.
- [12] In the months after the collision, Mr. Jones experienced pain in his arms, upper back, and neck. He had limited strength and he found it hard to reach up or lift things. Over time, these symptoms subsided, with the most significant continuing effects of the collision being increasing low back pain affecting his lower extremities, and continuing cognitive and emotional challenges.
- [13] With regard to the back pain, Mr. Jones testified that over time his gait has become more laboured. He explained that by the end of 2016, some seven or eight months after the collision, he started to feel numbness in his hips and legs, and had some difficulty walking. Ms. Pechet testified to the same effect, explaining that Mr. Jones's gait was off, more on the right side than on the left.
- [14] With regard to cognition, Mr. Jones experienced diminished mental acuity. He described a feeling of losing his sense of time, involving an inability to think ahead or think back to past events. He feels like everything is in the day or in the moment. He has poor short term memory and cannot stay organized. He cannot plan his day or his chores, and he cannot remember a task long enough to see it through.
- [15] Ms. Pechet testified that since the collision Mr. Jones has become more irritable and impatient. He has difficulty concentrating, and is unable to see a task through to completion. Mr. Pechet explained that Mr. Jones's behaviour is now somewhat erratic. He sometimes gets irritated and angry with people, causes a scene, and then immediately regrets his behaviour.
- [16] Mr. Jones testified that he used to be a voracious reader, but since the collision he is unable to read more than a page or two at a time. With regard to driving, he feels as though he has lost his sense of direction and he has difficulty remembering well-known driving routes. Ms. Pechet confirmed both of these aspects of Mr. Jones's testimony, that is, the changes in his reading habits, and his challenges with driving.

Treatment History

- [17] Mr. Jones went to the Cottonwood Clinic in Maple Ridge on the day of the collision, 4 April 2016. He completed a whiplash disorder form on intake. In his testimony, Mr. Jones acknowledged filling out the form and went on to recount his discussion with a doctor who recommended that he take Ibuprofen, a course of treatment that Mr. Jones found strangely funny, considering the force of the collision in which he had been involved.

- [18] Mr. Jones continued to see a doctor at the Cottonwood Clinic throughout the summer of 2016. He was referred to physiotherapy, which he attended as directed from September through to December of that year. The physiotherapy treatments helped with his shoulder pain, but he had continuing pain in his back.
- [19] Mr. Jones's last visit to the Cottonwood Clinic was on 4 September 2016. At that visit, the doctor showed Mr. Jones some medical images of his neck, indicating no abnormalities. Mr. Jones got angry because he felt the images did not relate to the area where he was experiencing the most pain, in his back. There was a scene and the staff at the Cottonwood Clinic suggested to Mr. Jones that he might get better service from his former family doctor in Vancouver. Mr. Jones agreed and made arrangements to see his former family physician Dr. Coburn. In reflecting on this event in his testimony, Mr. Jones described it as an example of a situation where he got agitated due to shortness of temper, and later felt embarrassed, having a sense that he over-reacted in the moment.
- [20] Mr. Jones began to see Dr. Coburn in March of 2017. Dr. Coburn arranged for imaging of Mr. Jones's spine, below the neck. This resulted in identification of a herniated disc, leading to two surgeries in the area of Mr. Jones's T10-11 joint.
- [21] In first surgery, which took place on 9 July 2018, Mr. Jones had a small metal brace inserted at his T11-12 joint. The surgery seem to go well and Mr. Jones was on the track to recovery, until a few months later when he developed a serious infection in or around the apparatus, causing a rupture of one of the joints in his back. He was hospitalized for more than two weeks, and then had to undergo a second, much more intrusive surgery.
- [22] The second surgery, which took place on 17 November 2018, involved removal of the original metal apparatus, the use of antibiotic beads, and the installation of a Jewett brace, a thoracic lumbar brace used to immobilize the spine. The brace was left in place for a number of months, until Mr. Jones's joints fused and stabilized.
- [23] Dr. Matishak, a neurosurgeon, was recognized by the Court as an expert in neurology. He explained that as a result of the second surgery, Mr. Jones was left with a kyphosis of 35 to 37 degrees, meaning that the joints in his spine fused together at that angle.
- [24] Following both surgeries, Mr. Jones was treated at the Transitional Pain Clinic ("TPC") at Vancouver General Hospital, where he received care from physical medicine and rehabilitation specialists, an orthopedic surgeon, and a psychologist. Upon release from the TPC program, it was recommended that if Mr. Jones had difficulty managing his pain, he should attend a pain clinic and seek family counselling. Mr. Jones did not pursue either of these options.
- [25] In the wake of these surgeries, Mr. Jones used prescription narcotics, including Hydromorphone and Gabapentin, to cope with the pain. He has since weaned himself off opioids and is determined not to resort to them again. He continues to take Gabapentin, and he also takes cannabis products to help him with pain.

Post-Collision Condition and Activities

- [26] Since the second surgery, Mr. Jones has had limited mobility. He can walk around his house without an aid, and he is physically able to do some but not all of the basic household chores he used to do. In cross-examination, Mr. Jones acknowledged that he continues to do some of the housekeeping and household chores, including washing dishes, cleaning the bathrooms (with the exception of the shower), and doing laundry. Mr. Jones also testified in chief that he has difficulty going to the bathroom. He has no sexual function. He spends most of his time inside the house sitting in a recliner, watching television.
- [27] Outside of the house, Mr. Jones cannot walk any distance without assistance. Around his property, he uses a scooter. This places obvious limits on his ability to tend to the fruit trees on his property. He no longer rides ATVs, and he finds archery difficult because of diminished strength. When Mr. Jones goes out in public, he generally takes a walker.
- [28] Mr. Jones works at a part-time job two to three days per week, sitting or and sometimes standing, monitoring a machine at a distillery.
- [29] About one year after the second surgery, Mr. Jones resumed playing drums. He set up his drum kit in his in-home studio, and made arrangements to record music with the other members of his blues band. Mr. Jones testified that they play an average of twice per week, for three hours maximum per session. Mr. Jones finds it to be a constant effort to play properly. He has difficulty physically pressing down and pulling up on the drum pedals, and he usually has to go back and edit out his mistakes. This is as much drumming as Mr. Jones can handle given his current condition. He has not played any live performances since the surgeries, although he speculates that he may try to do so in the future.
- [30] Mr. Jones continues to have difficulty concentrating and focusing, and he continues to be irritable and irrational. He does not socialize or seek out friends. He sees his band mates from time to time, but that is the extent of his social interaction. He does not see family or other friends.
- [31] Ms. Pechet gave evidence corroborating much of what Mr. Jones said about his current physical, cognitive, and emotional state. In her experience, Mr. Jones has shown a steady decline in his physical abilities, including an increasingly limited ability to walk. He spends 85% of his time at home sitting in a recliner. He is only able to play in one band. He is only able to do some chores inside the home, and cannot do any outside chores at the family property. Ms. Pechet also corroborated the testimony of Mr. Jones with respect to his diminished cognitive function. He presents as irritable and appears to lack the capacity to concentrate or see a task through to its completion. Ms. Pechet worries about her ability to cope with caring for Mr. Jones as he ages. She is concerned that Mr. Jones may lose his mobility and end up in a wheelchair. She has no confidence that she is up to the task and she worries what the future will be like.

[32] Mr. Jones's friend and former band-mate Mr. Ketcheson testified that prior to the collision, he played with Mr. Jones in both the brass band and the swing band. They practiced regularly and performed 35 to 40 times per year. In that time, Mr. Jones was "sharp as a tack", and knowledgeable and conversant in many topics. Since Mr. Jones has had his surgeries, they have not played music together, but Mr. Ketcheson has visited Mr. Jones's property eight to ten times in the past three years or so. He has noted Mr. Jones to be much less mobile and agile than he used to be. When he does move, he is in obvious pain. Mr. Ketcheson described Mr. Jones as a "shadow of his former self", having lost perhaps 40 or 50 pounds, and seemingly unable to bend over to pick up a pencil. Cognitively, Mr. Jones seems to get side-tracked easily, often forgetting his train of thought and then apologizing about it.

The Expert Medical Evidence

- [33] I heard from four physicians who presented expert opinion evidence with respect to diagnosis, prognosis, and future treatment of the injuries sustained by Mr. Jones in the collision. In particular, I was presented with evidence from (i) Dr. Matishak, a neurosurgeon called by the plaintiff, (ii) Dr. Medvedev, a neurologist called by the plaintiff, (iii) Dr. Richardson, an orthopedic surgeon called by the defendant, and (iv) Dr. Cameron, a neurosurgeon called by the defendant. I also heard from a fifth expert witness, Ms. Robertson, a physiotherapist called by the plaintiff, who presented opinion evidence focused on Mr. Jones's treatment needs and costs of future care.
- [34] There was a fair amount of common ground between the expert witnesses, although they differed on several key points.
- [35] One area of disagreement had to do with whether Mr. Jones's cognitive difficulties are a function of post-concussion syndrome or merely a by-product of chronic pain from his other injuries. This disagreement is significant because it impacts on the prognosis with respect to Mr. Jones's cognitive difficulties. For the reasons detailed below, I accept the opinion evidence of the plaintiff's expert, Dr. Medvedev, reinforced by the opinion of Dr. Matishak, that Mr. Jones's cognitive difficulties are in large measure the product of post-concussion syndrome arising from a head injury suffered during the collision.
- [36] Another significant point of departure in the opinion evidence relates to the nature of Mr. Jones's current, rather dire lower back condition. The experts were in agreement that quite independent of the collision, Mr. Jones had pre-existing degenerative disc disease, but they parted company on whether or to what extent the collision contributed to Mr. Jones's disc herniation, spinal chord compression, and thoracic myelopathy, for which he required the two surgeries that have left him in the condition in which he now finds himself. For the reasons discussed below, I accept the evidence of the plaintiff's experts that the collision had the effect of exacerbating Mr. Jones's previously asymptomatic degenerative disc disease, contributing to his spinal stenosis, permanent partial disability, and risk of further deterioration.

[37] In the net result, I find that the three most significant physiological conditions experienced by Mr. Jones in the wake of the collision have been: (a) post-concussive syndrome with associated cognitive disorder, (b) whiplash associated disorder, (c) exacerbation of pre-existing degenerative disc disease, leading to disc herniation and cord compression at the T10-11 joint, resulting in partially-resolved disc myelopathy, and kyphosis, and (d) chronic pain.

(a) Post-Concussive Syndrome

[38] As noted, the medical experts were in disagreement about whether Mr. Jones suffered a concussion during the collision. Because this was a significant point of contention between the experts, I will review their evidence on this point in some detail.

[39] Dr. Matishak, a neurosurgeon called by the plaintiff, provided an opinion that the cognitive impairment described by Mr. Jones was consistent with post-concussion syndrome. Dr. Matishak agreed that in his initial recounting of the collision, Mr. Jones did not profess any loss of consciousness. Dr. Matishak seemed to concede that the evidence with respect to loss of consciousness was ambiguous at best, but went on to explain that while brief loss of consciousness must be present in "classic" concussion, there need not be any loss of consciousness in a "simple" concussion. Mr. Jones was involved in a forceful collision and many of his subsequent, persistent cognitive difficulties in terms of memory, concentration, focus, and irritability are consistent with post-concussion syndrome. Dr. Matishak testified that he was aware of but did not accept Dr. Cameron's opinion that Mr. Jones's cognitive difficulties are attributable to chronic pain. In Dr. Matishak's opinion, the symptoms experienced by Mr. Jones have been beyond the pale of cognitive difficulties commonly associated musculoskeletal pain. Dr. Matishak maintained that many of Mr. Jones's symptoms have the hallmarks of a minor traumatic brain injury. I acknowledge the submission of defendant's counsel that Dr. Matishak's approach might be criticized on the basis that he engaged in "cherry picking of the records". He freely admitted in cross-examination that he chose to rely on information that supported his position, and discounted information that did not. This approach is generally not in keeping with the proper role and duty of an expert, which is to assist the court by providing an informed opinion based on an objective and balanced assessment of the relevant material. I have taken this criticism into account in assessing the weight attached to Dr. Matishak's opinion evidence.

[40] Dr. Medvedev, a neurologist tendered by the plaintiff, opined that Mr. Jones suffers from post-concussive syndrome, leading to post-traumatic headaches, cognitive dysfunction, and personality dysfunction. Dr. Medvedev explained that a diagnosis of post-concussive syndrome requires evidence of acceleration-deceleration trauma, plus symptoms of cognitive dysfunction, headaches, impaired balance, and neurological and cognitive effects. In cross-examination, Dr. Medvedev agreed that he noted in his report there was no evidence of loss of consciousness. He explained that post-concussive syndrome is a clinical diagnosis, not a technical one, and thus it does not require evidence of loss of

consciousness. Dr. Medvedev agreed with Dr. Cameron's proposition that chronic pain and sleep can affect cognition, but maintained that in Mr. Jones's case, the cognitive impairments were multi-factorial, and that post-concussive syndrome was a material part of the picture.

- [41] Dr. Cameron, a neurologist called by the defendant, offered an opinion that Mr. Jones's cognitive difficulties were in effect a by-product of chronic pain from soft tissue injuries. In Dr. Cameron's opinion, Mr. Jones does not meet the criteria for a minor traumatic brain injury because he suffered no altered state of consciousness or loss of consciousness at the time of the collision. Moreover, some of the symptoms described by Mr. Jones, specifically impaired visual perception and speech, are not classical symptoms of a concussion or minor traumatic brain injury. Dr. Cameron expressed the opinion that headaches, anxiety, and depression probably contributed to Mr. Jones's post-collision cognitive difficulties. In cross-examination, Dr. Cameron agreed that many of the symptoms Mr. Jones reported to treatment providers in the wake of the collision were consistent with post-concussion syndrome, but maintained that to meet the diagnostic requirements for a minor traumatic brain injury, the subject must have experienced a loss of consciousness. In Dr. Cameron's view, the most reliable evidence with respect to loss of consciousness is the account given by the subject at or shortly after the event, and in this case Mr. Jones denied a loss of consciousness in his initial description of the collision. Dr. Cameron agreed that there was evidence Mr. Jones banged his head, and that he has suffered cognitive difficulties including inability to concentrate and organize, loss of short-term memory and sense of direction, diminished mathematical aptitude, and loss of patience. However, in Dr. Cameron's opinion these ongoing cognitive difficulties have been the product of depression and anxiety caused by soft-tissue injuries, rather than a product of a minor traumatic brain injury.
- [42] Considering all of this evidence together, and assessing it in light of the testimony of Mr. Jones and Ms. Pechet, I prefer the opinion of Dr. Medvedev over that of Dr. Cameron. I also find that Dr. Medvedev's opinion is supported by the opinion of Dr. Matishak, although I must be cautious in accepting Dr. Matishak's opinion given that he was admittedly selective in his assessment of the evidence as to loss of consciousness. However, on my own assessment of the evidence I find it quite likely that Mr. Jones suffered at least some degree of "altered consciousness" during the collision. Mr. Jones was unquestionably involved in a forceful collision, and he gave unchallenged, reliable evidence that he banged his head. While he may have denied any loss of consciousness or gaps in memory during his initial description of the event, his testimony at trial supports the conclusion that he did in fact experience what Dr. Cameron referred to as an "altered state of consciousness". Mr. Jones banged his head and was disoriented. He testified that he remained in the truck for a period of some five to ten minutes before getting out, and he was clearly confused in his testimony about his manner of exiting the truck.

[43] Accepting Dr. Medvedev's testimony that a diagnosis of post-concussive syndrome requires evidence of acceleration-deceleration trauma, together symptoms of cognitive dysfunction, headaches, impaired balance, and neurological and cognitive effects, I find that to be an apt description of Mr. Jones's situation. I consider many of Mr. Jones's cognitive challenges to be entirely consistent with the symptoms of post-concussive syndrome as described Dr. Medvedev, and also by Dr. Matishak. I find Dr. Cameron's opinion that Mr. Jones's continuing cognitive difficulties are a product of depression and anxiety from chronic pain to be unconvincing. Dr. Medvedev's opinion that Mr. Jones's cognitive difficulties are multi-factorial, with post-minor traumatic brain injury being a contributing factor, is more consistent with the probabilities of the case arising from my assessment of the evidence as a whole. It should be noted that the other significant factor contributing to Mr. Jones's continuing cognitive difficulty - chronic pain - is also a product of Mr. Jones's collision-related injuries.

(b) Whiplash Associated Disorder

[44] Recall the testimony of Mr. Jones that in the months following the collision, he experienced pain in his arms, upper back, and neck. He had limited strength and he found it hard to reach up or lift things. Over time, these symptoms subsided. All of this evidence is consistent with the opinion of Dr. Matishak that the collision caused Mr. Jones to suffer from whiplash-associated disorder affecting his cervical spine area. The opinion of Dr. Matishak, which I accept and find to be consistent with the testimony of Mr. Jones and the other plaintiff witnesses, is that the effects of this condition have largely resolved over time, and Mr. Jones has been left with somewhat limited mobility but normal strength in his neck, upper back, and arms.

(c) Exacerbation of Pre-Existing Degenerative Disc Disease

[45] All four medical experts were in agreement that prior to the collision, Mr. Jones had pre-existing degenerative disc disease. The evidence is also beyond dispute that roughly one year after the collision Mr. Jones suffered a herniated disc, requiring a course of surgical treatments that did not turn out well, leaving him in a seriously compromised position. He now suffers from thoracic myelopathy and thoracic kyphosis of 35 to 37 degrees, conditions which are partially debilitating and which pose at least some risk of further deterioration, including a possibility of partial paralysis. The witnesses agree that prior to the collision the degenerative disc disease was basically asymptomatic. The experts part company, however, on the question of whether there is an identifiable causal connection between the collision and the subsequent emergence of Mr. Jones's spinal and lower back problems.

[46] To reach a conclusion on this point it is necessary to briefly summarize four settled principles of law governing causation. First, the basic test for causation is that the plaintiff must demonstrate, on a balance of probabilities, that he or she would not have suffered a particular loss "but for" the defendant's tortious conduct: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey] at para. 14; *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 21; *Clements v. Clements*,

2012 SCC 32 at para. 8. Second, the law provides that where there are said to be causes for the plaintiff's injury other than the conduct of the defendant, including pre-existing conditions, the requirement for causation is made out where it is shown that the tortious conduct was a contributing cause to the plaintiff's injury. Thus, although the "but for" analysis continues to apply in the sense that the plaintiff must show that he or she would not have suffered the injury "but for" the defendant's tortious conduct, the test can be met by proof that the defendant's tortious conduct was "a contributing cause" to the plaintiff's injury: *Athey* at para. 12. Third, the law of causation provides that where the defendant's conduct is found to be a contributing cause of an injury, liability is not reduced or apportioned due to the presence of other contributing causes. This means the defendant tortfeasor is liable for the plaintiff's injuries even if those injuries are unexpectedly severe due to a pre-existing condition: *Athey* at para. 34. A fourth point, which is probably more relevant to assessment of damages than the initial analysis of causation, is that the plaintiff is entitled to damages that would place him in the position that he occupied prior to the collision, but no better position. Thus, in assessing damages, it is the difference between the plaintiff's "original position" prior to the tortious conduct, including any pre-existing conditions, and the plaintiff's "injured position" after the tort that is used to measure the loss: *Athey* at para. 32; *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

- [47] When I consider the evidence in the case at bar in light of the legal principles stated above, my conclusion is that the collision was indeed a contributing cause of Mr. Jones's current thoracic myelopathy and fixed kyphosis. I start from the premise that prior to the collision Mr. Jones's pre-existing degenerative disc disease was asymptomatic. He was a relatively active person with no limitations to speak of in relation to his lower back. I next consider the evidence of Dr. Richardson that "the onset of spinal cord myelopathy resulting from compression of the spinal cord can present as acute symptoms from a sudden compression or can present on a slow progressive basis with the gradual onset of clinical findings of cord compression until compromise of the spinal cord reaches a critical point". In Mr. Jones's case, in the year or so following the collision, he began to experience lower back and lower extremity problems. He was later diagnosed with a herniated disc, and surgery was recommended.
- [48] Against this backdrop, and considering all the evidence about the time frame in which the symptoms emerged and were diagnosed thereafter, I accept Dr. Medvedev's opinion that the force of the collision aggravated Mr. Jones's previously asymptomatic degenerative disc diseases, which in turn led to spinal cord compression, emergence of thoracic myelopathy, and disc herniation. Again, I note that Dr. Medvedev's opinion is consistent with or reinforced by that of Dr. Matishak. I find Dr. Richardson's opinion - that the exact cause or occurrence of the herniated disc, and the relationship between the collision and Mr. Jones's myelopathy are both unknown - to be unconvincing. For his part, Dr. Cameron in his expert report acknowledged the possibility that the soft tissue and musculoskeletal back injuries suffered by Mr. Jones at the time of the collision were "a contributing factor to the disk herniation at the T10-11 level". I agree with appellant's counsel that Dr. Cameron's trial

testimony was verbose and somewhat unresponsive to questions in cross-examination. In his trial testimony, he expanded his opinion to include a suggestion that imaging in 2017 and 2018 showed changes at the L5 level consistent with a fracture that could only have been caused by a traumatic event of some sort. However, there is no evidence of any intervening event after the collision on 4 April 2016.

[49] I find the acknowledged possibility in Dr. Cameron's report that the soft tissue and musculoskeletal back injuries suffered by Mr. Jones at the time of the collision were "a contributing factor to the disk herniation at the T10-11 level" to be consistent with the opinion evidence of Dr. Medvedev, as well as that of Dr. Matishak. In particular, I rely on Dr. Medvedev's opinion that while it is probable that Mr. Jones had some degree of degenerative stenosis prior to collision, the herniated disc at the T10-11 level "would require a substantial level of force and probably occurred at the time of the collision". I appreciate that Dr. Medvedev's opinion was somewhat qualified in that he described Mr. Jones's spinal cord condition as an "indirect consequence" of the collision, but based upon the principles of law discussed above I find that the collision was a contributing cause of the herniated disc. Subsequent surgical procedures to address this problem went poorly and have left Mr. Jones in the condition in which he now finds himself.

(d) Chronic Pain

[50] Based on the testimony of Mr. Jones, supported by the evidence of Ms. Pechet, and taking into account the opinion evidence of Dr. Richardson, Dr. Cameron, and Dr. Matishak, I find that Mr. Jones suffers from chronic pain as a result of injuries sustained in the collision.

(e) Prognosis

[51] The evidence indicates that the whiplash symptoms affecting Mr. Jones's neck, shoulders, and arms have largely resolved. With respect to the cognitive and behavioral difficulties attributable to post-concussion syndrome, taking into account that Mr. Jones continues to experience these symptoms some four years after the collision, I accept the expert evidence of Dr. Matishak and Dr. Medvedev that the prognosis is guarded such that Mr. Jones is not likely to see much improvement. As regards Mr. Jones's chronic pain, I accept the evidence of Dr. Medvedev that the treatment options are limited. Mr. Jones does not wish to continue with use of opioid drugs. He takes Gabapentin and CBD products to manage pain, but these drugs do not offer any prospect of long-term improvement in his condition.

[52] Finally, with respect to Mr. Jones's spine, low back, and lower extremity symptoms, I find that the prognosis is poor and indeed there is a possibility that these conditions will worsen over time, giving rise to some appreciable risk of lower-limb paralysis. I find that this is a risk, but I do not accept the submission of plaintiff's counsel that Mr. Jones will "likely suffer a permanent loss of function in both lower extremities" because, in my view, that submission rests on an over-reading of the expert evidence. In particular, I find Dr. Richardson's assertion that Mr. Jones will likely be left with permanent dysfunction in his lower limbs to speak to Mr. Jones's current level of disability, that is, a permanent partial

disability. I accept that further deterioration to the point of full paralysis in the lower limbs is a possibility. Finally, I note that there is some possibility of future surgery, but the procedure in question is considered highly invasive and risky, and not recommended in Mr. Jones's case.

- [53] Overall, considering the combination of Mr. Jones's cognitive difficulties, his permanently altered posture, his limited mobility, and his continuing chronic pain, I conclude that his condition is not likely to improve, and there is some risk that his spinal condition may deteriorate over time. I agree with Dr. Medvedev's characterization that Mr. Jones is "substantially disabled". This is reinforced to some extent by the defendant's expert, Dr. Cameron, who offered an opinion that Mr. Jones has suffered a partial disability. In terms of the effect on Mr. Jones's daily living, the evidence indicates that his physical, cognitive, and emotional changes make it a virtual certainty that he will be unable to play music at anything approaching the same level that he used to do, significantly limiting his social interactions. His unresolved injuries have also affected and will continue to affect his other recreational pursuits, and his home life, considering in particular Mr. Jones's cognitive impairment and problems with regulation of emotions.

Non-Pecuniary Damages

- [54] The purpose of non-pecuniary damages is to compensate the plaintiff for pain and suffering, loss of amenities, or loss of enjoyment of life, recognizing the limitations inherent in trying to place a market value on such matters: *Gillam v. Wiebe*, 2013 BCSC 565 at para. 68; *Pan v. Shihundu*, 2014 BCSC 504 at para. 109. The quantum of the award is determined not by reference to the nature of the particular injury in the abstract, but rather by the "ability to ameliorate the condition of the victim considering his or her particular situation": *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at p. 637.
- [55] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 the Court provided a non-exhaustive list of factors to be taken into account in determining an appropriate award for non-pecuniary damages. These factors include the plaintiff's age, the nature of the injury, the severity and duration of the plaintiff's pain, emotional suffering, the extent of any disability, the effect on family and social relationships, impairment of the plaintiff's mental and physical abilities, the impact on the plaintiff's lifestyle, and any evidence of stoicism, with this last factor being a consideration which should not operate to penalize the plaintiff.
- [56] In the case at bar, it would appear to be common ground between the parties that the injuries sustained by Mr. Jones in the collision, and the effects that those injuries have had on his life, are very significant indeed.

- [57] The plaintiff seeks non-pecuniary damages of \$280,000. Plaintiff's counsel cites two relatively recent cases, *Ho v. Ip*, 2019 BCSC 2220 [Ho] and *Sangra (Guardian ad litem of) v. Lima*, 2015 BCSC 2350 [Sangra], in which elderly plaintiffs who were seriously but not catastrophically injured in motor vehicle accidents were awarded non-pecuniary damages of \$280,000 and \$315,000 respectively.
- [58] The defendant submits that Mr. Jones should receive non-pecuniary damages in the range of \$175,000 to \$187,000. In support of this position, defendant's counsel has cited a collection of cases, with damage awards ranging from \$175,000 to \$182,900, when adjusted to 2021 values. See *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2011 BCSC 762, *McCullagh v. Rozinbaum*, 2020 BCSC 429, and *Chow v. Goodman*, 2016 BCSC 1486.
- [59] To briefly recount the plaintiff's injuries and their effect on his lifestyle, Mr. Jones is a 64 year old man who, prior to the collision, was in relatively good health. He had occasional headaches and minor neck pain from a prior collision. He had a pre-existing degenerative disc disease, but it was asymptomatic. Prior to the collision, Mr. Jones was engaged as a musician on a more or less full time basis, and he played an active role in tending and maintaining the grounds on the 20-acre property where he lives with his wife and son. In short, he was physically active, had no cognitive limitations, and enjoyed a busy and fulfilling lifestyle. In the immediate aftermath of the collision, Mr. Jones had significant pain from soft tissue injuries, in addition to cognitive difficulties. In the longer term, Mr. Jones has developed serious lower back and lower extremity problems. He went through several invasive surgeries, with serious complications that caused him pain and suffering. His back is now permanently fused at a 35 to 37 degree angle, he is unable to walk properly, he has chronic pain, and he is unable to focus or concentrate. He is extremely limited in his ability to play music, which was a central part of his pre-collision routine and lifestyle. He has limited social interactions, and even his relationship with his wife is strained. I find Mr. Ketcheson's description that Mr. Jones is now "a shadow of his former self" to be apt.
- [60] One relevant factor is Mr. Jones's age. In one sense, Mr. Jones could be expected to receive an award lower than that received by a younger plaintiff with comparable injuries, because a younger plaintiff would have more to lose and would have to endure those injuries for a longer life span than an older plaintiff: *Duifhuis v. Bloom*, 2013 BCSC 1180 [Duifhuis] at para. 58, citing *Olesik v. Macklin*, [1987] B.C.J. No. 229 (S.C.). However, there are also considerations going in the other direction. For one thing, a particular injury may have a more "profound" effect on an older person than it might for a younger plaintiff, who is more resilient and better able to adjust his or her lifestyle to accommodate for the injury: *Ho* at para. 66; *Sangra* at para. 113-114, both citing *Pingitore v. Luk*, 1994 CanLII 1050 (B.C.S.C.). It is also relevant that an elderly plaintiff may be deprived of some or all of the positive features of what was expected to be his or her "golden years": *Johal v. Radek*, 2016 BCSC 454 [Johal] at para. 52; *Duifhuis* at para. 57. In the final analysis, the court must weigh and balance these competing considerations in light of the particular facts of the case, to put the plaintiff's age in its proper context when assessing the nature of his or her loss: *Ho* at para.

71; Johal at para. 52.

- [61] Before determining the quantum of non-pecuniary damages, it is necessary to first address Mr. Jones's discrete claim for loss of "domestic capacity". The primary position of the plaintiff is that he is entitled to a discrete pecuniary damage award of \$100,000 for loss of domestic capacity, and in the alternative, the non-pecuniary damages should be increased on account of Mr. Jones's reduced capacity for housekeeping and household chores. The court has the discretion to address such a claim either as part of the non-pecuniary loss, or alternatively under a separate head of pecuniary damages. In *Kim v. Lin*, 2018 BCCA 77 at para. 33, Bauman C.J. identified a principled basis for deciding how to approach the issue. On the one hand, where the plaintiff has suffered a "true loss of capacity", due to an injury that "would make a reasonable person in the shoes of the plaintiff unable to perform usual and necessary house work", the loss may be compensated by a pecuniary award. On the other hand, "[w]here the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award". However, the Chief Justice stressed that these remarks were not to be taken as an "inflexible rule", since it always remains "in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": *Kim* at para. 33, citing *Liu v. Bains*, 2016 BCCA 374 at para. 26.
- [62] The defendant argues that it is not open to the plaintiff to seek pecuniary damages for loss of housekeeping capacity because it was not particularized that way in the Notice of Civil Claim. In response, the plaintiff filed a supplementary submission indicating that "loss of domestic capacity" was particularized in a letter dated 13 August 2020, and further that the authorities stretching back as far as *McTavish v. MacGillivray*, 2000 BCCA 164 recognize that, depending on the circumstances, "compensation for loss of housekeeping capacity" can fall into any one of five headings, namely non-pecuniary damages, special damages, past loss of income, cost of future care, or loss of future earning capacity, or "as an entirely new head of damages, sometimes pecuniary, sometimes not". The objective of the pleadings is to provide the opposing party with fair notice of the claim. I agree with plaintiff's counsel that in the case at bar the defendant has had fair notice of the plaintiff's intention to seek damages for loss of domestic capacity. The claim could be pursued under a number of heads of damages that easily fit within the pleadings.
- [63] Nevertheless, in view of the principles discussed above, this is not a case where loss of domestic capacity is most appropriately dealt with by way of a discrete pecuniary damages award. I have several reasons for reaching this conclusion. First, while Mr. Jones is somewhat limited in his ability to perform indoor chores and household tasks, he did acknowledge in his testimony that he is still able to do things like wash dishes, clean the bathroom (except the shower), and do the laundry. Second, with respect to house cleaning, yard and garden maintenance, and house maintenance, the plaintiff has advanced discrete claims for these items as part of his costs of future care, and I agree with defendant's counsel that Mr. Jones should not be compensated twice for this aspect of his loss. To be

clear, I will deal with Mr. Jones's claim for damages related to his incapacity to perform this kind of work as an aspect of the costs of future care. What remains to be considered is the effect of the plaintiff's diminished capacity on his enjoyment of life. For example, I understood his evidence to be that looking after the fruit trees on the property was an outdoor activity that was an enjoyable part of his lifestyle. He has lost that enjoyment. A loss of this sort is best addressed as an aspect of non-pecuniary damages.

- [64] There is no rule that requires this component of non-pecuniary damages to be segregated and valued separately from the balance of the non-pecuniary damage award. Indeed, there is much to be said for the idea that since determination of damages is an assessment and not a calculation, different aspects of the non-pecuniary claim should not generally be broken out and valued separately. In the case at bar, I have taken this aspect of Mr. Jones's loss into account in my assessment of his overall loss and corresponding entitlement to compensation.
- [65] I find as a starting point that an appropriate award for non-pecuniary damages is near the top end of the range suggested by plaintiff's counsel. The cases cited by the defendants are qualitatively distinguishable from the case at bar. In *Bouchard*, a key aspect of the plaintiff's non-pecuniary damage claim had to do with low back injuries that aggravated pre-existing degenerative disc disease, requiring surgery. However, the injuries and the outcome of the surgery were not nearly as dire as in Mr. Jones's case, and the plaintiff did not suffer any degree of cognitive impairment. In *McCullagh*, the plaintiff again suffered low back injuries with unresolved symptoms that were not as severe as those experienced by Mr. Jones. And while the plaintiff in that case also had collision-related psychological and emotional problems, they were not on the same level as the cognitive difficulties experienced by Mr. Jones. I would make the same general observation about the loss suffered by the plaintiff in *Chow*. In none of these cases were the plaintiffs as dramatically affected by their injuries as Mr. Jones has been. His lifestyle has been significantly and permanently altered by the effects of the collision. It is true that Mr. Jones is older than the plaintiffs in all three of the cases cited by the defendant, but as noted above, that factor cuts both ways. I have considered plaintiff's age in the manner described above in determining the appropriate non-pecuniary damage award.
- [66] Taking into account the additional consideration of Mr. Jones's loss of ability to participate in outdoor chores like tending to his garden and fruit trees, along with all of the other circumstances pertaining to Mr. Jones's injuries and how they have affected his life, I conclude that an appropriate starting point in the assessment of Mr. Jones's loss is \$290,000 in non-pecuniary damages. To be clear, this figure is not intended to reflect my acceptance of the plaintiff's claim for \$280,000, plus \$10,000 for the non-pecuniary component of the plaintiff's loss in ability to perform outdoor chores. Rather, looking holistically at the full measure of Mr. Jones's loss, I find that the starting point for the appropriate global award is \$290,000.

[67] I would apply a contingency to reduce the non-pecuniary damages on account of the possibility that at some point in time Mr. Jones's pre-existing degenerative disc disease might have materialized, producing some degree of low back pain and limitations in mobility. However, even if the risk materialized, it is by no means certain that Mr. Jones would have suffered a disc herniation requiring surgery. Furthermore, even if Mr. Jones's pre-existing degenerative disc disease became symptomatic at some point, it might have affected his mobility and physical health, but would not have detrimentally affected his cognitive function in the way the collision has done. Thus, Mr. Jones's mobility might have been impaired, and he might have suffered some degree of discomfort or pain, but there is no circumstance where he would have been left in the state in which he now finds himself. Taking all of this into account, I would reduce the non-pecuniary damage award by 10% on account of contingencies relating to Mr. Jones's pre-existing degenerative disc disease. The net amount of Mr. Jones's non-pecuniary damage award is \$261,000.

Special Damages

[68] The parties are agreed that Mr. Jones is entitled to \$4,662.47 in special damages.

Cost of Future Care

[69] Damages for cost of future care seek to place the plaintiff in the position he would have been in if he had not sustained the injuries caused by the defendant's tortious conduct. The test for determining an appropriate award for costs of future care is "an objective one", under which (i) "medical justification" must be shown for the items claimed, and (ii) the claims must be "reasonable": *Sendher v. Wong*, 2014 BCSC 140 at para. 193 citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (3d) 33 (S.C.) at p. 84. The plaintiff must also show that he or she is likely to incur the costs in question: *Young v. Shao*, 2018 BCSC 2017 at para. 110; *Loepky v. Insurance Corporation of British Columbia*, 2012 BCSC 7 at para. 109. In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13 [Penner], Newbury J.A. encouraged trial judges not to lose sight of "common sense" in assessing claims under this head, "however much they may be recommended by experts in the field".

[70] In determining damages for cost of future, the court is required to look ahead in an effort to predict "what care is likely to be in the injured person's interest": *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21-21. The award "should be sufficient to ensure that [the plaintiff] can live as complete and independent life as is reasonably attainable" through appropriate treatment and care: *Ho* at para. 95, citing *Penner* at para. 13. Because assessing costs of future care is a predictive exercise, the award must take into account positive and negative contingencies, including the possibility that the plaintiff may have been required to incur the expense of a particular form of care or treatment regardless of the defendant's tortious conduct, because of advancing age: *Ho* at para. 96.

[71] The plaintiff relies on the expert medical evidence of Dr. Matishak, Dr. Medvedev, and Dr. Richardson. The plaintiff also adduced opinion evidence from Ms. Phillips, an expert in physiotherapy, who provided a report that contained a line-item list of predicted future care costs. Finally, the plaintiff presented the expert report of Mr. Szekely, an economist. The figures and tables in Mr. Szekely's report operate on the premise that the average life expectancy for a male in British Columbia is 84.7 years. Thus, as at the date of trial, the horizon for costs of future care in Mr. Jones's case is 20.7 years. Mr. Szekely generated two tables, setting out the present value of future care costs, item by item, based on the low end and high end of the costs identified by Ms. Phillips. On these parameters, I find that the following costs of future care claimed by Mr. Jones are medically justified and reasonable in order to preserve or promote his physical and mental health:

(a) Physiotherapy

\$1,875

(b) Assistive devices

\$11,886

(c) Medication (Gabapentin)

\$5,378

(d) Housecleaning (weekly)

\$17,526

(e) Housecleaning (seasonal) (70% contingency)

\$9,136

(f) Yard and Garden Maintenance (70% contingency)

\$11,102

(g) House Maintenance (70% contingency)

\$6,736

(h) Snow Removal (70% contingency)

\$2,694

(i) Incontinence Products

\$10,785

(j) Walker

\$1,297

(k) Assisted Living (\$58,500 per year from 2035, 50% contingency)

\$156,575

[72] Most of these items are self-explanatory, but several require some additional comment.

[73] With respect to item (a), physiotherapy, the plaintiff's cost of future care report recommends 12 sessions per year, for a total cost of \$15,000. Ms. Phillips recommends physiotherapy to treat "exacerbations" of Mr. Jones's symptoms. I do not find the concept of exacerbations or flare ups to be applicable in Mr. Jones's case. There is no evidence that his symptoms wax and wane. In support of this position, Ms. Phillips cites the opinion of Dr. Medvedev, whose actual recommendation is for participation in structured physical activity to the best of his ability, "probably under the supervision of a physiotherapist". In cross-examination at trial, Dr. Medvedev testified that in his view it would be sufficient for a therapist to set up an exercise program which Mr. Jones could then follow on his own. For his part, Mr. Jones testified that he learned exercises from a physiotherapist and felt benefits when he did the exercises on his own. On this basis, the defendant submits that Mr. Jones is entitled to the cost of three "refresher" sessions with a physiotherapist, but no more than this. I find that there is some merit in that approach, but I would extend that reasoning to conclude that Mr. Jones will require similar "refreshers" every several years as he ages and his exercise capacity and needs change. I therefore award a total of \$1,875 for physiotherapy costs.

[74] With respect to items (d) and (e), housekeeping, I note the evidence of Mr. Jones that he is still able to do many household chores, but I have allowed one-half of the amount set out in the cost of future care report, based on the concession of defendant's counsel that this is medically justified and reasonable. As to seasonal, heavy duty housecleaning, I find the amount set out in the cost of future care report to be necessary and reasonable, but I have applied a 70% contingency to account for the possibility that, if Mr. Jones had not been injured in the collision, his degenerative disc disease might eventually have precluded him from doing work of this sort.

[75] With respect to items (f), (g), and (h), once again I have applied a 70% contingency to account for the possibility that Mr. Jones's degenerative disc disease might eventually have prevented him from doing this kind of work in any event.

[76] With respect to item (k), assisted living, in the cost of future care report Ms. Phillips states that due to his collision-related injuries, Mr. Jones "may" require supportive residential care some 10 to 15 years earlier than would otherwise be the case. The defendant submits that this evidence is too speculative to support an award for assisted living, especially considering that none of the plaintiff's medical experts directly addressed this point. However, I agree with the plaintiff's submission that the court can make findings on cost of future care based upon evidence from a variety of professionals with relevant expertise, provided that there is "some evidentiary link" between a physician's assessment of pain, disability, and recommended treatment, and the care recommended by a qualified health care professional: *Paur v. Province Health Care*, 2017 BCCA 161 at para. 109, citing *Aberdeen v.*

Zanatta, 2008 BCCA 420 at para. 43, 63 and Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 [Gregory] at para. 39 In this regard, it is not necessary for the plaintiff to present evidence from a medical doctor on each and every component of the claim: Gregory at para. 38-39; Jacobson v. Nike Canada Ltd., 1996 CanLII 3429 (B.C.S.C.) at para. 182.

- [77] I also do not agree with the defendant's submission that the claim for the future cost of assisted living is speculative. The medical experts, Dr. Medvedev, Dr. Matishak, and Dr. Richardson, all acknowledge the possibility that Mr. Jones's spinal and lower limb dysfunction will continue to deteriorate over time. Against this backdrop, and applying her experience in assessing ongoing and long-term care needs, Ms. Phillips offers an opinion that due to his collision-related injuries, Mr. Jones "may" require assisted living 10 to 15 years earlier than would otherwise be the case. I accept that the opinion of Ms. Phillips is expressed only as a possibility, but I find it to be a reasonable possibility. In her viva voce testimony, Ms. Phillips suggested that due to the uncertainties at play, it would be appropriate to apply a 50% contingency to this cost item.
- [78] Defendant's counsel further argues that the cost of future care report is vague, in that it fails to spell out in any detail what nursing or other specific care needs Mr. Jones is likely to face, so as to require him to go into assisted care in a residential setting at an earlier age than he might otherwise have done. I have considered this point, but on the basis of the testimony of Mr. Jones and Ms. Pechet, and the opinion evidence of Ms. Phillips, I conclude that the plaintiff has established a medical justification for this particular form of future care. Mr. Jones has conditions that impact significantly on his mobility, and also on his bodily functions including his ability to go to the bathroom. Mr. Jones already has difficulty walking, and his mobility and his overall ability to care for himself can reasonably be expected to further deteriorate as he ages. Ms. Pechet gave evidence that she already has difficulty caring for Mr. Jones in the home, and she is genuinely concerned that she will not be able to cope in the future. Her concerns are based not only on Mr. Jones's physical limitations, but also his cognitive and emotional deficits. It is a fact of life that many elderly people eventually require assisted care in a residential setting. The opinion of Ms. Phillips is that, due to his injuries, Mr. Jones may require care of this sort on an accelerated timetable. I accept that opinion. It is not based on mere speculation, or some nebulous concern about Mr. Jones's capacity as he ages, but rather on an assessment of his particular physical and cognitive limitations, and how those are likely to affect him as he ages.
- [79] Defendant's counsel is critical of the fact that Ms. Phillips has not, in her report, addressed other assisted-living options, including in-home care or assistance from a nurse. There is some merit in this point, but I refer here again to the evidence of Ms. Pechet, expressing genuine concern about her ability to care for Mr. Jones at home as he ages, particularly if his condition worsens.

- [80] Finally, counsel for the defendant questions whether Mr. Jones would actually be willing to go into a residential assisted care facility, even if the cost were covered in his damages award. This submission is based on evidence adduced in cross-examination of Mr. Jones. When asked about the assisted living proposal made by Ms. Phillips in her cost of future care report, Mr. Jones replied that it was absurd to ask him about such a thing, that he had never considered it, and that he could not say whether it would ever be necessary. In re-examination, when asked, if his condition deteriorated, whether assisted living would be appropriate some 10 to 15 years in the future, Mr. Jones responded that he would absolutely consider it. Viewing the evidence as a whole, I find that Mr. Jones would indeed be prepared to seek out residential assisted care if it was determined at some point that his care needs could no longer be met at home. I consider Mr. Jones's initial reaction to this topic when it was put to him in cross-examination in light of his overall demeanor as a witness. In his testimony, he presented as contrarian and somewhat irritable, particularly when challenged, surprised, or confused by a particular question. I find this demeanor to be in keeping with Mr. Jones's current cognitive condition, as described by Mr. Jones himself, Ms. Pechet, and Mr. Ketcheson, and consistent with the expert medical evidence.
- [81] To sum all this up, I accept the opinion evidence of Ms. Phillips that in view of Mr. Jones's condition, his care needs, his age, and his prognosis, it is a reasonable possibility that he will require residential assisted care some 10 to 15 years earlier than he would were it not for his collision-related injuries. I find this aspect of Mr. Jones's claim to be medically justified. Ms. Phillips presented a range of assisted living costs from several different care facilities. In my view it is reasonable that Mr. Jones should have some degree of choice, but he should not expect the most expensive assisted living option at the most expensive facility. Thus, I assess damages based on an annual cost of \$58,500 per year, from the year 2035, reflective of a risk of going into residential assisted care 12.5 years earlier than Mr. Jones would otherwise have been required to do. In view of the uncertainties involved, I have applied a 50% contingency to this cost.
- [82] There are other items in the cost of future care report which I find were not shown to be either medically justified or reasonable, for the following reasons.
- [83] The cost of future care report proposes an award of some \$5,400 for psychological counselling, including family counselling to assist Mr. Jones in dealing with the effects of his injuries. Ms. Phillips made this recommendation in light of difficulties expressed by both Mr. Jones and Ms. Pechet about the effect of Mr. Jones's condition on their family situation. Ms. Pechet testified that Mr. Jones's condition, his frustrations, and his cognitive challenges have been a strain on their relationship. However, there is also evidence that counselling was recommended to Mr. Jones upon his discharge from the transitional pain clinic following his second surgery. Mr. Jones was given a list of available services, but chose not to seek further counselling. In cross-examination, Mr. Jones testified that the counselling he received at the transitional pain clinic was "interesting", but he did not feel that more counselling would be helpful. On further cross-examination, Mr. Jones testified that he

found the prior counselling "fascinating", and "helpful", but never personally felt a need for it. It is difficult to know what to make of Mr. Jones's evidence on this point. On the one hand, it does appear that he can be somewhat contrarian when challenged, and this may explain his testimony on the point. On the other hand, there is clear evidence that follow up counselling was recommended, and Mr. Jones was not interested in pursuing it. Looking at things objectively, I can say from the testimony of Mr. Jones himself, and from the testimony of Ms. Pechet as to the strain of his condition on their relationship, that Mr. Jones would actually benefit from psychological and family counselling. But given Mr. Jones's own statements about his attitude toward counselling, which is ambivalent at best, I am not satisfied that he would actually pursue counselling, even if it was paid for by the cost of future care award. I conclude that Mr. Jones has not proven this aspect of his claim.

[84] Ms. Phillips also identified THC products as a future care expenditure, at a total cost of some \$115,000 over the next 20 years. Mr. Jones testified that he used cannabis products before his collision, for recreational, non-medical purposes, and I infer that he would have continued to do so even if he had not been injured in the collision. I therefore do not consider it reasonable to include these drugs in the cost of future care award.

[85] Similarly, Ms. Phillips included hydromorphone products in her report, at a total cost of some \$13,500. Mr. Jones testified that his overall experience with opioids has been negative, and he does not wish to rely on them in the future. I therefore find no sound basis to include this item as a cost of future care.

Summary

[86] To summarize, I find that the defendant is liable to pay the following damages to the plaintiff:

(1) Non-pecuniary damages

\$261,000.00

(2) Special damages

\$4,662.47

(3) Cost of future care

(a) Physiotherapy - \$1,875

(b) Assistive devices - \$11,886

(c) Medication (Gabapentin) - \$5,378

(d) Housecleaning (weekly) - \$17,526

(e) Housecleaning (seasonal) - \$9,136

(f) Yard maintenance - \$11,102

- (g) House maintenance - \$6,736
- (h) Snow removal - \$2,694
- (i) Incontinence products - \$10,785
- (j) Walker - \$1,297
- (k) Assisted living - \$156,575

Subtotal:

\$234,990.00

Total Damages

\$500,652.47

Costs

[87] If the parties are unable to agree on costs, they can file written submissions. Counsel for the plaintiff may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within three weeks of the release of these reasons. Counsel for the defendant may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within three weeks of receiving the plaintiff's written submissions. Counsel for the plaintiff may file a reply of two pages or less (plus any reply affidavit material) within one week of receiving the written submissions of the defendant. If either party takes the view that submissions on costs cannot effectively be dealt with in writing, that party may, within the time limits set out above, submit a request to schedule a further appearance for oral submissions on costs.

"Riley J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/11/2021BCSC1175.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/jones-v-colonna-2021>

Prepared on 29 October 2026 · Esheria