
CANADA / JUDGMENT

Kardum v. Asadi-Moghadam

2011 BCSC 1566

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 1566 Kardum v. Asadi-Moghadam

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kardum v. Asadi-Moghadam,

2011 BCSC 1566

Date: 20111118

Docket: M092585

Registry: Vancouver

Between:

Joseph M. Kardum

Plaintiff

And

Mojtaba Asadi-Moghadam

Defendant

- and -

Docket: M100773

Registry: Vancouver

Between:

Joseph M. Kardum

Plaintiff

And

Yugal Kishore, Amrik Singh Bahd,

Amarpal Singh Arora, and Lewis Brian Maxwell

Defendants

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for Plaintiff:

K. Gourlay

Counsel for Defendants:

H. Grewal

Place and Date of Trial/:

Vancouver, B.C.

May 16 - 20, 2011

Place and Date of Judgment:

Vancouver, B.C.

November 18, 2011

- [1] Joseph Kardum was injured in car accidents in June 2007 and October 2009 (the "accidents"). Liability for both accidents is admitted by the defendants and this trial is concerned with the assessment of damages and apportionment between the defendants.
- [2] On June 10, 2007, Mr. Kardum was driving northbound on Seymour Street; he stopped and was rear-ended by the defendant.
- [3] On October 3, 2009, Mr. Kardum was a passenger in a car crossing the Lions Gate Bridge when that car was struck from behind by Lewis Maxwell, whose vehicle had in turn been struck from behind by Yugal Kishore.
- [4] Mr. Kardum's statement of claim sets out particulars of his injury claims as follows:
 - a. soft tissue injuries to the neck, shoulders, and back;
 - b. headaches;
 - c. pain and permanent disability;
 - d. loss of income and loss of income earning capacity; and

e. expenses.

- [5] Mr. Kardum claims non pecuniary damages, past wage loss, loss of future earning capacity, future care costs and special damages. The most contentious issue raised by him is that his ability to work full-time has been compromised by his injuries and he may lose 20% of his income for the balance of his working life.

Plaintiff's Background

- [6] Mr. Kardum is a 37-year-old architect who lived in Victoria for most of his later high school years. Mr. Kardum developed an interest in architecture at an early age and obtained a bachelor of arts in history from the University of Victoria followed by a bachelor's degree and a master's degree in architecture from the University of British Columbia.
- [7] During his university years Mr. Kardum worked with his father's construction company and at a Chrysler plant doing vehicle inspections. During his high school years he also worked as a gardener.
- [8] After graduation from university, Mr. Kardum obtained employment with an architectural firm in Victoria known as Merrick Architecture Ltd. ("Merrick") where he has been very busy and has managed to do his job well.
- [9] Mr. Kardum has travelled frequently including trips to Europe and a four month course of studies in Egypt and Greece. He has travelled to Ontario many times to help his aging grandparents.
- [10] He reported enjoying good health as he grew up with the exception of an auto accident in 1995 resulting in headaches lasting for three years. In the years prior to the accidents he had experienced some soreness in his right hip but no neck or upper back problems. Before the accidents he was not taking prescription medications nor was he undergoing any therapies; he was generally healthy.
- [11] Prior to the accidents he exercised regularly. He held a membership at the YMCA as well as at other gyms in Vancouver. He would frequently jog on routes in the city and the Stanley Park seawall.
- [12] His interests include work, exercise, and socializing with friends. He was an active competitive runner.
- [13] He is currently engaged to Georgina Lyons, also an architect, whom he met while employed at Merrick. They have been together since 2005 and will be married in August of 2011.
- [14] At the time of the accident Mr. Kardum lived at 933 Seymour Street in Vancouver.

Employment

- [15] Merrick is a firm of 30 people in two offices. The firm was extremely busy in 2006/2007 and managed to weather the 2008/2009 recession because of a significant contract for work at the Olympic Village.
- [16] In 2004 Mr. Kardum transferred from Merrick's Victoria office to their Vancouver office. In order to achieve professional designation as an architect, Mr. Kardum was required to complete 5,600 hours in the nature of an internship program and successfully complete nine exams. He qualified as an architect in 2006.
- [17] Mr. Kardum became an associate at Merrick in 2010. This was an intermediate step up from his role as an intern. The promotion signalled recognition of his success with the firm and was evidence of a long-term future. He said that he had worked very hard to achieve a good reputation with Merrick. In the years prior to the accidents he exceeded the annual target of 1,950 billable hours for architects in the firm. If he exceeded that target he would be allowed to take time off or receive payment for the extra effort. He generally chose to be paid for his extra hours. In addition to billable work architects at Merrick were required to undertake professional development study.
- [18] His supervisor at Merrick is Greg Borowsky. Mr. Borowsky testified that Mr. Kardum demonstrated a high level of professionalism in the firm. He is very satisfied with Mr. Kardum's thorough work. He views Mr. Kardum as being fully committed to the company and has no concerns or complaints about his work or involvement with Merrick.
- [19] The global slowdown impacted Merrick; in spite of these events they have maintained a staff of 30 architects. Mr. Kardum would have had full-time work available to him from 2010 to the present. He said that the time worked by interns in the firm is commonly in the range of 50 hours per week. He commented that overtime with the firm is now discouraged.
- [20] The firm does not perform annual reviews of staff but Mr. Kardum said that he received periodic reviews with Mr. Borowsky and has received no complaints with regard to his work.
- [21] He believes that achieving the status of associate in the firm is an indication that his tenure is secure.
- [22] In 2005 Mr. Kardum recorded 2,535 hours worked and taxable income of \$57,856. In 2006, he logged 2,368 hours and had income of \$60,533. In 2007 he recorded 2,761 hours with an income of \$82,630. He indicated that Merrick allocates bonuses to staff based on management's discretion. In the year 2006/2007, he thought \$3,000-\$4,000 of his salary may have been bonus income. In 2008 his income was \$67,000 and Mr. Kardum recorded 2,053 hours. In 2009 he recorded 1,800 hours for taxable income of \$64,770.

- [23] Mr. Kardum reported that in 2009 his decrease in his billed hours and income may have been due, in part, to a slowdown in the economy and Merrick's policy of discouraging overtime. He also indicated that architects are able to set their own schedules to ensure that they get the work required of them done. In 2009 he did take time off as leave of absence. He could not recall the specifics of these leaves but assumes that they were more than two days in total in 2009.
- [24] Mr. Kardum's fiancé, Ms. Lyons, testified. She has been at Merrick since 2005 where she worked as an intern. She secured employment with Merrick and formed a relationship with Mr. Kardum at that time.
- [25] Ms. Lyons observed that in 2007 Merrick had lots of work but the workload had dropped off by 2008. There was a large project scheduled for the firm which was postponed resulting in the firm losing staff and becoming smaller. In 2008 she said everyone was worried for their jobs.
- [26] She said Mr. Kardum worked flexible hours and that he worked longer hours than she worked. He appeared to be ambitious and attempted to find better ways to accomplish his tasks while encouraging her to increase her workload.

The Accidents

- [27] The first accident occurred on June 10, 2007. In the early morning hours of that day Mr. Kardum was returning home from an outing with his fiancée. He was traveling northbound on Seymour Street, intending to drop Ms. Lyons off at her home. In the block before Nelson Street Mr. Kardum stopped for a vehicle in the west lane intending to parallel park. At the time he was driving his sister's Ford Explorer. He decided not to overtake the parallel parking car and while waiting for it to complete its manoeuvre, he was struck from behind by a red Chrysler. The impact did not appear to do significant damage to his Ford Explorer but the photographs showed damage to the Chrysler indicating that it had pushed underneath the Explorer's rear bumper.
- [28] He described the impact as shocking, unexpected, and jarring. He was pushed forward but restrained by his seatbelt. He described a person coming to his window and saying to him that it looked like everything was okay. He was nervous that the other driver might leave the scene and telephoned 911 for assistance. The police, the fire department, and an ambulance came to the scene. He described being shaken up and was told by the ambulance attendants that he could expect to "tighten up" within the next two days. He did not get out of his car.
- [29] Mr. Kardum left the scene of the accident and recalls going home and calling ICBC immediately. He walked over to the local 7/11 store and purchased Tylenol. He was nauseous and upset.

- [30] The day after the accident he was "not feeling great" but the nausea had gone away. After two days he continued to feel unwell and went to a walk-in clinic across the street from his house.
- [31] The second accident happened on October 3, 2009, on the Lions Gate Bridge. Mr. Kardum was the front seat passenger in a southbound vehicle that was struck from behind by a vehicle that, in turn, had been struck from behind. He described the experience as being bumped forward on impact although he had some warning of the impending collision. He was wearing a seat belt and did not strike any part of the inside of the vehicle. He was unclear about the positioning of the headrest. There was extensive damage to the first of the two vehicles in this sequence of collisions but Mr. Kardum could not recall any damage to the car he was riding in.
- [32] Mr. Kardum does not remember if he exited the car nor if he felt any symptoms at the scene.

The Injuries

- [33] The accidents caused injury to Mr. Kardum; one major issue in this action is the extent to which those injuries have resulted in permanent consequences for Mr. Kardum.
- [34] Mr. Kardum reports that since the accidents he has had constant discomfort in his neck, between his shoulder blades and in his head. The most troubling pain occurs in the back left side of his neck. He said the muscle in that area tightens and causes pain to go into his top left shoulder and down his spine to an area between the shoulder blades. He describes the neck soreness as being inside his neck and not at the skin level. It feels like something is pressing in from the neck into his temple. He says he has a headache "pretty much all of the time" although the intensity varies; this fluctuation occurs with different types of activity including exercise. He says his symptoms worsen as the day progresses. His best time is in the morning. He said that when he flies, sitting in a fixed spot increases the strain on his neck. Also, some of his postures at work also increase his neck pain.
- [35] He described four ongoing problems:
- i. when sitting for prolonged periods of time (in airline seats) pain is aggravated;
 - ii. particular types of exercise will aggravate the strain and pain;
 - iii. standing aggravates the pain; and
 - iv. the discomfort interferes with his sleep.

- [36] After the first accident Mr. Kardum saw his family doctor, Dr. E. E. Stockenstrom on June 18, 2007. He reported pain in his neck, a sore head, and pain in his back between his shoulder blades. In the early days after his accident Dr. Stockenstrom referred Mr. Kardum to physiotherapy. He attended City Supports Physio where he was treated by Dan Haggart until August of 2010. He saw other physiotherapists at the recommendation of Mr. Haggart but did not achieve complete relief from any treatments.
- [37] In the month after the first accident Mr. Kardum felt quite shaken up. His nausea had stopped but neck and mid-back pain continued. He had stabbing pain between the shoulders when coughing. He also found his sleep was disturbed.
- [38] He could not remember the specific exercises recommended by Mr. Haggart but believed he did chin tucks and neck stretching exercises. He did exercises at home and at the Haggart clinic. The exercises helped to lessen the intensity of the discomfort to some degree but failed to resolve this condition.
- [39] He described doing heavier exercises that would set him back by increasing his symptoms. The physiotherapy exercises seemed to help keep things in check but did not resolve his complaints.
- [40] In the second half of 2007 Mr. Kardum thought he was busy working on two projects in Vancouver; he usually worked on one or two projects at a time. His work routine would normally change over the course of a project. In the early stages there was more time spent in the office doing drawings, meeting with clients, and working on the tendering process. It appears that this type of activity was more likely to aggravate his symptoms. Once the construction phase of a project commenced he was involved in on-site inspections and management and his symptoms were less pronounced.
- [41] After the first accident he continued with his busy schedule but would make adjustments to accommodate physiotherapy treatments and doctors' appointments in such a way as to conceal his injuries from co-workers at Merrick. He did not want people to know that he was injured.
- [42] He could not recall his list of symptoms during the balance of 2007 but he said the symptoms would vary up and down. The pain in the area between his shoulder blades improved and was less intense. The upper neck and head problems remained in spite of the massage therapy treatments he started taking in September 2007.
- [43] He felt massage therapy helped relax the muscles and improved his flexibility. In 2007 Mr. Kardum traveled to Mexico at Christmas time and to Ontario in 2008. He thought it was also possible he went to Montréal in the latter part of 2007 to visit an ailing uncle; he was uncertain about this trip.

- [44] On his trip to Mexico he thought he had headaches from the injuries but was still able to swim and run on the beaches. He was able to sightsee but avoided more vigorous recreational opportunities due to his ongoing symptoms.
- [45] In early 2008 Mr. Kardum went to Europe with his father to attend a family funeral in Croatia. He said flying was difficult because of the necessity to sit in confined spaces without much opportunity to move around.
- [46] When asked about his symptoms in 2008 he said it was hard to remember as his symptoms were fluctuating up and down. He took 28 physiotherapy treatments in 2008 but only one of those treatments happened in May and June. He explained the interruption in the schedule as follows: "Maybe I just wanted to rest and exercise at home".
- [47] At that time his treatments included physiotherapy and massage therapy, use of a TENS machine, suction cups, and entire muscular stimulation. He was trying to hide the impact of the injuries from others at his work.
- [48] In 2008 he also noticed he was having more difficulty getting to sleep and his sleep was being interrupted. It was hard to relax. He would stay up later, read and watch television until he became tired enough to sleep. He does not remember precisely when the sleep problems started.
- [49] He was referred to a physiatrist, Dr. Lisa Caillier; his first visit was on March 26, 2009. She recommended he begin working with a kinesiologist trainer, take Nortriptyline, see Dr. Travlos to investigate symptoms of carpal tunnel syndrome and have an MRI of his cervical spine. Later she prescribed injections for pain relief; these were not successful and on one occasion made his neck symptoms worse.
- [50] He tried sleeping pills prescribed by his family doctor and melatonin prescribed by Dr. Caillier. He was uncertain as to whether he had been prescribed nortriptyline. He said he took all medications recommended by his doctors but did not have a clear memory. He was generally reluctant to take these medications all the time.
- [51] Under cross-examination he was asked about Dr. Caillier's recommendation that he take nortriptyline to improve his sleep. He said he took that medication but it did not work. He said there must have been a reason why he did not continue taking the medication; he could not remember if it was helping him sleep.
- [52] Mr. Kardum could not remember any changes in his symptoms in 2009 before the second accident. He could not remember the specifics of his symptoms except to repeat that things went up and down. At the time of the second accident there was some aggravation of symptoms.

- [53] In October 2009 Mr. Kardum was referred to Monique Charbonneau, a physical trainer a physical trainer at the Bentall Centre Gym. He could not recall any change in his symptoms save to say that things were up and down; he continued to see Ms. Charbonneau until August 2010.
- [54] In the October 3, 2009 accident he felt a forward thrust but shortly after he did not feel any change in his symptoms. In the weeks following and up until the end of 2009, his symptoms continued to go up and down. He said that the latter accident aggravated things "a little bit" and "maybe" he had a little more physiotherapy.
- [55] He began to observe his neck "cracking" and he was experiencing electric shocks from his neck to his hands. He also described electrical jolts to the shoulders. He also described having tingling (pins and needles) in his hands and arms beginning in December 2008. It is clear that he did not have these symptoms for a considerable time after the accidents. The pins and needles are now primarily in his fingers and he notices symptoms when working out in the gym and at night. He described the tingling as having his arm fall asleep.
- [56] Mr. Kardum remembered being tested for carpal tunnel syndrome and confirmed that he was diagnosed with this condition following nerve conduction studies. Dr. Caillier recommended that Mr. Kardum use a night-time splint to address the carpal tunnel symptoms; he did not follow her advice and used a splint on one arm only. He said the splint did not help but did not ask for any medical advice as to how long he should attempt the treatment.
- [57] Prior to January 2010 Mr. Kardum had not told any of his work colleagues about his injuries or the difficulties he was having with his neck problems.
- [58] After the accidents he continued to run with friends; he thinks he was jogging around the seawall. He said, "Shorter runs make you feel better but longer runs tended to make you feel worse".
- [59] In 2009 he was not taking time off on any regular basis due to his injuries but he had taken a few days off unofficially. He was reducing his pace from previous years and believed he needed to step back and take more time to adjust his work-life balance and to rest his neck; but he said this reduction in work may have been as a result of the overall economic slowdown and not because of his injuries.
- [60] Throughout 2009 he did not take any other time off of work but in 2010 he reduced the number of hours he was working after a discussion with Mr. Borowsky, his employer. He asked Mr. Borowsky if he could reduce his work week by one day to allow time for exercises and physiotherapy. Initially he would take Fridays off to go to physiotherapy and then took massage treatments.
- [61] He said that he lost the equivalent of one day's salary per week. I took from his evidence that he did not always take one day off but rather took time off during the week totalling the equivalent of one day. The records of his attendances at massage and physiotherapy

treatments disclosed an inconsistent pattern of treatments. Prior to the second accident he attended physiotherapy and massage therapies once or twice each month. After the second accident and before September 2010, he took treatments between three and ten times per month. After September 2010 he reverted to receiving treatments one to three times per month. The frequency of these attendances increased after January 2011.

- [62] His decision to take this day off was not made on the recommendation of his physician; he discussed that decision with his doctor after he had started on his new schedule. He felt that the change in schedule was something that was needed in order to get better and he did not feel, at the time, he was even close to a full recovery.
- [63] Dr. Caillier advised him that he needed to improve the amount of sleep he was getting; he felt exhausted and was falling asleep at his desk because he was tired. He felt he was slipping up and making mistakes which could, in the end, cost the company millions of dollars. Although he likes to work he took the difficult decision to reduce his hours in the hopes of achieving a reduction in symptoms.
- [64] Mr. Kardum says that reducing his hours commencing January 2010 has not resolved his problems but helps him cope a little better. He said he is "now not always sprinting" and not in a panic to get his exercises done. He plans to continue his current schedule involving massage therapy, physiotherapy, and I. M. S. (injections). He has a new physiotherapist at the Sport and Spinal Physiotherapy Clinic.
- [65] During his testimony, Mr. Kardum looked fit and appeared to be in no obvious distress, but told the Court he had taken medications to cope with the physical symptoms he was experiencing at the trial.

Effects on His Life

- [66] Mr. Kardum's major complaints are sleep, constant headache, and neck pain. In 2008 he described his personal life as less enjoyable. He was grumpier. His sleep patterns varied from his fiancée's and he found their relationship negatively impacted.
- [67] Mr. Kardum remains physically active is taking to measures that he hopes will ameliorate his symptoms. His routine includes back and neck stretching each morning while he is in bed, attending a gym Wednesday and Friday mornings and some weekends, and running.
- [68] He said his sleep has not improved and he does not get to bed until 1:00 a.m. or 2:00 a.m. in the morning and rises between 7:30 a.m. and 8:00 a.m. He frequently wakes up in the middle of the night and generally cannot get a full night's sleep.
- [69] Mr. Kardum's memory of historical events was challenged several times. He said he "likely went to Ontario in April or May of 2008 but was not sure if it was the end of 2008 or early 2009". He "might've" gone to Mexico in 2009 but was unsure.

- [70] He was asked if there were any change in his symptoms in 2009. He did not remember the specifics but felt that things continued to go up and down. There was an aggravation to his injuries at the time of the second accident that occurred in October 2009. On March 26, 2009, Mr. Kardum saw Dr. Caillier; she discussed with him exercising and maintaining a positive attitude. She tried intramuscular injections to ease the pain but these were not successful. He received some temporary benefit but no permanent improvement.
- [71] Dr. Caillier him referred to Monique Charbonneau, who was physical therapist specializing in trauma cases. He attended Ms. Charbonneau, from October 2009 until August 2010. She instructed him on different exercises. He also purchased a TENS machine in 2010 which he uses when his pain is aggravated.
- [72] He said that in January 2010 he spoke, Greg Borowsky, and requested a reduction in his work week to four days. He told Mr. Borowsky he needed the time for exercise and physiotherapy. Following that discussion Mr. Borowsky's partners agreed that Mr. Kardum could reduce his work week to accommodate his physical problems.
- [73] Mr. Kardum said he took time off during the week. Sometimes he would go to physiotherapy, sometimes he would go to massage, and sometimes he would be doing his exercises. He could not remember many of the specifics of this time off and it appeared to me that his time away from work was adjusted to accommodate the demands of his job and his feeling about the needed time away from the job. He tried to schedule his time off for Fridays but that did not always work.
- [74] Mr. Kardum was suffering from sleep interruption and a resulting exhaustion coming from interrupted sleep patterns. He said he was making more mistakes on the job. His interrupted sleep pattern is not helped significantly by sleep medications including the melatonin.
- [75] He said he enjoys work and enjoyed working long hours on what sounded like very interesting projects. It was clear that each project involves work within the office which is more difficult for Mr. Kardum. Work outside of the office seems to offer him a greater flexibility to move about and achieve some relief from the discomfort that builds up when he is sitting in front of a computer terminal for extended times. Even at that he makes an effort to walk around and move about in his office when spending prolonged time at the computer.
- [76] He stretches every day in bed and then after he gets up. He runs in organized events and achieves reasonably good times. He exercises Wednesdays and Fridays at a gymnasium as well as on weekends.

- [77] Mr. Kardum said the most significant impact of the injuries (other than in his work) has been on his relationship with his fiancé, Ms. Lyons. She has stayed with him notwithstanding the limitations on his activities. He gets short-tempered and lacks interest in physical activities (such as soccer) which he's afraid will make his neck problems worse. He is not as accessible to people by which I understood him to mean he does not feel as social.
- [78] Ms. Lyons noted that in the latter half of 2007 Mr. Kardum was complaining of a sore neck. He complained of difficulties sleeping and she noticed he started reading Internet news and watching television at night. He began napping during the days on the weekend. She observed his personality change; he became cranky and his energy levels appeared to decline. His fatigue seemed to impact his interest in social activity; she often goes out with friends without Mr. Kardum because he is not up to that type activity. She described Mr. Kardum as being upset by the duration of his symptoms.
- [79] Since the first accident she and Mr. Kardum have taken tennis lessons involving repetitive drills lasting between one and one-half hours. She said Mr. Kardum has been taking time off work to do exercises. She also confirmed that Mr. Kardum jogs and that they have run together in the St. Patrick's Day race and in the Times Colonist race. He is a faster runner than she is but recently she said he doesn't run at all. She jogs without him. However, she also said she was not too aware of what he was doing for exercise.
- [80] Mr. Kardum's sister, Christine Kardum, testified. She is in frequent contact with him and they have a close relationship. She confirmed that Mr. Kardum has a strong work ethic and spent long hours on projects. She was dependent on her brother for help and assistance; now he takes naps on the weekends and during the day he's not as accessible as before. She described him as being more irritable.
- [81] Under cross-examination Mr. Kardum acknowledged that he has run several 10 km races since the first accident. He ran with his employer's group in the Times Colonist race in April 2008, a 10K run on Granville Island. He also ran in a charity event. He denies running marathons and restricts his activity to 10 km runs or less. He ran a 5 km run on St. Patrick's Day 2010 but insisted that he did not train for the race and did not know his finishing time.
- [82] Mr. Kardum complains of right hip pain and tingling in his hands, stinging pain from his neck and arms, and had a recent injury to his bicep tendon. Dr. Caillier concluded that these conditions were unrelated to the car accident.
- [83] Throughout 2007/2008 Mr. Kardum worked out at a local gym and took tennis lessons. He described the tennis lessons as loosening him up. Dr. Caillier encouraged him to work out with an exercise trainer. Mr. Kardum did look at the personal trainers in his gym but felt that they would not help him.
- [84] Mr. Kardum moved from his Seymour Street condominium in January 2010, shortly after the second auto accident. He moved the furniture but thought he had some help.

Medical Evidence**Dr. Stockenstrom**

- [85] Dr. Stockenstrom was Mr. Kardum's family physician from May 2005. She saw him on June 18, 2007, and observed that he had paraspinal pain of the neck upon extreme flexion as well as left rotation. A diagnosis of soft tissue injuries of the neck was made and he was referred to a physiotherapist. Between June 2007 and December 2008 Mr. Kardum attended at Dr. Stockenstrom's office and was noted to have pain in his upper back and the left side of his neck fluctuating from a level 1 out of 10 to 8 out of 10. She noted that in December 2008 he developed symptoms of pins and needles in both hands at night-time. He was referred to Dr. Caillier.
- [86] After the second accident Mr. Kardum visited Dr. Stockenstrom with complaints of worsening neck and back symptoms. She opined that his prognosis for full recovery of his neck and upper back pains was guarded.

Dr. Caillier

- [87] From March 2009 Dr. Lisa Caillier was Mr. Kardum's principal treating physician who was dealing with the injuries from these accidents.
- [88] In December 2009, she concluded that he had sustained a musculoligamentous injury to the left side of his neck, his posterior shoulder, and upper back. His headaches resulted from the first accident and his poor sleep arose from his chronic neck, shoulder, and back pain. She said the second accident aggravated and exacerbated the symptoms extant from the first accident. His prognosis was good. She also gave measures to address his sleep difficulties. On the issue of Mr. Kardum's employment, she said as follows:

December 13, 2009

Mr. Kardum is currently working full time as an architect. It is probable that sustained postures of the neck will likely flare his symptoms while at work. Mr. Kardum does need to ensure that he maintains proper posture. He would benefit from an ergonomical assessment of his workstation such that there is no undue stress placed upon the neck, shoulder and upper to mid back musculature. I do not foresee Mr. Kardum having difficulties in regards to completing or filling his role as an architect in the future. However, it is possible that symptoms involving the neck may limit the time he is able to stand within one particular position while at work, thus he may need to have stretching breaks throughout the day.

February 25, 2010

My opinions stated in the December 13, 2009 medical letter report remain unchanged.

January 12, 2011

It is my opinion that Mr. Kardum's headaches are likely cervicogenic in nature; thus, are a direct consequence and reflective of the motor vehicle accident of June 10, 2007 and in part secondary to the motor vehicle accident of October 3, 2009. It is my opinion that given the chronicity of his headaches that he is likely to continue having intermittent headaches now and into the future and depending on the intensity of the headaches, it is possible that the headaches may interfere with his work and capabilities at times. Management of his headaches will involve ensuring proper posture, ongoing and regular exercise, taking breaks when in sustained neck postures and ensuring an ergonomical assessment of his workstation

It is my opinion that Mr. Kardum's ongoing intermittently disturbed sleep is likely a reflection of the chronic neck pain that exists within the neck, posterior shoulder, as well as upper back region.

It is my opinion that there is likely not much more that additional therapy sessions can do to benefit him in regards to long-term improvement. Although there is likely to be short-term benefit with that of massage therapy and physiotherapy, it is my opinion that at this point in time given the lack of long-term benefit that Mr. Kardum should discontinue these therapies which he has done.

Mr. Kardum is currently working full time as an architect. I am recommending he continue to do so. I am recommending he have an ergonomical assessment of his workstation. It is my opinion that it is likely that sustained postures of his neck, particularly if the neck is a laterally flexed or rotated to the left, or in an extended position, that it is probable that his left-sided neck symptoms will flare. Management of the symptom flares will involve regular exercise, proper posture and an ergonomical assessment of his workstation, such that there is no undue stressed placed upon the neck, shoulder, upper and to mid - back musculature.

It is my opinion that Mr. Kardum will be able to complete and fulfill his duties as an architect now and into the future despite that of the chronic left - sided neck symptoms. He will likely need that of stretching breaks throughout the day, particularly if he has to be in a sustained neck postures, but I do not see this interfering with his ability to perform his work to the best of his abilities.

It is my opinion that functional, recreational, or vocational activities that place his neck in sustained postures particularly that of lateral rotation or flexion to the left or extension, will probably result in a flare of his left-sided neck symptoms. When he finds himself in positions like this, he will need to take a break or alter his position.

[89] Dr. Caillier said that ergonomic setups are important to minimize the strain on the patient's neck. She discussed with Mr. Kardum the importance of maintaining his head and shoulders in a more upright position.

- [90] She said that Mr. Kardum had been diagnosed with carpal tunnel syndrome in his hands. This was a nocturnal symptom caused by the compression of the median nerve in his wrist. She said that he also had tingling at night coming from the compression of his ulnar nerve. This symptom was separate from the carpal tunnel symptoms. In her second report she noted Mr. Kardum's continued irritation of his ulnar nerve contributed to his sleep interruption and that his hands were still tingling.
- [91] The doctor confirmed that the tingling in his hands was unrelated to the car accident and she was unclear as to the cause of the pain in his arms. I have concluded that neither of these conditions was caused by the accidents.
- [92] Dr. Caillier also noted that Mr. Kardum's posture in 2009 was not good; his head and shoulders were rounded forward. She observed that he had tenderness only on the left side of his neck but had no loss of muscle bulk in his neck or shoulders.
- [93] Dr. Caillier recommended that Mr. Kardum see a kinesiologist because they are skilled at assessing and treating joint and muscle movement problems. She was aware that Mr. Kardum had a trainer but did not know if he was a qualified kinesiologist.

Dr. Rhonda Shuckett

- [94] Dr. Shuckett is a rheumatologist. She saw Mr. Kardum on only one occasion, on December 10, 2010, for the purposes of an independent medical opinion. She concluded that Mr. Kardum had:
- neck whiplash injury with musculoligamentous and zygapophyseal joint capsular injury bilaterally;
 - thoracic spine pain with some suggestion on plain x-ray to support some vertebral compression fractures of mild degree; and
 - cervicogenic headaches/posttraumatic headaches on left side of head seeming to come from the neck.
- [95] I do not accept Dr. Shuckett's suspicion that Mr. Kardum sustained a vertebral compression fracture in the 2007 accident as evidence that he suffered that injury. He did not appear to experience acute mid back pain after the accident and Dr. Shuckett acknowledged that the x-ray finding could be an incidental finding unrelated to the accident.
- [96] Dr. Shuckett concluded that Mr. Kardum had reached his maximum medical recovery from the 2007 accident and that the exacerbating effects of the 2009 accident had lessened over time. Although she believes he has achieved maximum recovery from the 2007 accident, she felt there was still some room for improvement in the next one to two years from whatever effects are deriving from the 2009 accident. She concluded that his decrease in work week from five days to four days a week was "in keeping with his injuries".

Dan Haggart

- [97] Dan Haggart, a physical therapist, treated Mr. Kardum from June 22, 2007, until August 2010. Mr. Haggart has been a physiotherapist for eight years and is skilled at intermediate manipulative therapy. He has a degree in human kinetics.
- [98] He met with Mr. Kardum and did a subjective and objective review of Mr. Kardum's condition. Mr. Haggart saw Mr. Kardum exactly 100 times, during which he referred Mr. Kardum to another physiotherapist, Carol Kennedy, who was a specialist in physiotherapy for neck injuries. Mr. Kardum was seen by Mr. Haggart two to three times per week at the outset and by the conclusion of their relationship he saw Mr. Kardum once a month.
- [99] Mr. Haggart followed Mr. Kardum's symptoms consistently from meeting to meeting. He noted tension in the back left of the neck, stiffness, and tight muscle tone in the sub-occipital muscles. He noted Mr. Kardum to have a painful left side of the neck. He taught Mr. Kardum stretching of the sub-occipital muscles.
- [100] He initiated an exercise routine including deep neck flexing and exercises to deal with the larger muscles. He worked on the smaller baseline muscles and gave Mr. Kardum 10 separate exercises designed to loosen tight muscles. He could not get Mr. Kardum pain-free and therefore referred him to Ms. Kennedy. He also referred Mr. Kardum to a Ms. Williams for something known as the Mackenzie treatment.
- [101] By October 3, 2009, Mr. Kardum was doing better and was able to control his symptoms. He was doing a ball massage and he was able to work and do the things he wanted to.
- [102] Mr. Kardum was complaining to Mr. Haggart of the headaches coming from the base of the skull. He assessed Mr. Kardum after the second accident and recalls his symptoms being more acute, particularly in the area where the shoulder blade attaches to the neck and at the base of the skull. Mr. Haggart stopped treating Mr. Kardum because he was making no further progress. He always encouraged Mr. Kardum to continue exercising, running, and doing his work.
- [103] Mr. Haggart said that Mr. Kardum was improving up until the time of the second accident but after that accident he was not able to recover to his pre-October 2009 condition. Mr. Haggart was not aware of Mr. Kardum using anti-inflammatory medications but did understand he was taking Advil regularly.

Dr. Grypma

- [104] Dr. Grypma was engaged by the defendants to provide an independent medical opinion. He opined that Mr. Kardum had sustained a grade 1 soft tissue injury to his neck with symptoms radiating into his left scapula secondary to the first accident. He thought the first accident involved very little damage.

- [105] He concluded that the second accident aggravated the pre-existing symptoms and noted that there was minimal damage to the vehicles involved.
- [106] He observed that Mr. Kardum did not appear to have had active physiotherapy or regular exercise. The evidence contradicted his understanding on those points. He felt that Mr. Kardum's present subjective complaints were not supported by objective findings. In the final analysis he could not find any objective finding to support an enduring disability. He felt Mr. Kardum would improve following active rehabilitation.
- [107] Dr. Grypma suggested that Mr. Kardum's symptoms are likely to improve if he undertakes active physiotherapy, participates in regular home exercise, and maintains proper posture. Dr. Grypma's opinion is qualified by the fact that he cannot explain why Mr. Kardum continues to have the level of symptoms he testified to in this trial. He suggests that a review of other x-rays and a SPECT bone scan might provide an explanation. Dr. Grypma also speculated that Mr. Kardum's symptoms might be due to degenerative changes as were already evidenced on his MRI scan back in April 2009. It may be that on this evidence that the accidents triggered his symptoms; he was not asked that question.
- [108] Dr. Grypma was questioned about the objective findings of Dr. Shuckett, Dr. Caillier, and the physiotherapists that Mr. Kardum was found to have palpable tightness in his muscles. He was surprised that those people found such evidence which, he acknowledges, is an objective sign of the injury. He said the tightness is a sign of spasm and is an objective finding, but he would not comment on Mr. Kardum's muscle tightness because he did not observe it firsthand.
- [109] In one exchange Dr. Grypma was asked if a person who was symptomatic after two years from the date of injury faced a poor prognosis. He failed to answer that question and said that he sees people with injuries two years after the accident who do recover. He indicated that medicine cannot predict in advance which victims of injury will improve.
- [110] Dr. Grypma did not discuss Mr. Kardum's continuing headaches because those were outside of his area of expertise. When asked if the symptoms starting in the back left neck resulted in headaches, Dr. Grypma declined to comment and indicated that a neurological consultation would be necessary. At the time, he did not know that Mr. Kardum had received 100 physiotherapy treatments although he did have Mr. Kardum's physical therapy records from 2007/2009.
- [111] Dr. Grypma is an orthopaedic surgeon. He is not a specialist in rehabilitation medicine. His opportunity to observe and examine Mr. Kardum was restricted to a single 1.5 hour examination on January 31, 2011. He confirmed that Mr. Kardum did not demonstrate any nonorganic symptoms. He was not aware of the amount of damage to the defendant's vehicle in the first accident. He did not make the same observations of Mr. Kardum's physical symptoms noted by Drs. Caillier and Schukett. Where there are conflicts between his opinions and the evidence of Drs. Caillier and Schukett, I accept the opinions of the latter two doctors.

Conclusion

- [112] I conclude that Mr. Kardum suffered a chronic soft tissue injury to his neck, shoulder, and upper back region caused in the accidents of 2007 and 2009. In addition to those injuries Mr. Kardum suffers ongoing chronic headaches and disrupted sleep secondary to his neck pain. His prognosis is guarded and it is unlikely that he will become symptom free. The intensity of these symptoms will vary over time and he will likely achieve some improvement over the next one to two years. The measure of that improvement is unknown but may be a function of his efforts in pursuing the recommendations of Dr. Caillier.
- [113] He also suffers from carpal tunnel syndrome, nerve irritation, "zinging" pain from the neck and arms and tingling within his hands. These aspects of Mr. Kardum's health were not caused by the accidents.

Issues

Impaired Earning Capacity

- [114] Mr. Kardum's claim for loss of a future earning capacity requires proof that his earning capacity been impaired by his injuries. His compensation depend on measure of the resulting financial harm that might occur over time. The assessment of loss must be based on the evidence. It is not an application of a purely mathematical calculation. The appropriate process of assessment will vary.: *Brown v. Golai* (1985), 26 B.C.L.R. (3d) 353; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260; *Pett. v. Pett*, 2009 BCCA 232.
- [115] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what Mr. Kardum would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79.

- [116] Mr. Kardum argues that his future earning capacity has been diminished because of the ongoing effects of his injuries. He says he is not able to work full-time hours because the pain he suffers prevents him from sleeping properly.
- [117] The defendants argue that Mr. Kardum has worked hard to attain his professional goals and that none of his physicians were consulted about his decision to take time away from his work. Neither did any practitioner recommend he take time away from work, although Dr. Shuckett confirmed that it was in keeping with his injuries that he do so. The defendants argue that the decision to take time off work was Mr. Kardum's decision alone and that the evidence does not support a real and substantial possibility that his injuries will prevent him from working full time in the future. They say this is consistent with Dr. Caillier's opinion and with Dr. Grypma's views.
- [118] I have concluded that there is a real and substantial possibility that Mr. Kardum will experience a loss of income in the future as he attempts to deal with effects of the injuries suffered in the accident.
- [119] Mr. Kardum indicated that his hours worked in 2009 were 1,800. In 2007 and 2008 his hours billed were 2,761 and 2,053 hours, respectively.
- [120] In 2009 he had been taking a few days off unofficially without an agreement with his employer. However in 2010 he reached an understanding with the company to reduce his work week by one day so that he would have time for exercises and physiotherapy.
- [121] His physician advises he needed to improve his sleeping pattern. Although he had a good reputation at work and applied himself he was starting to fall asleep at his desk. He described himself as feeling exhausted. He was making more mistakes and did not want to compromise the projects requiring his attention. He said that it was part of who he is to work long hours and cutting back was a difficult decision.
- [122] He said that he has maintained a schedule of one day off per week but it is not necessarily one full day off each week. He tries to schedule that day for Fridays in order to get a three-day break.
- [123] He began this reduction to four days per week in January 2010. He described being less stressed and less panicked in that he is able to do his exercises and attend physiotherapy on non-work days.
- [124] He suffers greater discomfort when he is required to work in his office. Once a project reaches a certain point, architects spend more time on the actual worksite which is less of a problem. Being able to move around seems to ameliorate his symptoms.
- [125] Mr. Kardum could not remember a discussion with Dr. Caillier about posture although he did recall discussions about stretch breaks at work. He accepted that Dr. Caillier may have talked to him about an ergonomic assessment. He has not pursued a discussion with anyone about reorganizing his workstation to achieve better management of his symptoms.

He did not ask his employer for an ergonomic assessment because he did not want to make an issue of it in the workplace. He felt that he was taking care of his workspace in a way that produced the most comfortable situation for him.

[126] He described his current exercise schedule as follows:

- a. he stretches his neck and back on a daily basis and starts the stretches in bed;
- b. he runs regularly; and
- c. he has a gym membership and attends Wednesday and Friday mornings and at other times in the afternoons or on weekends.

[127] He acknowledged that neither Dr. Stockenstrom nor Dr. Caillier had recommended that he reduce his work hours; he decided to do it because he wanted to get better. He hoped a reduction would be for a limited duration and that he would eventually get back to full-time work.

[128] Initially Mr. Kardum said that his reduction in work hours by one day per week was necessary to allow him to attend physiotherapy treatments, exercises, and generally rest to enable him to work the balance of the week.

[129] In 2007/2008 Mr. Kardum tried to find early morning physio massage therapy appointments. He did not take late afternoon appointments because he believed the therapists were not as good. His hours of work were from 9:00 a.m. to 5:00 p.m. but he was able to regulate or adjust that time if he was going to appointments. He indicated that his hours were flexible but that the employer was not happy if he was away from his desk and inaccessible.

[130] Mr. Kardum manages to jog around the Stanley Park seawall and when on holidays he will run 3 km to 10 km in order to stay in shape. Longer runs make him feel worse.

[131] He did not take lunchtime physio therapy appointments because of his concern over the level of attention from the therapists. He did not know if these facilities were open Saturdays or Sundays.

[132] He worked full-time and following the first accident but could not recall tingling in his hands or arms until much later. He did not tell anyone at work about his injury for more than two years after the first accident. At his workplace he said he had organized his station to be comfortable for him. He did not ask his employer for an ergonomic assessment as he did not want to make an issue of his physical condition. He confirmed that his employer would allow him to take some stretch breaks.

[133] In January 2010 Mr. Kardum formally changed his work schedule so that he worked only four days per week. Prior to that time he had used Fridays to see his massage therapist and his exercise trainer. He was not doing physiotherapy on Fridays and had stopped seeing his exercise trainer.

- [134] He said that he would see a massage therapist on Fridays and might do his exercises on Fridays. He said he might also jog on Fridays but that he had split up his time off throughout the week. In other words, following his 2010 decision to shorten his work week, he stopped taking an entire day off each week. Rather he was scheduling his appointments and other exercise opportunities throughout the week.
- [135] The records indicate that in the three months from February 3, 2011, to May 11, 2011, Mr. Kardum attended 12 physiotherapy treatments and seven massage treatments. This represents approximately 1.5 treatments per week. In the week prior to trial Mr. Kardum attended a physiotherapy session and received an intramuscular injection which caused a flare-up of his symptoms. He still takes acetaminophen for pain.
- [136] Dr. Caillier believes that Mr. Kardum is capable of working full time as an architect. She believes he is capable of fulfilling his duties as an architect now and into the future despite his chronic left sided neck symptoms. He will likely need stretches throughout the day but she does not see this as interfering with his ability to perform his work to the best of his abilities. She recommended an ergonomic assessment which might produce changes to relieve some stress on his neck, shoulder, upper and mid back. She believes he will be able to manage the symptoms as they flare up. She said that he will need stretching breaks throughout the day, particularly if his neck is in a strange position. She said that the vocational activities that place his neck in a strained posture particularly that of lateral rotation or flexion to the left or extension, will probably result in a flare of his left-sided neck symptoms. When he finds himself in positions like this, he will need to take a break or alter his position. He may have to do this once an hour for 30 or 45 seconds.
- [137] Dr. Shuckett states Mr. Kardum reported to her the following:
- ...the lack of a varied schedule of activity at the workplace with not often going to job sites is actually harder for him. Sitting at his desk at the computer is challenging since the MVA's. It was at the beginning of 2010 that he decided to take Fridays off as a wellness day to go for appointments and to go to the gym. He does not quite take off every Friday.
- [138] Dr. Shuckett said that that reducing his work week from five days a week to four days a week was in keeping with his injuries. In cross-examination she said:
- ...well, I understand from talking with him that he is dealing with these symptoms on a chronic basis, that he works in front of a computer, over the computer, and over papers, and finds this quite uncomfortable in his neck.
- So I can't really say a magical work week that he can or can't work but I do understand why he may feel - - he's working nearly full-time, but why he may feel he needs some time off to pursue his treatment, to pursue his exercise, and just to have a bit of a break from the effect of the workplace on his symptoms.

- [139] Nevertheless, it appears to me that there is a real and substantial probability that Mr. Kardum will be better equipped to cope with the chronic affects of his injuries and perform his duties if he takes some time away from his work to achieve relief from his symptoms. The fatigue and distraction brought about by chronic pain and sleep interruption are likely to reduce his durability at work. These features of his ongoing condition will likely interfere with his performance and prospects if he seeks a change in his employment.
- [140] It is clear that his symptoms may improve but not disappear. But for the symptoms Mr. Kardum is a physically active, fit, and capable person.
- [141] I do not accept Dr. Grypma's evidence that Mr. Kardum's injuries will not have any effect on his present or future ability to work.
- [142] Mr. Kardum currently works fewer hours per week than before the accident because of his belief that this time off will afford him relief from symptoms and an opportunity to obtain treatment to ameliorate the effects of these injuries that he found to be interfering with his work. The physicians attending to him did not recommend or advise him to take this time away from his job as a means of achieving recovery but opined that his condition is permanent.
- [143] In my analysis of his claim I accept the proposition that a future or hypothetical possibility must be taken into account as long as it is a real and substantial possibility of income loss that rises to a level above mere speculation.
- [144] I accept Dr. Caillier's opinion that Mr. Kardum is able to complete and fulfill his duties as an architect with the benefit of stretching breaks throughout the day. I also accept that it is unlikely he will be pain free in the future and that his need to find breaks from his work will have an impact on his overall ability to earn income in the future.
- [145] Dr. Caillier also concludes that he should discontinue massage therapy and physiotherapy and manage his symptoms with exercise and other techniques that have been shown to him by his physiotherapist. She also concludes that there is little pharmaceutical help for Mr. Kardum. She has suggested that Botox injections into his left sided cervical paraspinal region might help his headaches.
- [146] I have concluded that the demands of Mr. Kardum's position require him to spend considerable amounts of time in his office working on the computer, and that those postures will continue to cause him difficulty. The nature of his work he for him to be in good physical condition, or at least a condition that does not distract his attention or focus, and that the effects of the injuries he has suffered do interfere with his focus and attention. He is been advised to obtain an ergonomical assessment in the hopes of achieving a better working environment. I accept that the medical evidence does not support the proposition that Mr. Kardum is disabled from performing his duties, however I have concluded that it is reasonable for him to take some time away from his architectural practice to ameliorate the effects of the chronic symptoms he now lives with. I consider that Mr. Kardum has, and

may in the future, suffer a loss of income arising from the injuries in these accidents. He has therefore proven a real and substantial possibility that now, and in the future, his ability to earn income is compromised.

- [147] I conclude that Mr. Kardum has struggled with the symptoms arising from these accidents and is adjusting his schedule to achieve some time off to ameliorate the symptoms of the injury. However, he is not taking every Friday off but continues to take intermittent physiotherapy and massage treatments. I understand he is not doing exercise training which requires more concentrated time with set appointments. I accept Dr. Caillier's evidence that he is able to perform the duties of his job on a full-time basis. I also accept her opinion that Mr. Kardum's accident related headaches may interfere with his ability to work in the future. She also opines that his sleep disturbances are related to the injuries suffered in the accidents. I have concluded that Mr. Kardum is a victim of significant ongoing pain and discomfort which impacts his focus and attention at work. Part of his difficulty stems from a poor sleep pattern caused or contributed to by his neck and back symptoms. However, he also suffers from carpal tunnel syndrome and a tingling in his arms which also interferes with his sleep patterns.
- [148] He is entitled to compensation for loss of his earning capacity because of the time he may take away from his job due to pain and fatigue caused by these injuries.
- [149] I must now turn to the quantification of his loss of earning capacity either on an earnings approach or a capital asset approach. In my view Mr. Kardum's loss is not easily measurable. The evidence is that he may yet experience some improvement in symptoms and that he is capable of doing all of the duties required of his position at this time. Initially he took one day per week away from his employment to ensure he had time to obtain treatment and to achieve some relief from the postures he assumes while working in the office. Dr. Caillier recommends that Mr. Kardum discontinue physiotherapy and massage treatments.
- [150] Mr. Kardum's duties require him to be in the office for substantial time periods and out of the office for others. While out of the office he does not have the same postural problems that are attendant on a person working before a computer terminal on an extended basis. Further, Mr. Kardum does not currently attend the same treatment schedule that prevailed on and before January 2010. In my view, while he will require some time away from his office in the future, the evidence falls short of proving that he will lose one day per week for 27 years as was argued.
- [151] Mr. Kardum relied on the this Court's decision in *Shapiro v. Dailey*, 2010 BCSC 770, where the Court made an award to a woman suffering injuries to her cervical, lumbar, and sacral spine that left her with disabling cervicogenic headaches, chronic pain disorder, depressive symptoms falling short of depressive disorder, mood disorder, and mild cognitive difficulties. Mr. Kardum in this case continued to work and the Court awarded \$900,000 in respect of lost earning capacity because she was at risk of being unable to meet the

employer's requirements and would be hard-pressed to replace even a lower level of income she had been capable of earning. These facts are not parallel to Mr. Kardum's circumstances.

[152] Mr. Kardum also relies on *Bradshaw v. Matwick*, 2011 BCCA 111, in which the Court of Appeal said:

33 As this Court has noted on many occasions, an assessment of future income loss is an exercise in judgment and assessment, and not a mathematically precise calculation...

The court of appeal in *Reilly* underlined the difficulty in assessing a claim such as this: Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong

[153] The fatigue and distraction brought about by chronic pain, headaches and sleep interruption are likely to reduce his durability at work. These features of his ongoing condition will likely interfere with his performance and prospects if he seeks a change in his employment.

[154] Although I conclude that Mr. Kardum will likely be away from his job and be deprived of some income in the future because of the injuries suffered in this accident, I am not satisfied that a one-day absence is anything but an arbitrary attempt on his part to find a schedule that works for him. The evidence to justify a one day per week mathematical calculation of his loss is absent. Mr. Kardum argued that the net present value of one day's income per year (\$13,260) for 27 years was \$261,036. He argues this does not consider any amounts for lost bonuses, overtime, promotions, or raises.

[155] I am satisfied that Mr. Kardum is a focused and dedicated employee who will be able to make some adjustments in his work schedule to satisfy his employer's requirements. Nonetheless he will likely lose some income and his future prospects are somewhat dimmer than they would have been but for these accidents. He has suffered some impairment of his earning capacity and is less capable overall from earning income from all types of employment available to an architect. Accordingly, taking into account these contingencies, Mr. Kardum is entitled to damages assessed at \$90,000.

Past Wages Lost

[156] Mr. Kardum claims \$17,680 representing 16 months of wages loss from January 2010 to May 2011.

[157] He argues that commencing January 2010 he was no longer able to maintain his work schedule and asked his employer to reduce his schedule to four days per week. He was not sleeping properly and was not recovering. He said working on multimillion dollar projects concerned him because of mistakes that he might make as a result of fatigue.

- [158] He has restricted his claim for past income loss to the time after January 2010 notwithstanding his belief that he missed some days of work prior to December 2009. The defendants argued that Mr. Kardum's poor sleep hygiene and thus his fatigue was not caused by the accident or that Mr. Kardum failed to mitigate his damages by not making adjustments to his sleep routine.
- [159] The defendants argued that Mr. Kardum worked full-time to mid-January 2010 at which point he unilaterally decided to take time off work so he could attend medical appointments. They argue that there was no medical basis to support his decision to shorten his work week. In the absence of evidence suggesting that it was medically necessary for him to take time away from his job, he ought not to be awarded anything for past income loss.
- [160] Mr. Kardum was a very focused and determined employee at Merrick architecture. While I have rejected his need to be absent one day per week into the future, it is my conclusion that his decision to take time off work in the 16 months prior to trial was not unreasonable and would not have occurred but for the injuries and the lingering symptoms from the auto accident. However, I note that in her January 2011 report Dr. Caillier said that Mr. Kardum did not require further physio therapy or massage treatments. She opined that he was able to work full time at his job with Merrick. I conclude that some of the time he has taken off is reasonable. This analysis does not equate with a mathematical calculation. I assess Mr. Kardum's past wages loss at \$15,000, subject to a reduction as mandated by section 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.

Non-pecuniary Damages

- [161] I conclude that Mr. Kardum suffers from chronic pain involving his left posterior lateral neck, his posterior shoulder, and upper back region. He continually has headaches and disrupted sleep secondary to the pain involving his neck. He has some prospect of improvement in symptoms but will likely have a measure of pain or discomfort for the balance of his life.
- [162] Non-pecuniary damages are awarded to compensate Mr. Kardum for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair; fairness is measured against awards made in comparable cases. Based on the evidence, particularly from Dr. Caillier and Dr. Shuckett, it appears that Mr. Kardum's condition may improve. He has not had an ergonomic adjustment to his workplace, he has not had the services of a kinesiologist, and has not embraced a change in his sleep hygiene.

- [163] Defence counsel submitted that Mr. Kardum's non-pecuniary damages fall in a range of \$30,000-\$35,000. They cite cases such as *Kop v. Lobb*, 2008 BCSC 1237 (\$30,000), *Dhillon v. Zarek*, 2001 BCSC 271 (\$32,000), *Chiacig v. Chiacig*, 2001 BCSC 1709 (\$35,000), *Hepner v. Gill*, [1999] B.C.J. No. 1755 (\$20,000), *Myers v. Leng*, 2006 BCSC 1582 (\$25,000), *Lopez v. VW Credit Canada Inc.*, 2008 BCSC 320 (\$25,000), *Noriega v. Lewars*, 2008 BCSC 1405 (\$30,000), *Eaton v. Regan*, 2005 BCSC 3 (\$37,500), and *Robbie v. King*, 2003 BCSC 1553 (\$40,000).
- [164] Mr. Kardum argues that similar parallel authorities in *Grigor v. Johal*, 2008 BCSC 1823, (\$90,000), *Gosal v. Singh*, 2009 BCSC 1471 (\$95,000), *Gosselin v. Neal*, 2010 BCSC 456 (\$100,000), *Neumann v. Eskoy*, 2010 BCSC 1275 (\$90,000), and *Schnare v. Roberts*, 2009 BCSC 397 (\$85,000) support a finding on the facts of this case of \$80,000 in non-pecuniary damages.
- [165] The defendant argues that from the date of the first accident Mr. Kardum remained physically active and functioning at a high level in his work. He did not mention his injuries to co-workers and no one at Merrick knew that he was suffering from the injuries. They argue that his disturbed sleep does not relate to the injuries but stems from Mr. Kardum's poor sleep hygiene. They said that his level of functioning is inconsistent with his expressed level of discomfort. He is at near-normal range of motion in his neck and his muscle examination is normal and nothing objectively points to an injury.
- [166] The defendants argue that Mr. Kardum's ongoing symptoms do not prevent him from exercising, jogging, traveling, socializing with friends, and working. They also argued that there is an inconsistency between his reported neck symptoms and his ability to move his neck in comfort.
- [167] Mr. Kardum argues that he suffers chronic soft tissue pain in his left posteriolateral neck, pain in the posterior shoulder and upper back regions, cervicogenic headaches, and disturbed sleep secondary to pain involving the neck. He is unlikely to ever become pain-free.
- [168] Before the accident Mr. Kardum was a physically active and highly motivated professional facing the prospect of professional success in architecture. He had worked hard and diligently to earn the high regard of his employer; he was successful in that endeavour and became an associate of the firm. The accident and resulting injuries have imposed an ongoing level of physical discomfort on Mr. Kardum which I accept based, on the evidence of Dr. Caillier and Dr. Shuckett, will be permanent. I accept that he will likely have some improvement in the symptoms and that he may achieve even better recovery if he follows the recommendations to ergonomically adjust his workstation, attend to better sleep hygiene, and pursue a kinesiology-based exercise program.

[169] His current symptoms will have a deleterious impact for the balance of his life. Mr. Kardum's life has been affected in many ways including a set back in his professional pursuits, limitations on his recreational activities such as soccer, sleep disturbance, irritability, and energy loss. His social relationships, work capacity, and lifestyle have been significantly impacted and the prognosis of improvement is bleak.

[170] The general principles relating to assessment of non-pecuniary loss are set out in the decision of the B.C. Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34, at paras. 45 and 46:

45. Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders*, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[Emphasis added.]

46. The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of Mr. Kardum;
- (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) Mr. Kardum's stoicism (as a factor that should not, generally speaking, penalize Mr. Kardum: *Giang v. Clayton*, [2005] B.C.J. No. 163, 2005 BCCA 54).
- [171] The list of common factors set out in *Stapley* is useful in assessing the loss but the overriding consideration is "an appreciation of the individual's loss". The amount of the award should depend on the seriousness of the injury and, insofar as money can, its "ability to ameliorate the condition of the victim considering his or her particular situation". The award must "meet the specific circumstances of the individual case".
- [172] Although each of these suggestions of his doctors may improve his chances of further recovery, none of the physicians opined on the prospects of a complete recovery if these measures are undertaken.
- [173] I have concluded that the nature of Mr. Kardum's injuries coupled with the duration of symptoms that are likely to be permanent will diminish his lifestyle and affect his social relationships. There may be improvement but there will be a permanent reduction in his enjoyment of a lifestyle that was, before the accidents, unbounded by any physical limitations. He has been resilient to the point of maintaining an active physical exercise routine but will continue to have the nagging discomfort and inconvenience of the symptoms he now complains about. He is a young man and will have these symptoms over many years; his will be a different life because of the accident.
- [174] I conclude that Mr. Kardum is entitled to non-pecuniary damages of \$70,000.

Special Damages

- [175] Mr. Kardum presented a claim for special damages in the sum of \$11,840.52. I am satisfied that the amounts claimed for physiotherapy and massage therapy totalling \$11,840.52 are reasonable and he will recover that sum.

Future Care

- [176] Mr. Kardum also argued for an award of \$10,000 to provide him a fund to draw upon to get treatments. He testified that in the week prior to the trial he had taken a further physiotherapy treatment and received an injection. However, based on the opinion of Dr. Caillier those treatments lack any long-term benefit for him and should be discontinued. Similarly, she indicated that continued use of medications will not be helpful. Dr. Caillier did suggest that Mr. Kardum might benefit from a trial of Botox injections to alleviate his headaches.
- [177] Mr. Kardum relies on *Izony v. Weidlich*, 2006 BCSC 1315, to support the argument that special damages are a matter of prediction in the face an uncertain future. In this case I am faced with the medical opinion that recommends against future physiotherapy and massage treatments because they lack any long-term benefit. Mr. Kardum did not testify that these treatments bring about significant relief. However, I understand he continues to take such

treatments in an effort to cope with his symptoms. There is evidence that he uses medications to deal with pain which I accept is a reasonable measure. Although he may not achieve any long-term benefit from physiotherapy and massage treatments I have concluded that the temporary benefits of those treatments may assist Mr. Kardum in coping with these chronic symptoms. In three months of 2011 Mr. Kardum has spent \$1,535 on physiotherapy and massage therapy. Accordingly, he will recover \$4,000 for his future care.

Failure to Mitigate

- [178] The defendants allege that Mr. Kardum's claim ought to be reduced due to his failure to mitigate his damages. That failure includes his refusal to engage in a kinesiology-based exercise program, obtain an ergonomical assessment of his workstation, and employ proper sleep hygiene to improve his sleep. The defendant recognizes that it carries the burden of proof to show that Mr. Kardum failed to discharge the positive duty to mitigate.
- [179] Once Mr. Kardum has proved the defendants' liability for his injuries, the defendants must prove that he acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the Mr. Kardum acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.
- [180] The defendants rely on *Robbie* and *Hepner* for the proposition that Mr. Kardum's damages should be reduced to reflect this failure to mitigate. In both *Robbie* and *Hepner* the evidence of the attending physicians was that the recommended treatments would have ameliorated the symptoms of both plaintiffs. Although Dr. Caillier gave Mr. Kardum recommendations on dealing with sleep and exercise in her workplace assessment, she did not give evidence of the expected or anticipated results from these treatments. I am unable to conclude from her evidence that these recommendations would have changed the chronic nature of Mr. Kardum's symptoms or reduced his loss. Both recommendations may have brought about additional temporary relief or permanent relief. They may have simply offered him a chance or possibility of improvement. I cannot conclude that, on the evidence, the defendant has met the burden of proof he refers to in *Graham v. Rogers*, 2001 BCCA 432.

Apportionment

- [181] Mr. Kardum argues that I do not need to make a finding on the issue of apportionment. I accept this argument. The liability for an injury caused by joint tortfeasors is joint and several. *Bradley v. Groves* 2010 BCCA 361 The evidence convinced me that the second accident was a cause of Mr. Kardum's injuries. The injury suffered in the second accident cannot be distinguished from the injuries extant at that time. The second collision caused a minor exacerbation in his symptoms. Both defendants are jointly and severally liable for Mr. Kardum's damages.

Summary

[182] In summary, Mr. Kardum will recover damages as follows:

Non-pecuniary damages \$70,000

Past income loss \$15,000

Loss of earning capacity \$90,000

Special damages \$11,840

Future care costs \$4,000

TOTAL \$190,840

[183] The plaintiff is entitled to his costs.

"Armstrong J."

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