

CANADA / JUDGMENT

Khashei v. Pirro

2020 BCSC 1048

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Supreme Court of British Columbia

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2020 BCSC 1048 Khashei v. Pirro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Khashei v. Pirro,

2020 BCSC 1048

Date: 20200715

Docket: M183204

Registry: Vancouver

Between:

Mehdi Khashei

Plaintiff

And

Matthew Pirro

Defendant

Before: The Honourable Madam Justice Iyer

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

June 8-12 and 15-19, 2020

Place and Date of Judgment:

Vancouver, B.C.

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INTRODUCTION

- [1] In 2009, Mehdi Khashei came to Canada to reunite with his family. He had become separated from them because of conflicts in the Middle East, and the family had relocated to Vancouver. They sponsored Mr. Khashei, who arrived here at the age of 21. In the ensuing years, he achieved high school equivalency, improved his English language proficiency and worked in various jobs. Eight years later, he was an experienced steel fabricator, earning a good income, and sponsoring his wife and baby daughter to join him in Canada.
- [2] On August 21, 2017, Mr. Khashei was in his car and stopped at the intersection of 132 Street and 100 Avenue in Surrey, British Columbia, when he was rear-ended by the defendant, Matthew Pirro ("Accident"). Mr. Pirro admits liability for the Accident.
- [3] The central questions in this trial concern the amounts and types of damages Mr. Khashei should be awarded to compensate for the losses he suffered because of the Accident. Of these, the most contentious issue is Mr. Khashei's lost future earning capacity: he says that his injuries mean that he can never return to his former occupation and his prospects for other employment are bleak. Mr. Pirro says that Mr. Khashei's injuries do not prevent him from returning to work as a steel fabricator in approximately two years.

FACTS

- [4] The following narrative is based on the evidence at trial. The defendant did not challenge the credibility or reliability of the plaintiff's non-expert witnesses. I have no reservations about their evidence. I also rely on the clinical notes of Dr. Ajaero, the plaintiff's family doctor. While I agree with the defendant that aspects of Dr. Ajaero's expert report conflict with other evidence, I accept that the clinical notes themselves accurately reflect Dr. Ajaero's contemporaneous interactions with and assessments of Mr. Khashei. I will address the issues relating to the expert evidence in the final section of this narrative, where I make findings about Mr. Khashei's present condition and prognosis.

Mr. Khashei's Life Before the Accident

- [5] Mr. Khashei was born in Afghanistan in 1988. His family emigrated to Iran when he was young to avoid the coming conflict. He completed high school there but was unable to attend university because the cost was too high for him as a foreign national. Mr. Khashei and a few friends took a post-graduation trip to Iraq in 2004. However, when they tried to return to Iran, they were refused entry and deported to Afghanistan. Mr. Mehdi was 16 or 17 at the time. He became separated from his friends and lost contact with his family.

- [6] After a very difficult time, Mr. Khashei managed to cross into Pakistan and to find his grandmother in Quetta. During this period, Mr. Khashei worked in a wide range of jobs, including hotel cleaning, serving in a restaurant, construction, selling backpacks on the street and in a money exchange. When he moved in with his grandmother in Quetta, he took English language classes and met his future wife, Shumaila Kanwal, who was also an ESL student.
- [7] Mr. Khashei reconnected with his family by telephone in or around 2007. They had believed he was dead. The family had moved to Canada as UN refugees and were able to bring Mr. Khashei to join them in 2009. From the time he arrived in the Vancouver area, Mr. Khashei worked hard to become self-sufficient in order to be able to marry Ms. Kanwal and sponsor her to come to Canada from Pakistan. He also took courses to upgrade his education to British Columbia high school equivalency and to continue to improve his English.
- [8] In 2010, Mr. Khashei got a job in a steel fabrication business. The owner took him under his wing and taught Mr. Khashei how to be a steel fabricator. Mr. Khashei learned quickly and became very proficient at this trade. After the business was sold, Mr. Khashei opened his own steel fabrication business. However, after a year or so, he decided to close it because of the number of more established competitors.
- [9] In 2014, Mr. Khashei began working as a steel fabricator at AI Industries. After Mike Mario, the shop foreman, saw the quality of Mr. Khashei's work, he promoted him. Mr. Khashei received regular raises. He was eventually promoted to lead hand and the company paid for him to get his welding ticket. Mr. Khashei could not be promoted further because he did not have "Red Seal" certification as a metal fabricator. There is no dispute that Mr. Khashei was a valuable, trusted and highly skilled employee.
- [10] During this period, Mr. Khashei made annual visits to Pakistan to see Ms. Kanwal. On his 2014 trip they became engaged. In 2015, they married, and on their honeymoon trip in 2016, Ms. Kanwal became pregnant.
- [11] Also in 2016, Mr. Khashei took on a part-time job as a fabricator at Elegant Glass and Shower Mirror, working with both steel and aluminum. As he was on the afternoon shift at AI Industries, he worked weekday mornings and weekends at Elegant Glass. Mr. Khashei's daughter, Eiva, was born in May 2017. Mr. Khashei took leave from both his jobs to spend about four months in Pakistan following her birth. He received EI parental leave benefits during this period.
- [12] Mr. Khashei left Pakistan in August 2017, as he was due to return to work at AI Industries at the beginning of September.

The Accident and Immediate Aftermath

- [13] As I have said, the Accident was a rear-end collision that occurred on August 21, 2017. After the collision, Mr. Khashei and Mr. Pirro drove their vehicles to the side of the road and exchanged information. Mr. Khashei reported the claim to ICBC that day. He developed a headache and neck/back pain that persisted into the next day. He called Dr. Ajaero, and got an appointment for August 24, 2017.
- [14] When Mr. Khashei saw Dr. Ajaero, he reported headache, neck and upper back pain and stiffness. Dr. Ajaero prescribed non-prescription back pain medication, and referred him for physiotherapy and chiropractic treatments. Mr. Khashei commenced those treatments immediately. On his first visit to the chiropractor, he reported severe neck and lower back pain.
- [15] Mr. Khashei also told Mr. Mario about the Accident. As work was slow at the time, Mr. Mario and Mr. Khashei agreed that Mr. Khashei would extend his parental leave by a month, returning to work on October 1, 2017. Mr. Khashei did not resume working at Elegant Glass until the beginning of October either.
- [16] Mr. Khashei focused on recovering from his injuries in September. However, his symptoms worsened. Dr. Ajaero prescribed Tylenol 3 and Flexeril, a muscle relaxant. On Dr. Ajaero's recommendation, Mr. Khashei started physiotherapy and chiropractic sessions and, subsequently, massage therapy.

Mr. Khashei's Return to Work

- [17] Although his pain persisted, Mr. Khashei returned to full-time work at AI Industries on October 1, 2017. He also resumed his part-time job at Elegant Glass.
- [18] Metal fabrication entails assembling pieces of metal to create a larger structure. At AI Industries, Mr. Khashei fabricated structural steel objects for large commercial construction projects. His primary work was fabricating custom railings. Such work requires the fabricator to assemble various steel components at a workbench positioned at standing height. The worker must lift and move materials weighing up to 50 pounds by hand and use an overhead crane to maneuver heavier items. The fabricator must accurately position component materials and assemble them precisely according to the construction drawings. Once that is done, the fabricator tack-welds the components into place. The assembled structure is then inspected and moved elsewhere for welding and finishing.
- [19] The job requires the worker to stand throughout an eight-hour shift, leaning over a large worktable and using a variety of tools, some of which are heavy and require physical force to use. The worker must bend, lift and twist when fabricating. It is not possible to work from a seated position. Chairs are available during breaks. Work attire includes steel-toed boots, coveralls and a welder's mask. The work area is industrial. There are numerous objects on the ground and workers must take care to avoid them.

- [20] A fabricator must also be able to read and interpret technical construction drawings, and adapt them to the actual materials in order to ensure that the fabricated structure will fit into the larger project.
- [21] Mr. Khashei's work at Elegant Glass was similar to his work at AI Industries. He fabricated both steel and aluminum. Elegant Glass is a smaller operation and had fewer machines to assist with lifting. Mr. Khashei's work at Elegant Glass also included installing the custom pieces he produced. He and a co-worker would carry the finished structures to load into a truck. At the site, they would unload and install the structures, moving their bodies into the positions necessary to perform that work.
- [22] There is no question that Mr. Khashei's work entailed significant manual labour. He had to be physically fit and strong to do it. There is also no question that Mr. Khashei loved his work, relishing the skill and creativity it demanded of him. His employers and co-workers admired his expertise and his sociable nature.
- [23] After returning to both jobs at the beginning of October 2017, Mr. Khashei's reduced his hours at Elegant Glass in October and December working mostly on weekends rather than on weekday mornings. This allowed him to rest or attend chiropractic or other treatments before starting his afternoon shifts at AI Industries. While Mr. Khashei's neck and upper back symptoms improved during the fall of 2017, his lower back pain got worse. He continued taking his prescription medications and attending treatments. He saw Dr. Ajaero regularly.
- [24] Mr. Khashei stopped working for Elegant Glass at the end of December 2017 because of his ongoing lower back pain. He continued to work full-time at AI Industries in 2018. Mr. Khashei's wife and daughter arrived in Canada in February 2018. He continued on the same medications and treatments, consistently reporting ongoing back pain to Dr. Ajaero.
- [25] By June 2018, with no improvement in Mr. Khashei's lower back pain, Dr. Ajaero referred him for a CT scan of his lumbar spine. The report, which Dr. Ajaero received and discussed with Mr. Khashei in August 2018, stated that Mr. Khashei had a disc prolapse and central canal stenosis at L4-5. The image showed that a disc near the very bottom of Mr. Khashei's back was bulging against and compressing the nerves running through the thecal sac from the spinal cord towards the legs, causing pain. Seeing this, Dr. Ajaero referred Mr. Khashei to a neurosurgeon, Dr. Zurab Ivanishvili to discuss surgery.
- [26] Mr. Khashei's lower back pain worsened through the summer and fall. By October 2018, he was leaving work early and missing days because of the pain. When at work, he tried to sit as often as he could. He also tried to alleviate the strain on his back by bracing his arms against his worktable. Although he did not complain, Mr. Khashei's co-workers noticed that he was in pain and was finding the job difficult.

- [27] When Mr. Khashei had still not heard from Dr. Ivanishvili by November 2018, Dr. Ajaero became concerned about the delay. He recommended that Mr. Khashei pay for a private MRI so that the neurosurgeon would be able to review the images at the initial consultation rather than incurring the additional delay of waiting for Dr. Ivanishvili to order one after meeting Mr. Khashei. Dr. Ajaero also thought sending an MRI report along with a re-referral would assist Mr. Khashei in seeing the neurosurgeon faster. Mr. Khashei agreed. The MRI, taken on November 29, 2018, depicted a disc prolapse and central canal stenosis at L4-5. Dr. Ajaero sent the MRI and a re-referral to Dr. Ivanishvili.
- [28] Dr. Ajaero saw Mr. Khashei again near the end of January 2019. Mr. Khashei reported he was now also experiencing occasional "electric shock" pain in his back. Dr. Ajaero gave Mr. Khashei the MRI image and a note to take to his employer. The note stated:

This is to confirm that [Mr. Khashei] is a patient of this clinic. He has severe low back pain due to previous motor accident. Please allow him rest periods when his back pain flares up.

- [29] Mr. Khashei took the MRI and Dr. Ajaero's note to Mr. Mario on January 29, 2019. Mr. Mario had himself previously experienced back pain and had seen MRI imaging. He and Mr. Khashei searched the internet for information about similar MRI images. Based on this and on Dr. Ajaero's note, Mr. Mario decided that Mr. Khashei could not continue working at AI Industries. He considered that Mr. Khashei posed a safety risk and an accident could result in a WorkSafe claim against the company. When told that he could not continue in his job, Mr. Khashei asked if he could do other work instead. While Mr. Mario was sympathetic, he told Mr. Khashei that AI Industries did not accommodate any employees other than those returning to work on WorkSafe claims. Mr. Mario told Mr. Khashei he was welcome to return to AI Industries once he was medically cleared to resume his full duties full time. He advised Mr. Khashei to apply for EI disability benefits.

February 2019 to Commencement of Trial

- [30] Mr. Khashei was crushed by the loss of his job. He applied for EI disability benefits immediately, but his income was much lower than before. After those benefits ran out, the only way Mr. Khashei could support himself and his family was to obtain social assistance, which is ongoing. Mr. Khashei was and continues to be deeply ashamed of his reliance on state support.
- [31] When Mr. Khashei saw Dr. Ajaero in February 2019, Dr. Ajaero diagnosed depression and added an anti-depressant to Mr. Khashei's existing prescriptions. Subsequently, Dr. Ajaero recommended counselling and Mr. Khashei followed his advice. Mr. Khashei's severely reduced finances and depression put a lot of strain on the family.
- [32] At the end of July 2019, nearly a year after the referral, Mr. Khashei was able to see Dr. Ivanishvili, who advised him that surgery was required to decompress the nerves in his lumbar spine.

- [33] Dr. Ivanishvili operated on Mr. Khashei on September 4, 2019. He performed a laminectomy, removing parts of the spinal bone structure and lamina at the L4-5 area of the lumbar spine. This allowed him to access the bulging disc that was pressing on the thecal sac and to perform a discectomy, removing some of the disc material and alleviating the nerve compression.
- [34] The day after the surgery, Mr. Khashei was taken for a standing X-ray of his spine, a routine follow-up to surgery. Mr. Khashei had not stood up since the surgery and, although assisted by the x-ray technicians, he blacked out and fell onto his back. He was not injured in the fall and the x-ray was taken without incident on the following day.
- [35] Recovery from spinal surgery of the kind Mr. Khashei had takes approximately three to six months. Initially, Mr. Khashei was in considerable pain and required his wife's assistance with everything. He improved over the first couple of months as he healed from the surgery. He was able to walk independently and to resume showering and other personal activities without his wife's assistance. The pain in his right leg improved.
- [36] However, later in the fall of 2019, Mr. Khashei's back pain worsened. He experienced radiating pain, particularly down his left leg. He reported to Dr. Ajaero that he also felt tingling and numbness in his lower left leg. His depression also worsened. Dr. Ajaero added gabapentin, a nerve pain medication to Mr. Khashei's prescriptions and referred him for more counselling.
- [37] In December 2019, Dr. Ajaero sent Mr. Khashei for a further MRI to look for the reason for his persistent symptoms. When they met in January 2020, Dr. Ajaero told Mr. Khashei that the new MRI showed that fluid was compressing the left side of his thecal sac and the nerves in it, indicating that a second back surgery might be necessary. Mr. Khashei was distraught by this news. Dr. Ajaero increased his anti-depressant dosage and sent the MRI to Dr. Ivanishvili.
- [38] Mr. Khashei's depression worsened. He began contemplating suicide. He withdrew from the world, barely interacting with his wife and daughter and spending most of his days in his room with the lights off. He was irritable and uncommunicative with his wife. He cried frequently. He also developed pain in his abdomen.
- [39] Dr. Ivanishvili spoke to Mr. Khashei by telephone on April 9, 2020. He confirmed that Mr. Khashei need a second surgery urgently because of the possibility that the fluid compressing his nerves might be an infection. Dr. Ivanishvili also explained that, while the second surgery should alleviate Mr. Khashei's leg and abdominal pain, it would not relieve his lower back pain and might make it worse.
- [40] Dr. Ivanishvili operated on Mr. Khashei on April 24, 2020. There was no infection. Dr. Ivanishvili found removed the fluid and some disc material, addressing the compression on Mr. Khashei's thecal sac.

[41] Mr. Khashei went through the same recovery process as after his first surgery. The pain in his abdomen disappeared and the pain in his left leg improved as his back healed. By the time of trial, roughly six weeks after the surgery, Mr. Khashei had resumed walking independently, although with a limp. He had just resumed driving. His back pain remained unchanged. He reported that he continues to have headaches once or twice a week and must lie down in a dark quiet room. He continues with all of his medications and with counselling.

Mr. Khashei's Present Conditions and Prognosis

[42] Mr. Khashei's conditions span two areas of medical expertise. His back condition, including instability in his lumbar spine from the laminectomy, falls within a neurosurgeon's domain. His mental state is a matter for psychiatric expertise. There is no question that these conditions are interrelated.

[43] At present, Mr. Khashei is recovering from the second surgery. Dr. Ivanishvili will follow up with him in three months. At the trial, Dr. Ivanishvili explained that the goal of the first surgery was not to address Mr. Khashei's back pain but to relieve the nerve compression affecting his legs. Sometimes this type of surgery can increase lumbar pain. The goal of the second surgery was to remove any infection and relieve nerve compression, not to address pain.

[44] I also heard evidence from two expert neurosurgeons. Dr. Ramesh Sahjpaul, the plaintiff's expert, examined Mr. Khashei in May and November 2019, both before and after his first surgery. Dr. Paquette, for the defendant, examined Mr. Khashei in January 2020. Both produced initial and responsive expert reports and were provided with all relevant material.

[45] Before turning to the substance of these expert opinions, I must address the defendant's objection to the admissibility of Dr. Sahjpaul's February 2020 report, which was raised for the first time in closing submissions.

[46] Leaving aside the fact that the objection should have been made when the expert report was tendered, it is without merit. The defendant says Dr. Sahjpaul's report is inadmissible or I should give it little weight because the only letter of instruction appended to it relates to the second meeting Dr. Sahjpaul had with Mr. Khashei in November 2019. The letter relating to his initial meeting with Mr. Khashei in May 2019 is not attached to the report. In cross-examination, Dr. Sahjpaul confirmed he had the first letter in his file. He explained that he only wrote one report, in which he combined the information obtained from both his meetings with Mr. Khashei and responded to the second instruction letter. The defendant did not ask him to produce the initial instruction letter. In oral submissions, the defendant argued that Dr. Sahjpaul's report is "confusing" because it is based on two meetings with Mr. Khashei and does not expressly identify what information derives from each meeting.

- [47] The defendant has not demonstrated the relevance of the first instruction letter, let alone that its non-inclusion makes Dr. Sahjpaul's report inadmissible. The defendant did not explain the significance of being able to pinpoint what information in the report derives from each meeting. I accept and rely on Dr. Sahjpaul's report.
- [48] Dr. Sahjpaul and Dr. Paquette agreed that the Accident caused Mr. Khashei's back injury and/or associated symptoms.[1] They also agree that Mr. Khashei's lower back pain is his most physically disabling condition from a neurological perspective. In their view, surgical removal of portions of Mr. Khashei's spinal processes at L4-5 in the first surgery means that his spine is less stable than it was. Neither examined him after the second surgery, but both were aware of it. Both consider that further surgery, in the form of spinal fusion, might be necessary in the future, although Dr. Sahjpaul is less optimistic than Dr. Paquette about whether it will be of any benefit. They also agree that, at six weeks after the second surgery, Mr. Khashei is still in recovery and this affects the reliability of their prognoses for his lower back pain.
- [49] In fact, in his February 2020 report, report Dr. Paquette stated that he could not provide a prognosis at all. In his opinion, it was reasonable for Mr. Khashei to remain off work in light of the persistent symptoms following his recovery from the first surgery. In his report, Dr. Paquette opined that Mr. Khashei would need time to recover after a second surgery:
- [Mr. Khashei] will definitely need to complete a physiotherapy program and likely an active rehabilitation program before being able to return to work.
- [50] Dr. Paquette was provided with further information, including Dr. Sahjpaul's reports and expert file, Dr. Anderson's psychiatric report and expert file, clinical records of Mr. Khashei's counsellors, Mr. Cheesman's functional capacity evaluation and expert file, and Mr. Nordin's vocational assessment report. However, in two further reports, dated April 1 and June 15, 2020 respectively, he maintained that his opinion had not changed. I infer that he considered this additional information insufficient for him to provide a prognosis.
- [51] Dr. Paquette was not required for cross-examination and his report does not refer to the nature of Mr. Khashei's job. The appendix that sets out Mr. Khashei's account of his history also does not mention the nature of Mr. Khashei's work, only that he was not allowed to continue in it for safety reasons.
- [52] By contrast, Dr. Sahjpaul's report expressly refers to Mr. Khashei's occupation as a steel fabricator and briefly describes the nature of this work. In his initial opinion, which was given after the first surgery, Dr. Sahjpaul opines that Mr. Khashei is, "permanently restricted from manual labour-type work". Further, it is likely that he will experience, "aggravation of his symptoms with jobs that require prolonged sitting or standing, as these jobs typically aggravate spinal pain."

- [53] Dr. Sahjpaul also adverts to the possibility that Mr. Khashei may find some relief for his ongoing lower back pain in further surgery, injections, or spinal stimulation, although he is not optimistic about the extent of pain relief from any of these options.
- [54] I rely on Dr. Sahjpaul's opinion about the prognoses for Mr. Khashei's lower back pain. The fact that Dr. Paquette was unable to offer a prognosis does not make Dr. Sahjpaul's opinion unreliable. I take into account that Mr. Khashei is still recovering from the second surgery and that his lower back symptoms may improve in the future with or without the further treatments Dr. Sahjpaul described.
- [55] Dr. Sahjpaul and Dr. Paquette disagreed about whether Mr. Khashei had ongoing head and neck pain. The source of the disagreement was not so much a matter of expert opinion as what they understood Mr. Khashei was reporting to them. Dr. Paquette writes that Mr. Khashei, "describes no long-lasting symptoms of headache or neck pain." Based on that, he opined that the injury causing these symptoms had fully resolved. In his responsive report, Dr. Sahjpaul states that Mr. Khashei reported "intermittent" headache and neck pain and, based on that, opined that Mr. Khashei might be in the subset of patients who never fully recover.
- [56] Mr. Khashei testified that he continues to experience intermittent headaches. I accept that there is a possibility that these will continue indefinitely.
- [57] Turning to Mr. Khashei's mental health conditions, I heard evidence from Dr. Stephen Anderson, a psychiatrist called by the plaintiff. The defendant did not call psychiatric evidence and did not seriously challenge Dr. Anderson's opinion.
- [58] Dr. Anderson examined Mr. Khashei on February 21, 2020. He diagnosed Mr. Khashei with four inter-related psychiatric conditions: persistent somatic symptom disorder ("SSD") that is contributing to his experience of pain, moderately severe post-traumatic stress disorder ("PTSD"), severe generalized anxiety disorder ("GAD"), and moderately severe major depressive disorder ("MDD"). He also stated that Mr. Khashei is suffering some cognitive impairment caused by pain, insomnia and his psychiatric conditions. All of these are attributable to the Accident.
- [59] In Dr. Anderson's opinion, Mr. Khashei is not competitively employable (that is, he is not independently able to find and keep a job) nor able to succeed in education program at present because of his mental condition. Dr. Anderson has a number of treatment recommendations and these may alleviate Mr. Khashei's current symptoms. However, he will likely remain "emotionally vulnerable" and, in Dr. Anderson's view, is "unlikely to return to his pre-morbid level of functioning" even with treatment.

ISSUES

- [60] As mentioned, the defendant admits liability for the Accident. That means that the issues I must decide concern the types and amount of damages to which Mr. Khashei is entitled. He seeks non-pecuniary damages for the pain and suffering caused by the Accident, damages for past wage loss, damages for loss of earning capacity in the future, damages for the cost of future care, and special damages.
- [61] The defendant claimed that Mr. Khashei caused or contributed to an aggravation of his injuries by continuing to work despite his pain from October 2017 to the end of January 2019 and/or by falling in the X-ray room the day after his surgery. However, in closing argument counsel sensibly abandoned this submission. There is no medical evidence at all to support a finding that Mr. Khashei's continuing to work aggravated his injuries. Nor is there any evidence that Mr. Khashei was responsible for his fall. The evidence is that the fall did not injure his back.
- [62] It is convenient to address the issues in the following order:
- What award should be made for Mr. Khashei's pain and suffering?
 - What is Mr. Khashei's past wage loss?
 - What is the amount of Mr. Khashei's loss of future earning capacity?
 - What is the cost of Mr. Khashei's future care?
 - To what special damages is Mr. Khashei entitled?

ANALYSIS

A. What award should be made for Mr. Khashei's pain and suffering?

- [63] The defendant submits that the award of non-pecuniary damages must be reduced to reflect that Mr. Khashei had a pre-existing back condition in order to avoid over-compensating him for the damage caused by the Accident. In *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 34-36, a case that also concerned a plaintiff with a bulging disc, the Court held that a non-pecuniary damages award will be reduced if the defendant shows that there is some measurable risk (as opposed to mere speculation) that the pre-existing condition would have manifested if the accident had not occurred.
- [64] In this case, that means that Mr. Khashei's pain and suffering award should be reduced if Mr. Pirro shows that Mr. Khashei would have suffered a prolapsed disc even if the Accident had not occurred. In that case he should only be compensated for the fact that the Accident caused the symptoms to occur sooner or be more severe than they would otherwise have been.

- [65] The neurosurgical experts disagreed on this issue. Dr. Sahjpaul stated unequivocally that he found no evidence of degenerative spinal disease and that such a pre-existing condition would be very uncommon in an otherwise healthy young man. Dr. Paquette opined that Mr. Khashei had a completely asymptomatic pre-existing degenerative spinal condition that the Accident rendered symptomatic.
- [66] Even without considering Dr. Sahjpaul's opinion, Dr. Paquette's opinion is insufficient to justify reducing the damages award because he does not address the measurability of the risk that Mr. Khashei would have suffered a disc prolapse if the Accident had not occurred. Absent such evidence, that risk remains speculative and does not provide a basis for reducing this award.
- [67] In assessing the amount of a non-pecuniary damages award, the court must take into account a non-exhaustive list of factors. These include the plaintiff's age, the nature of their injuries, severity and duration of their pain, the disability experienced, emotional suffering, loss or impairments of life, impairment of family, marital and social relationships, impairment of physical and mental abilities, loss of lifestyle, and the plaintiff's stoicism (in that stoicism should not lead to a lower award): *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. In practice, the parties provide the courts with cases with facts they consider similar, on the basis that similar cases should attract similar awards. That can be helpful but in the end, an award for pain and suffering must be based on the circumstances of the particular case.
- [68] Mr. Khashei seeks an award of \$200,000 to \$250,000. He relies on *Gill v. Apeldoorn*, 2019 BCSC 798 and *Felix v. Hearne*, 2011 BCSC 1236. Mr. Pirro submits that an award of \$90,000 to \$100,000 is appropriate, relying on *Cruz v. Rashid*, 2013 BCSC 1530, *McCann v. Anderson*, 2019 BCSC 245, and *Gee v. Bock* 2019 BCSC 1348.
- [69] I have read these cases. In my view, those cited by the plaintiff are more analogous to this case than those cited by the defendant. Notably, in all of the cases relied on by the defendants, the plaintiffs themselves were seeking lower awards of \$130,000 or less in pecuniary damages.
- [70] Mr. Khashei is a relatively young man (now aged 32) whose life has been devastated by the Accident. Prior to the Accident, he had a challenging job that he loved and employers who valued him highly. It is likely he would have continued to work at AI Industries or in a similar position for his entire career. He and his wife were planning to have more children. Mr. Khashei was a sociable and upbeat individual who enjoyed his family and friends. Although there was some friction in his extended family, at the time of trial it was being resolved.
- [71] As a result of the Accident, Mr. Khashei has lost his work, has been in chronic and worsening pain for nearing three years, has undergone two surgeries, and has uncertain prospects for pain relief going forward. He has gone from taking great pride in his role as a provider for his family and a loving husband and father, to being dependant on social assistance, and relying on his wife to run the household. He is unable to play with or even

carry his active three-year-old daughter. He has four psychiatric disorders. Mr. Khashei's persistence in continuing to work for some 16 months after the Accident despite his significant pain demonstrate his stoicism.

- [72] Taking into account the authorities, I find that the circumstances of this case justify an award of \$200,000 to compensate Mr. Khashei for his pain and suffering.

What is Mr. Khashei's past wage loss?

- [73] The parties agree that Mr. Khashei is entitled to compensation for the 104 hours he missed from his job at AI Industries between October 2018 and January 2019. At that time, his hourly pay was \$32.62. Accordingly, I award him \$3,392.48 for this period.
- [74] Mr. Khashei also seeks compensation for the income he lost from AI Industries from the end of January 2019, when he was sent home, to the time of trial. The defendant agrees that Mr. Khashei is entitled to compensation for lost income from AI Industries for this period but says that amount should be reduced by the amount he could have earned if he had sought appropriate alternative employment.
- [75] A plaintiff must mitigate their loss of income from employment by trying to find alternative employment where a reasonable person in their position would have done so. Has Mr. Khashei proved on a balance of probabilities that he was not capable of seeking and securing other employment when AI Industries let him go at the end of January 2019?
- [76] The defendant submits that Mr. Khashei, "was not medically restricted from working by his family doctor." He says that Mr. Khashei could have asked AI Industries to accommodate him, obtained another note to give to Mr. Mario from Dr. Ajaero stating that he was not medically restricted from work, worked for Elegant Glass or some other employer, and/or taken vocational training.
- [77] This flies in the face of the evidence.
- [78] The note expressly imposes medical restrictions. It requires Mr. Khashei's employer to accommodate him by providing rest breaks as needed. In conjunction with his review of the MRI image, Mr. Mario read that note as establishing that Mr. Khashei presented a safety risk and could not be allowed to continue to work.
- [79] Mr. Khashei applied for EI disability benefits on February 1, 2019. Receipt of such benefits requires a medical certificate that a person is disabled from work. Dr. Ajaero provided this certificate and Mr. Khashei received EI disability benefits. By the end of March 2019, Dr. Ajaero had diagnosed Mr. Khashei with clinical depression and started him on anti-depressant medication.

- [80] Dr. Anderson diagnosed Mr. Khashei with four psychiatric conditions arising from the Accident: SSD, PTSD, GAD and MDD. He did not say (and was not asked on cross-examination) when these conditions manifested. However, Christen McCallum, Mr. Khashei's counsellor, testified that he had symptoms consistent with these conditions when she began seeing him in May 2019.
- [81] Mr. Khashei had surgery in September 2019 and again in April 2020. The recovery time from such surgeries is 3-6 months and Mr. Khashei's pain worsened after the first surgery. It was evident at the trial that Mr. Khashei is still in pain and cannot even sit for long periods.
- [82] It is obvious that Mr. Khashei has not been capable of working since AI Industries let him go and that a reasonable person in his circumstances would not have sought alternative employment.
- [83] Therefore, Mr. Khashei is entitled to the income he lost from his job at AI Industries from February 2019 to the date of trial. His hourly pay in 2019 was \$32.62. Mr. Mario testified that, if Mr. Khashei had been working at AI Industries at the date of trial, he would have been earning \$33.71. Mr. Khashei's paystubs show that he received a raise in February 2017 (to \$31.98/hr) and another in May 2018 (to \$32.62/hr). It is reasonable to assume that he would have received a raise in August 2019 to \$33.71/hr. It is also reasonable to assume that he would have continued to work the same hours in 2019 and 2020 as he had in 2018. His wage loss for this period is approximately \$116,000.
- [84] Mr. Khashei also seeks compensation for loss of income from Elegant Glass on the basis that, but for the Accident, he would have continued working there on Saturdays for about eight hours at pay of \$30/hr. The plaintiff submits that a calculation based on this number takes into account the positive contingency that he might have worked more hours at the request of his employer and the negative contingencies that he might have taken time off to settle his family or if work was slow. He seeks an award of \$10,000-\$12,000 for 2018, \$15,000 for 2019 and \$44,000 for 2020, on the basis that he would have increased his hours at Elegant Glass once his family had settled here.
- [85] The defendant submits that Mr. Khashei is not entitled to any award for past wage loss from Elegant Glass because he "admitted" that he intended to discontinue working there after his wife and daughter arrived in Canada. That is not accurate. Mr. Khashei's evidence at trial and from his discovery, as read in by the defendant, is that he intended to reduce his hours when his family arrived, not stop working at Elegant Glass entirely.
- [86] I am satisfied that, but for the Accident, Mr. Khashei would have continued to work some hours at Elegant Glass. I place more weight on the negative contingencies that such work would not always have been available and on the likelihood that Mr. Khashei would have chosen to spend more time with his family on weekends, both because of his daughter and the couple's intention to have more children. However, I also take into account the positive contingencies of more work being offered to Mr. Khashei and his drive to provide for a growing family. I award Mr. Khashei \$10,000 for his past income loss from Elegant Glass for

2018, \$15,000 for 2019 and \$10,000 for the 23 weeks preceding the trial in 2020.

[87] In total, I award Mr. Khashei \$154,400 for past wage loss.

B. What is the amount of Mr. Khashei's loss of future earning capacity?

[88] An award for loss of future earning capacity is justified where a plaintiff can show that the defendant's negligence impaired the plaintiff's earning capacity such that there is a "real and substantial possibility" that the plaintiff will suffer financial harm going forward. This well-settled law is summarized succinctly in *Midgley v. Nguyen*, 2013 BCSC 693 at para. 235-237.

[89] The parties agree that Mr. Khashei has established a real and substantial possibility of loss of future earnings for some period, and that I should use a capital asset approach to calculate his loss. Having considered the factors set out in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, a capital asset approach is appropriate.

[90] Determining the amount of such an award necessarily involves hypotheticals. Here, I must compare what Mr. Khashei's future earnings would likely have been had the Accident not occurred ("without Accident" earnings) with what his future earnings are likely to be given that the Accident happened ("with Accident" earnings). I must take into account the positive and negative contingencies according to their likelihood and taking into account the risk that any assumptions may be wrong. As much as possible, I must ground the analysis in factual and mathematical anchors, bearing in mind that this is an assessment of what is fair and reasonable in all of the circumstances, not a calculation: see generally, *J.J. v. Barton*, 2017 BCSC 1196; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144; *Knapp v. O'Neill*, 2017 YKCA 10.

[91] In *Grewal v. Naumann*, 2017 BCCA 158, the Court of Appeal explained how to consider hypothetical events in this context (at paras. 48-49):

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari...* at para. 32.

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

- [92] While there is no real dispute on the law, the parties could not be farther apart on the amount needed to compensate Mr. Khashei for loss of future earnings.
- [93] The plaintiff says that he will never again be able to work as a steel fabricator or in any physically demanding job. In light of his educational credentials, prior work experience and physical/psychological limitations, he claims is unlikely to be able to earn much more than a minimum wage. Mr. Khashei is now 32 and would likely work until he is 65. Applying the appropriate multipliers[2], the plaintiff says that the net present value of Mr. Khashei's without Accident earning capacity based on an annual income of \$100,000 to \$110,000 is \$2.5 million to \$2.8 million. From this, the plaintiff deducts the net present value of Mr. Khashei's with Accident earning capacity, which he estimates will likely remain close to minimum wage for the rest of his career, an amount of \$905,000. On this basis, the plaintiff seeks an award of \$1.6 million to \$2.0 million.
- [94] The defendant takes a very different view of Mr. Khashei's future. Consistent with his position that Mr. Khashei never lost the ability to work and should have mitigated his loss of employment income, Mr. Pirro says that Mr. Khashei can work. The defendant says that I should award Mr. Khashei the equivalent of two years lost salary based on his 2018 income after applying a 25% reduction based on Mr. Khashei's post-Accident earning capacity during this period. The defendant says \$120,000 represents the net present value of Mr. Khashei's loss of future earnings.
- [95] I have little difficulty estimating Mr. Khashei's without Accident future earnings. He was passionate about his work and both of his employers want him to return if he is medically cleared to do so. The plaintiff estimates Mr. Khashei would have worked until the age of 65 and I see no reason to doubt this. There is ongoing market demand for the work Mr. Khashei produced. Turning to specific contingencies, it is possible but that Mr. Khashei would have acquired his Red Seal certification, which would open the door to further promotion at AI Industries and better-paying positions with other employers. Mr. Khashei's has demonstrated ambition and drive; he has a strong work ethic and prioritizes providing for his family. These are all specific positive contingencies.
- [96] Specific negative contingencies are that Mr. Khashei may have stopped working at a second job to spend more time with his family and/or to open another business. Mr. Khashei had registered the business name, "Matt's Tires," and had thought that he and his wife might be involved in it, but had not taken any other steps in that direction. Given the high failure rate of new businesses, it is certainly possible that embarking on such a venture would have decreased Mr. Khashei's earnings for some time.
- [97] Considering these contingencies together with Mr. Khashei's employment and earnings history, I find that Mr. Khashei's without Accident future annual earning capacity is \$100,000.

- [198] Assessing Mr. Khashei's with Accident future earning capacity is more challenging. The plaintiff called expert evidence from Ralph Cheesman, an occupational therapist and Derek Nordin, a vocational counsellor, both of whom assessed Mr. Khashei before his second surgery. I take this into account in the weight I give their opinions.
- [199] Mr. Cheesman did not perform a full functional capacity evaluation. He did not test Mr. Khashei's strength during lifting or carrying because Dr. Ajaero had said it was not safe to do so. Necessarily, this diminishes the reliability of the assessment. Mr. Cheesman also relied on his general knowledge of steel fabrication work rather than visiting Mr. Khashei's work sites or speaking with his employers. I am satisfied that Mr. Cheesman had a general understanding of the nature of the work.
- [100] Mr. Cheesman opined that Mr. Khashei might be able to perform modified duties as a steel fabricator on a part-time basis if he could do the work from a sitting position and with the ability to stretch and move around. However, I accept Mr. Mario's evidence that the work cannot be done from a sitting position.
- [101] Mr. Cheesman also wrote:
- I note Dr. Sahjpaul has indicated Mr. Khashei's lower extremity symptoms are not expected to improve and his back pain may improve to some degree following an additional fusion surgery at the L4/5 vertebral level. Based on this prognosis I am of the opinion Mr. Khashei will probably remain disabled from his current work as a steel fabricator in the future, absent the ability to perform modified sitting based work. Without resolution of lower extremity radicular symptoms I believe Mr. Khashei's standing tolerance will remain limited and not meet the demand requirements of his former work position.
- [102] In fact, Mr. Khashei's lower extremity symptoms have improved since the second surgery but his back pain persists. It is not clear whether he will have fusion surgery. This reduces the weight I place on Mr. Cheesman's opinion.
- [103] According to Mr. Nordin, Mr. Khashei is not competitively employable at this time because of his physical and mental conditions. Mr. Nordin says Mr. Khashei is not likely to be able to return to any form of manual labouring work, including steel fabrication. He considers that Mr. Khashei's level of intellectual functioning is low and that it precludes him from completing training programs. Mr. Nordin opines that Mr. Khashei's future vocational options are limited to entry-level minimum-wage jobs.
- [104] I place little weight on Mr. Nordin's assessment. As noted, it was written before Mr. Khashei's second surgery. More importantly, Mr. Nordin assessed Mr. Khashei's word reading, spelling and math computational skills at the grade 4 level. However, some or all of the vocational tests he administered required a higher level of reading comprehension. Other than the test scores, the balance of Mr. Nordin's opinion summarizes the opinions of Dr. Sahjpaul, Dr. Anderson and Mr. Cheesman, and does not add to them.

- [105] There is no question that Mr. Khashei is fully disabled from remunerative employment and/or re-training at this time. He has not yet recovered from the second surgery, and further surgery and/or treatment for his lower back pain may be necessary. Mr. Khashei also needs treatment for his psychiatric conditions, and Dr. Anderson has recommended various kinds of treatment that will also take time. Based on this, I conclude that it is not reasonable to expect Mr. Khashei to resume remunerative work for two years. I award him the net present value of his without Accident income of \$100,000 for two years. The net present value of that is \$195,590.
- [106] From that point forward, I must determine Mr. Khashei's likely future earning potential based on reasonable hypotheticals. The anchors in this analysis are Mr. Khashei's without Accident earning potential, which I have assessed at \$100,000 as of 2020, and the earning potential of a minimum wage job, which is \$31,200 annually.
- [107] It is very unlikely that Mr. Khashei will be able to return to work as a steel fabricator. Equally, it is very unlikely that a person with Mr. Khashei's demonstrated drive, work ethic, capacity for learning, and sense of responsibility would be satisfied with minimum wage employment. Mr. Khashei's life before the Accident demonstrates that he has the capacity to persevere in the face of very significant obstacles: he has supported himself in dire circumstances, married the woman he loved despite family obstacles, and worked through increasing pain to support his wife and daughter in Canada.
- [108] The Accident precipitated a chain of events that have devastated Mr. Khashei and his young family. However, it is far more likely that the major causes of his present state are temporary rather than permanent. His mental and physical conditions negatively reinforce each other. With time and treatment, that cycle can be broken. After the neurological options have been addressed, Mr. Khashei will have greater certainty about the nature of his chronic pain and can take steps to manage it. Appropriate treatment for his mental conditions will also provide stability. It is impossible to predict what specific types of work will be open to Mr. Khashei, but it is likely that they will be more remunerative than minimum wage jobs.
- [109] I also find it likely that Mr. Khashei will be able to work full time to the age of 65. He has worked more than full-time in the past. When performing work that is consistent with his physical limitations (whatever they turn out to be), there is no reason to think he will be unable to work full time. In my view, any cognitive impairments found in the expert assessments are primarily a product of Mr. Khashei's pain and mental conditions, and are unlikely to persist if they are addressed. Mr. Khashei's own evidence, together with that of his co-workers demonstrate that he is a high-functioning, creative and intellectually capable person when he is healthy.

- [110] That said I appreciate that the source of Mr. Khashei's pre-Accident economic well-being has been his ability to learn on the job, rather than by accumulating educational credentials. Finding a different line of work that is consistent with any physical limitations is going to be challenging for him. It will preclude the level of remuneration he was earning temporarily and quite possibly permanently.
- [111] With all of this in mind, I conclude that the Accident has reduced Mr. Khashei's earning capacity by 50% over the next 31 years until he reaches age 65. The net present value of this is \$1,232,305.
- [112] Combining the net present value of Mr. Khashei's lost income for the next two years with the net present value of his lost income for the years thereafter gives a total of approximately \$1,430,000.
- [113] I acknowledge the possibility that Mr. Khashei may be slightly overcompensated by an award in this amount. The "net present value" of a future loss is meant to represent a sum that, if invested properly, with payments made from the principal at an appropriate rate, will have shrunk to zero at the end of the plaintiff's period of loss. In this case, it will be two years before Mr. Khashei will need to encroach upon the second half of his award. In the meantime, the principal will have accrued interest. Given the general imprecision of calculating future losses on this scale, however, I am satisfied that any potential overcompensation falls well within the margin of error.
- [114] I award Mr. Khashei \$1,430,000 for loss of future earning capacity.

C. What is the cost of Mr. Khashei's Future Care?

- [115] An award of damages under this heading is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: J.J. at paras. 74-75.
- [116] Mr. Khashei seeks an award to cover the following costs:
- Physiotherapy and active rehabilitation upon completion of any further surgical interventions;
 - Massage therapy;
 - Psychotherapy with a registered psychologist;
 - Marital therapy;
 - Cost of medication; and
 - Multidisciplinary pain clinic program.

- [117] The defendant agrees to pay for physiotherapy and active rehabilitation therapy. I am advised that a gym membership is necessary for an active rehabilitation program as it is not included in the cost of the service. Accordingly, if not included in the cost of active rehabilitation, the defendant must also cover the cost of a gym membership for Mr. Khashei over the period of active rehabilitation.
- [118] The defendant points out that Mr. Khashei only attended three massage therapy sessions after the first surgery. Mr. Khashei seeks compensation based on session every one or two weeks to the age of 75, based on Dr. Ajaero's expert report. In that report, Dr. Ajaero briefly references an ongoing need for massage therapy based on ongoing "neck and back symptoms" without any indication of frequency or duration. This evidence does not support the claim. I award Mr. Khashei the cost of twelve massage therapy sessions.
- [119] Dr. Anderson recommended that Mr. Khashei attend 15-20 psychotherapy sessions with a registered psychologist and indicated that he might require 8-12 sessions annually if his mood did not significantly improve. The defendant is willing to pay the lower cost of sessions with a counsellor for one to two years, apparently based on a misreading of Dr. Anderson's recommendations. He wrote:
- Mr. Khashei has established good rapport with his present counsellor, M[s]. Kristen Hamilton. Ideally, however, Mr. Khashei should be treated by a registered psychologist who has experience in treating patients who have chronic pain, anxiety and depression.
- [120] The evidence establishes that the psychological counselling recommended by Dr. Anderson is medically necessary.
- [121] I reach the same conclusion with respect to marital therapy, again based on Dr. Anderson's recommendation of "several sessions with an experienced marital therapist".
- [122] The defendant does not address Mr. Khashei's claim for the cost of medication, but the parties have agreed on the costs of such medication. I accept that Mr. Khashei will continue on his current pain medication for an indeterminate period. I also accept Dr. Anderson's evidence that other, somewhat costlier, anti-depressant medications may be more appropriate for Mr. Khashei, as recommended by a treating psychiatrist or as prescribed by Dr. Ajaero.
- [123] Finally, the defendant submits that it is premature for Mr. Khashei to attend a pain management program, and points to Dr. Ivanishvili's testimony that most people's pain symptoms improve on their own. In fact, his evidence was that, in 8 of 10 cases, surgery does not improve back pain. I also note that Dr. Ivanishvili was called as a lay witness, not as an expert. The expert neurosurgical evidence was that Mr. Khashei's pain arises from a combination of physical and psychological factors. It is very likely that he will have to live with some degree of ongoing chronic pain and that, in order to be as mentally and physically healthy as possible, he must learn how to manage it. I find that Mr. Khashei is entitled to the cost of the pain management program recommended by Dr. Anderson.

[124] The parties agreed on the cost of these various items. I do not agree with the plaintiff's assumption that Mr. Khashei will require the various therapies regularly until the age of 75, as the evidence does not establish this. I award the plaintiff \$65,830 for the cost of future care, which comprises the following amounts:

Physiotherapy (on average once every two weeks for two years)

\$3,600

Active rehabilitation program (initial plus one year of follow up)

\$4,160

Gym membership (2 years)

\$830

Massage therapy (12 sessions)

\$1,330

Psychotherapy (4 years)

\$10,500

Cost of medication (present value)

\$30,000

Multidisciplinary pain clinic program

\$14,000

Marital therapy (6 sessions)

\$1,410

D. To What Special Damages is Mr. Khashei Entitled?

[125] The parties have agreed on all items under this heading except for the cost of the private MRI. Dr. Ajaero advised Mr. Khashei to get in November 2018 in order to reduce the wait time to see Dr. Ivanishvili and get the first surgery. The defendant says this cost is not recoverable because Mr. Khashei could have had an MRI completed "through the emergency department of any hospital." Counsel conceded that there is no evidence an MRI scan would have been performed if Mr. Khashei had attended at an emergency department for back pain. There is also no evidence about waiting times to obtain MRIs in the public system. Dr. Ivanishvili testified that wait times to see him are extremely lengthy and Mr. Khashei's wait of nearly one year was not unusual. I find that the MRI expense was reasonable in the circumstances.

[126] I award Mr. Khashei \$2,895 in special damages.

CONCLUSION AND QUANTIFICATION OF AWARD

[127] Before concluding, I want to comment on the position taken by the defence in this case, particularly with respect to Mr. Khashei's loss of earnings. A sophisticated party such as a public insurer, ought to take positions that in some way derive from the evidence. There was absolutely no foundation in this case for the defence position that Mr. Khashei would be completely recovered and back at his steel fabrication job in two years' time, nor its position that he failed to mitigate his damages when he was let go in January 2019. No alternative arguments were advanced. Such a strategy deprives the court of helpful submissions and it runs counter to the goal of facilitating settlement.

[128] I find that Mr. Khashei is entitled to damages awards in the amounts set out below.

Non-pecuniary Damages

\$200,000

Past Wage Loss

\$154,400

Loss of Future Earning Capacity

\$1,430,000

Cost of Future Care

\$65,830

Special Damages

\$2,895

Total

\$1,853,125

[129] Mr. Khashei is also entitled to his costs on Scale B, subject to any costs issues the parties want to raise with me. If so, the parties should apply to me in writing as soon as convenient.

"Iyer J."

[1] Dr. Paquette opined that Mr. Khashei had an asymptomatic degenerative back condition that the Accident rendered symptomatic.

[2] Based on Appendix E of the Civil Jury Instructions: see *MacGregor v. Bergen*, 2019 BCSC 315 at para. 116, note 1.

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