

CANADA / JUDGMENT

Kim v. Basi

2022 BCSC 1793

COURT

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2022 BCSC 1793 Kim v. Basi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kim v. Basi,

2022 BCSC 1793

Date: 20221013

Docket: M185936

Registry: Vancouver

Between:

Chung Ja Kim

Plaintiff

And

Kulwinderjit Basi

Defendant

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Dates of Trial:

Vancouver, B.C.

June 6-10, 13-15, 2022

Place and Date of Judgment:

Vancouver, B.C.

October 13, 2022

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INTRODUCTION

- [1] The plaintiff, Chung Ja Kim, seeks damages for injuries she suffered in a motor vehicle accident on July 26, 2016.
- [2] The plaintiff was a passenger in a car driven by her husband. A collision occurred at 159th Street and 88th Avenue in Surrey B.C. when a car driven by the defendant made a left turn across the path of the Kim vehicle. There is no dispute about the defendant's liability. The plaintiff's husband, Sung Hak Kim, testified that their car was spun 180 degrees on impact, airbags deployed and the car was "totalled." He was also injured and was the plaintiff in a separate action that has been settled.
- [3] Ms. Kim believes she lost consciousness in the collision. Her first recollection is of being helped out of the car and being put on a stretcher. She next remembers waking up in hospital.

- [4] The plaintiff was 72 years old on the date of the accident and 78 at trial. She was born in North Korea and spent most of her life in South Korea, where she operated a successful wholesale fabric business. She retired in 2009 and moved with her husband to British Columbia, where the elder of their two sons, Apollos Kim, already lived with his family. The younger son was left in charge of the business in Korea, but his mismanagement led to its bankruptcy by 2014. One of the injuries Ms. Kim alleges from the accident is a depressive disorder. There is an issue about whether there was a pre-existing depression arising from the business failure and its resulting income loss.
- [5] In hospital following the accident, the plaintiff was found to have a burst fracture of the T12 vertebral body with associated narrowing of the spinal canal and compromise of the spinal cord. There were fractures of the fourth to seventh ribs on the left side and the third to seventh ribs on the right. She also complained of neck pain and was diagnosed with a mild traumatic brain injury, also known as a concussion. She was discharged from hospital wearing an orthopedic back brace four days after the accident.
- [6] After returning home, she was initially bedridden and needed help with self-care, such as going to the bathroom. She required homecare assistance and various home aids and bathroom modifications.
- [7] The plaintiff testified that her whole back continues to be painful. Both sides of her upper abdomen are also painful to the touch and she has continued pain in her neck. She said sleep is particularly difficult because of pain whenever either side of her body touches the bed and she cannot sleep at all without sleeping pills. She says she usually has a headache when she wakes up.
- [8] That evidence is confirmed by Sung Hak Kim, who says his wife appears to be in pain every day and cannot get through a day without medication. He said he hears her groaning from pain in her sleep.
- [9] Ms. Kim agreed she previously had sleeping problems after the failure of her business, but said that had improved before the accident. Although she previously took sleeping pills, she says she did not do so on a daily basis as she does now. That evidence is also supported by that of her husband.
- [10] Ms. Kim says most housework has become impossible and she is "just barely" able to cook simple meals. She said she often feels that it would be "better to die than live in pain like this" and testified that "I wish I could go to heaven as soon as possible."
- [11] In addition to physical symptoms, Ms. Kim has experienced memory and concentration problems since the accident. She says if something needs to be done, she needs to do it immediately or she will forget to do it. She has difficulty focussing when she tries, for example, to read a novel.

- [12] Her husband has also noticed memory problems and cognitive decline and says that Ms. Kim is frequently angry and irritable, which is a change from her previous personality. Her granddaughter, Hannah Kim, says she and her grandmother previously had an excellent relationship, but the plaintiff now gets upset about things that formerly would not have bothered her and they have frequent arguments. Hannah Kim says that the plaintiff cannot carry on a conversation because she gives unrelated answers to questions and "spaces out."
- [13] The plaintiff's son Apollos Kim said he is now most concerned about his mother's mental state because she sometimes seems suicidal.
- [14] Ms. Kim's hearing has also deteriorated since the accident. Apollos Kim testified that he noticed in late 2016 or early 2017 that his mother was having difficulty with daily conversation and needed the television at a volume that was uncomfortable for others. Although hearing aids were recommended, Ms. Kim refused to consider them. Hearing aids were finally purchased shortly before trial, but she had not yet used them.
- [15] Ms. Kim also complains of pain in both knees, but the medical evidence attributes that to a pre-existing arthritic condition.
- [16] Beginning in October 2016, Ms. Kim began regular and frequent sessions with a kinesiologist that continued until the spring of 2018. The kinesiologist assisted her with exercises both at home and at a swimming pool. Ms. Kim said that she had been a competitive swimmer during her youth in Korea and she continues to swim as her primary exercise. She said she swims for about 30 minutes five or six days a week. That is the similar to what she did before the accident, but she says she is now slower. After coming home from swimming, she says she is unable to do much more because of pain and fatigue.
- [17] Ms. Kim testified that she is no longer doing any of her other pre-accident physical activities because she lacks energy and strength. The evidence suggests many of those activities, such as golf, ended before the accident. But prior to the accident, for a few weeks each summer, she and her husband worked picking berries. They were in fact on their way to the berry-picking job at the time of the accident. Ms. Kim also was active in a number of social activities connected to her church. Mr. Kim says they now attend church services, but prolonged sitting appears to increase her pain and she no longer participates in other church-related activities.
- [18] When she and her husband decided to retire to Canada, Ms. Kim said, their plans included extensive travel but "all that is gone."
- [19] At the time of the accident, Mr. and Ms. Kim were living with their two granddaughters in a townhouse owned by their son, Apollos. They sold their own townhouse prior to the accident and there is evidence that was at least partially due to financial problems arising from the failure of the Korean business. They now live in a rented basement suite.

- [20] Apollos Kim testified that he has a doctorate in biochemistry and was working in a research position in Atlanta, Georgia, at the time of the accident. He says he left that job and returned home to help his parents in August 2016. For almost two years, he said, he assisted with care of his parents on a full-time basis and took them to medical appointments, where he had to translate. Because he had to be available for his parents, he said he could not apply for a scientific position in Vancouver and has now been out of the field too long. He has had to accept a warehouse job instead, choosing the graveyard shift so he can still be available to assist his parents during the day.
- [21] For the first year after the accident, Apollos Kim considered tending to his parents' needs to be more than a full-time job. That has lessened, but he testified that he still takes his mother to all medical and other appointments, fills prescriptions, helps with some housekeeping and recently arranged the purchase of hearing aids. He estimated he still spends six to eight hours a week providing that assistance, excluding normal voluntary family time.

MEDICAL EVIDENCE

- [22] Dr. Bassam Masri, an orthopaedic surgeon, says the plaintiff's burst fracture at the T12 level of the spine has healed with "significant compression and a kyphus (round back) deformity." He says:

The reason for the residual pain, I believe, is the collapse of the T12 vertebral body that gives her pain in the mid back and the associated chest wall. The pain in the chest wall is only present with compression such as when she is sleeping on her sides, and not necessarily during the day. However, she has been left with chronic constant and fairly severe pain secondary to the burst fracture. Unfortunately, there is no treatment that can be offered that would lessen the pain, other than what she is doing in terms of analgesics.

- [23] Although Ms. Kim's most significant pain comes from the burst fracture, Dr. Masri says she also has neck and shoulder pain caused by soft tissue injury to the cervical spine and mechanical low back pain due to both soft tissue injury and altered spinal alignment. He says ongoing strengthening exercises and active rehabilitation will be helpful but:

I do not believe that the pain will ultimately resolve, and the role of treatment is to improve her coping skills and potentially lessen the pain. There is no role for surgery, and her symptoms, in my opinion, are permanent.

- [24] Dr. Kelly French is a geriatric psychiatrist who was tendered as an expert witness by the plaintiff. In April 2018, Dr. French diagnosed Ms. Kim as suffering from a major depressive disorder. When she saw Ms. Kim again in June 2021, she found the depression to be persisting, although now classified as moderate. Dr. French also diagnosed post-traumatic stress disorder, which has now resolved, and a continuing mild neurocognitive disorder. Her evidence suggests that it is difficult to determine whether the neurocognitive disorder is associated with the depression or is the result of a specific brain injury. She says:

Depression is a treatable illness. However, once a patient has had one episode of depression, there is a 50% chance of a recurrence of depression in the future. In that sense, depression is a risk factor for future depressive episodes. In Mrs. Kim's situation, she has persistent cognitive symptoms, which may be associated with depression, and therefore should also be considered a risk factor for future cognitive impairment. I believe that Mrs. Kim's mood could improve with further treatment. However, in my experience the longer her symptoms linger, the harder it will be for her to achieve full remission.

If indeed Mrs. Kim's neurocognitive disorder is due to depression, then this will increase her risk for future major neurocognitive disorders. If her mild neurocognitive disorder is due to a traumatic brain injury, then over time, her symptoms should hopefully dissipate. The fact that her neurocognitive symptoms are still present, suggests that any improvement that was to occur over the short term has likely occurred, and that ongoing mild neurocognitive symptoms now may be permanent and/or related to her ongoing depression.

[25] The defendant obtained an opinion from another psychiatrist, Dr. Paul Latimer, who has not seen Ms. Kim but reviewed the clinical records and Dr. French's report. He agrees with the diagnosis of depression but believes Ms. Kim does not meet the diagnostic criteria for a neurocognitive disorder. He says her cognitive symptoms are consistent with depression.

[26] The difference between the opinions of Dr. French and Dr. Latimer does not appear to be significant, but to the extent it is, I prefer the opinion of Dr. French because it is based on direct examination and assessment of Ms. Kim.

[27] Dr. Lillian Wong is an otolaryngologist with a subspecialty in hearing issues. She confirms Ms. Kim's hearing loss and believes it to have been probably caused by the accident. She said one reported connection between motor vehicle accidents and hearing loss relates to the noise of airbag deployment. Dr. Wong has recommended the use of hearing aids, which she said will improve Ms. Kim's quality of life and may also help with cognition. On cross-examination, she agreed that hearing difficulties can be mistaken for cognitive impairment and can contribute to depression.

[28] Dr. Heather Finlayson is a physiatrist--a specialist in physical medicine and rehabilitation. She generally agrees with Dr. Masri about the sources of the Ms. Kim's ongoing pain, but adds that Ms. Kim now suffers from a chronic pain disorder that contributes to her sleep disturbances and low mood:

Pain, mood and sleep are all intimately connected as they are regulated by some of the same neurotransmitters (chemicals that carry signals in the brain and spinal cord). Dysfunction in one area contributes to the perpetuation and worsening of others such that a vicious cycle is created. For example, people with chronic pain often become depressed and have poor sleep, while depression and poor sleep lead to worsening and perpetuation of pain.

- [29] Dr. Finlayson also believes Ms. Kim sustained a mild traumatic brain injury. She says that has likely contributed to her cognitive problems, but chronic pain is the more significant factor.
- [30] Dr. Finlayson recommends various treatments, including exercise under the supervision of a kinesiologist, physiotherapy, massage therapy and psychiatric treatment. She says those treatments may lead to improved management of pain, but will not eliminate it and "the prognosis for complete resolution of her symptoms is poor."

NON-PECUNIARY DAMAGES

- [31] On all of the evidence, I find that the physical injuries Ms. Kim suffered in the accident have resulted in severe, constant and likely permanent pain. I find that physical pain would have been sufficient in itself to have a devastating impact on Ms. Kim's lifestyle and her enjoyment of life.
- [32] I find that Ms. Kim also suffers from a significant depression as a result of the accident. Although she experienced stress and some sleep disturbance following the collapse of her business, there is no evidence that progressed to a depressive disorder and I find those pre-accident events have not contributed to her current psychological symptoms.
- [33] I also accept the evidence of decline in her memory, concentration and cognitive ability. It is unclear whether that is the result of a discrete injury or related to some combination of depression, chronic pain and hearing loss, but in my view, little turns on that. The symptoms are very real, they are the result of the accident and as Dr. French suggests, the fact they have persisted for six years does not bode well for complete recovery.
- [34] I agree with the defendant that Ms. Kim's stubborn resistance to the use of hearing aids led to unnecessary persistence of her hearing loss, which in turn may play some contributing role in depression and cognitive difficulties. However, I find that any disability that can be attributed to hearing loss is a relatively minor contributor to Ms. Kim's overall condition. I repeat that the physical injuries and resulting pain would have had a devastating impact in the absence of anything else and would be grounds for significant non-pecuniary damages.
- [35] I also agree that Ms. Kim was at an age where she was at some risk for physical and cognitive decline in any event, but there is no evidence to support a suggestion that would have occurred as suddenly or severely as has happened as a result of the accident. There is no evidence of any significant age-related deterioration prior to the accident, other than Ms. Kim's arthritic knees, which she did not pursue as an issue at trial.
- [36] While medical experts suggest some possible treatments that may assist Ms. Kim in managing her pain, that is complicated by the fact that Ms. Kim is not fluent in English and may have difficulty finding Korean-speaking practitioners. She will likely have to continue to rely, at least some of the time, on Apollos being available to translate both the history she gives and the instruction and advice she receives.

- [37] To some extent, Ms. Kim's lifestyle was constrained prior to the accident by the loss of income from her business and the resulting reduced financial circumstances. That likely interfered, for example, with the plans she and her husband had to travel extensively during their retirement. But I find that makes the loss of the social and other activities she was still able to engage in even more significant.
- [38] Non-pecuniary damages for pain and suffering are assessed on the basis of some common factors applied to a plaintiff's individual circumstances. Those factors include, but are not limited to: the nature of the injury; severity and duration of pain and disability; emotional suffering; loss or impairment of life; impairment of physical and mental abilities; loss of or interference with pre-accident lifestyle; impairment of family, marital, and social relationships; stoicism; and age: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.
- [39] While previous decisions involving similar injuries provide helpful guidance, no two cases are identical and each must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [40] A further issue arises when a plaintiff is of an age similar to Ms. Kim. In *Fata v. Heinonen*, 2010 BCSC 385, the Court said at para. 88:

The retirement years are special years for they are at a time in a person's life when he realizes his own mortality. When someone who has always been physically active loses his physical function in these years, the enjoyment of retirement can be severely diminished, with less opportunity to replace these activities with other interests in life. Further, what may be a small loss of function to a younger person who is active in many other ways may be a larger loss to an older person whose activities are already constrained by age.

- [41] Other cases suggest application of this "Golden Years" doctrine is not inevitable and the considerations giving rise to it may be balanced by others, such as the fact chronic pain may be more significant to a younger plaintiff with a longer time to suffer the pain: *Lewis v. Worth*, 2020 BCSC 57, paras. 58-60.
- [42] On the facts of this case, I find that the loss of the lifestyle that was still available to Ms. Kim before the accident to be a particularly significant factor in assessing non-pecuniary damages.
- [43] The plaintiff seeks non-pecuniary damages of \$250,000. The defendant submits an appropriate award would be in the range of \$85,000 to \$125,000, before a 10% deduction for failure to mitigate and a further 20% deduction for the arthritic knee pain that would have been present in any event.
- [44] The alleged failure to mitigate relates to Ms. Kim's refusal to use hearing aids to mitigate her hearing loss. The burden is on the defendant to prove not only that the plaintiff acted unreasonably but also the extent, if any, to which damages would have been reduced by the recommended treatment: *Nikkhah v. Batin*, 2019 BCSC 2223 at para. 104.

- [45] I accept that Ms. Kim's refusal to date to use hearing aids was unreasonable, although her depression and cognitive difficulties may have influenced her attitude. Although Dr. Wong said use of hearing aids would improve her quality of life and may also help with cognition, the likely extent of that improvement has not been proved and remains largely speculative. I therefore decline to make a specific deduction for failure to mitigate.
- [46] In seeking a deduction for a pre-existing condition, the defendant relies on *Mofazeli v. Johnson*, 2021 BCSC 1061 [Mofazeli], *Corrado v. Mah*, 2006 BCSC 1191 and *Lamont v. Prat*, 2021 BCSC 1294, where deductions of 20 or 25% were made.
- [47] I find those cases distinguishable because they were all "crumbling skull" cases, where pre-existing conditions were made symptomatic or aggravated by the accident. In other words, the pre-existing conditions were present in the very parts of the body that were injured in the accidents and created a risk that the plaintiffs would have had some of the pain or symptoms at issue even in the absence of the accidents.
- [48] For example, in *Mofazeli*, the most serious injury alleged by the plaintiff was to his right hip, where he had pre-existing but previously asymptomatic arthritis. The Court found at para. 60 that there was a measurable risk that absent the accident, the hip would have become symptomatic to the extent that hip replacement would be required.
- [49] In this case, the plaintiff suffers knee pain as a result of pre-existing condition. Although the notice of civil claim includes a claim for injury to the knees, that was not pursued at trial and the plaintiff accepted, indeed introduced, the evidence of Dr. Masri that knee pain is unrelated to the accident. There is no evidence of any connection between the plaintiff's knee pain and her devastating severe back and upper body pain, or between the knee pain and her psychological and cognitive difficulties.
- [50] While the plaintiff was likely to suffer knee pain in the absence of the accident, there is no evidence that it would have become significantly disabling on its own, with the possible exception of Ms. Kim's ability to continue her limited work picking berries, which will be dealt with below. There is, in short, no evidence that the plaintiff would now be significantly less disabled in the absence of her knee pain.
- [51] On assessment of non-pecuniary damages, the plaintiff refers to *Sangra (Guardian ad litem of) v. Lima*, 2015 BCSC 2350 [Sangra]; *Ho v. Ip*, 2019 BCSC 2220; *Choi v. Ottahal*, 2022 BCSC 237; *Fryer v. Nakusp (Village)*, 2022 BCSC 497 and *Plett v. Davis*, 2022 BCSC 789.
- [52] Non-pecuniary damages in those cases ranged from \$210,000 to \$315,000. The cases at the upper end of that range involved injuries, including brain injuries, that were more serious than those in this case. In the most serious of them, *Sangra*, the injuries were almost fatal, required surgery and were described by the trial judge at para. 94 as "close to catastrophic."

- [53] The defendant relies on *Kassam v. Wong*, 2020 BCSC 764, *Paller v. Morgan*, 2013 BCSC 1672; *Schweitzer v. Li*, 2021 BCSC 52, and *Paterson v. Hindle*, 2017 BCSC 1104 [Paterson]. All those cases involved some degree of depression and/or cognitive difficulties and most involved physical injuries that were soft tissue in nature. There was nothing compared to the effects of the spinal fracture and spinal deformity that Ms. Kim suffered.
- [54] The largest damage award in the cases relied upon by the defendant was *Paterson*, where the plaintiff was found to have suffered soft tissue injuries and a concussion. Most of the soft tissue injuries had resolved but the plaintiff still had chronic neck pain, memory problems, depression and anxiety. She was awarded non-pecuniary damages of \$125,000. While the injuries were found to have a significant impact on the plaintiff's life, the injuries and their impact appear to be less serious than what Ms. Kim has experienced.
- [55] As said above, each case must be decided on its own facts. To the extent comparable cases are relevant, I find those cited by the plaintiff to be more helpful. Considering all the cases cited to me and the evidence specific to this case, including Ms. Kim's pain and resulting limitations in all aspects of life, including housekeeping, I find an appropriate award for non-pecuniary damages to be \$215,000.

COST OF FUTURE CARE

- [56] Jennifer Lane is an occupational therapist who conducted a functional capacity evaluation in February 2022. The results of her testing of Ms. Kim's physical abilities are generally consistent with the limitations Ms. Kim describes. She says Ms. Kim needs help with household tasks. Based on her own testing and the recommendations of other experts, Ms. Lane also makes recommendations for ongoing treatment and therapies, including occupational therapy, physiotherapy, massage therapy, psychological counseling and kinesiology.
- [57] The evidence is clear that Ms. Kim's pain is likely to be permanent. Most of Ms. Lane's recommendations do not purport to offer any cure, but are aimed at whatever relief is possible and helping Ms. Kim manage and adapt to her pain. I find that to be a necessary goal, although it is impossible to predict how successful those efforts will be.
- [58] The defendant relies on the opinion of another occupational therapist, Matthew Gregson, who has not examined or tested Ms. Kim but has reviewed Ms. Lane's report and is critical of her methodology. His major criticism is that Ms. Lane relied too much on Ms. Kim's subjective complaints of pain and limitations and failed to do sufficient standardized testing to confirm that Ms. Kim was giving maximum effort on the tests. He also says that being able to perform an activity with subjective reports of pain and limitation is not the same thing as being physically unable to perform the task.

- [59] I find such reports by an expert who has not actually seen the plaintiff to be of limited probative value. There is no suggestion from anyone that Ms. Kim's complaints are exaggerated or not genuine. In addition to the tests that she performed, Ms. Lane was in a position to exercise her professional clinical judgment in assessing Ms. Kim's abilities, including her judgment about what tests were necessary.
- [60] If Mr. Gregson had performed his own functional capacity evaluation using his own methodology, he may or may not have obtained different results and arrived at different recommendations that the Court could consider. In the absence of such an evaluation, I do not find his opinion to be helpful and accept the evidence of Ms. Lane.
- [61] Kevin Turnbull, an economist, has calculated the present value of Ms. Lane's recommendations. Where Ms. Lane has indicated a range of a particular cost, Mr. Turnbull has used an average of the range. The total present value of Ms. Lane's recommendations is \$105,573.
- [62] Many of Ms. Lane's recommendations are presumed to continue throughout Ms. Kim's remaining life expectancy. I find that some, such as the need for housekeeping assistance, may have become necessary in any event as Ms. Kim aged. Various therapies may be discontinued early or reduced, based on both Ms. Kim's and the therapists' evaluation of their ongoing benefit. On the other hand, Ms. Lane indicates that Ms. Kim could deteriorate to the point that she needs a personal care aide. That expense has not been included in her recommendations, presumably because the need and timing is so difficult to predict.
- [63] Balancing these positive and negative contingencies, I award \$85,000 for the cost of future care.

LOSS OF EARNING CAPACITY

- [64] Although the plaintiff was retired, she testified that for five or six weeks each summer she worked, along with her husband, picking berries. She testified that she did this work primarily because she enjoyed the activity, but earned between \$2,000 and \$3,000 per season. She has not done that work since the accident and advances a small claim for loss of past income and loss of future earning capacity.
- [65] Ms. Lane says that her functional capacity testing shows that Ms. Kim is incapable of meeting the physical demands of berry picking or any other kind of sustained employment.
- [66] The plaintiff agreed on cross-examination that her knee pain, which is unrelated to the accident, becomes worse with standing for long periods and with knee bending, which is sometimes necessary to pick berries.

- [67] The evidence does not show that Ms. Kim's arthritic knee pain would likely have become sufficiently disabling on its own by now to make berry picking impossible for her in the absence of accident related injuries. But her evidence is that she picked berries more for the enjoyment it provided than for the limited income it produced. I find that increasing pain, even if not disabling, would likely have reduced her enjoyment and her willingness to continue.
- [68] I find that, in the absence of the accident, Ms. Kim would likely have continued berry picking for at least some time after 2016. At \$2,500 a year (the mid-way point of the range she testified to), total income through the summer of 2021 would have been \$12,500. Recognizing the possibility of her stopping at an earlier date, I reduce that by a contingency factor of 30%, for a net award of \$8,750.
- [69] In order to succeed in a claim for loss of future earning capacity, the plaintiff must show a potential future event that could lead to a loss of capacity, then must show that there is a real and substantial possibility that the future event will lead to an income loss. The court must then assess the relative likelihood of that loss occurring: *Rab v. Prescott*, 2021 BCCA 345 at para. 47.
- [70] In view of Ms. Kim's already manifest knee pain and the general effects of aging, I find she has failed to show a real and substantial possibility of future income loss and I make no award under that head of damage.

LOSS OF HOUSEKEEPING CAPACITY

- [71] The plaintiff seeks a separate award for loss of housekeeping capacity. Such an award can be made on either a pecuniary or non-pecuniary basis, but the Court of Appeal has provided somewhat conflicting guidance.
- [72] In *Kim v. Lin*, 2018 BCCA 77, the Court confirmed at para. 31 that an award for loss of housekeeping capacity is compensation for loss of an asset that should be recognized regardless of whether replacement services are actually purchased. Such a claim overlaps with, but is distinct from an award for cost of future care that includes replacement services. The Court said at para. 33:
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award.
- [73] However, in *Riley v. Ritsco*, 2018 BCCA 366, the Court said that special circumstances are required for a separate, non-pecuniary award.

- [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.
- [102] I acknowledge what was said in Kroeker about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.
- [74] The award I have made for cost of future care includes some replacement housekeeping services. I have also considered Ms. Kim's pain and limitations in housekeeping in coming to an award of non-pecuniary damages. Gratuitous contributions by family members will be addressed below. In these circumstances, I find that a separate award is neither necessary nor appropriate and would, in fact, amount to double recovery.

"IN-TRUST" AWARD

- [75] An "in-trust" award is intended to compensate family members or others for services they have provided to the plaintiff as a result of the plaintiff's injuries. If provided by family members, they must be over and above what would be expected from the family relationship and the maximum value of services is the cost of obtaining them outside the family: *O'Mara v. Insurance Corporation of British Columbia*, 2019 BCSC 2222, at para. 133.
- [76] Quantification may also be approached on the basis of income lost by caregiving family members: *Caffrey v. Davies*, 2020 BCSC 792 at para. 141.
- [77] There is no doubt on the evidence that Apollos Kim gave up a job in the field for which he was trained in order to provide extensive care to the plaintiff. This has included transportation to and assistance with medical appointments as well as some help with housekeeping and shopping. He initially found that he had to at least be available on a full-time basis and was unable to earn income. He is now working, but has been unable to find a position in his chosen field and still works a graveyard shift so he can be available to his parents during the day and evening.
- [78] The defendant agrees that an in-trust award is appropriate, but points out that the plaintiff's need for assistance from Apollos was reduced considerably after the first two years following the accident.

- [79] In their submissions as to how this loss should be quantified, the plaintiff and the defendant have come to similar results by different means.
- [80] The plaintiff submits Apollos should be compensated for time spent, which is estimated at 24 hours per week in the first year after the accident, reducing to 10 hours in the second year and 6 hours in each subsequent year. The wages for replacement services are estimated at ranging between \$15 an hour (minimum wage) and \$39 an hour (Ms. Lane's estimate of the cost of a personal care attendant, should one become necessary). The total annual amount produced by those calculations ranges from \$44,700 to \$116,220 and counsel suggests an award halfway between those numbers, or approximately \$80,000.
- [81] There is no evidence that directly values the replacement cost of the specific services Apollos provided. Most of them, while not necessarily replaceable at minimum wage, would appear to be compensable at a level closer to that than to the upper rate counsel refers to. One service that would likely be more costly to replace is the translation service Apollos has provided in medical and therapist appointments.
- [82] Defence counsel arrives at almost the same amount of \$80,000 based on Apollos' loss of income in the two years immediately after the accident, but submits his time was spent caring for both parents and has been partially recognized in the settlement his father received. Counsel therefore contends for an award equal to half of Apollos' two-year income loss, or approximately \$39,500.
- [83] While I agree that any award should recognize that some of the services provided by Apollos were for the benefit of his father or benefited both parents, an award based on equal division would be entirely arbitrary. I do not have detailed evidence of the severity of Mr. Kim senior's injuries compared to those of the plaintiff, nor do I have details of the settlement he received.
- [84] Considering all of these factors, I award an in-trust amount of \$60,000.

SPECIAL DAMAGES

- [85] The plaintiff claims special damages of \$1,000 for mileage to medical appointments and treatments. While that sounds reasonable on its face, it is not supported by any documents or other evidence as to how that amount was arrived at. The plaintiff also claims the initial cost of hearing aids, but that cost was included in Mr. Turnbull's calculation of future care costs. The plaintiff has therefore failed to prove any special damages.

SUMMARY

- [86] In summary, the plaintiff will recover the following damages:

Non-pecuniary damages

\$215,000

Cost of Future Care

\$ 85,000

Past Loss of Earning Capacity

\$ 8,750

In-Trust Award

\$ 60,000

Total

\$368,750

[87] The plaintiff will also have costs at Scale B, unless there are matters I am unaware of that counsel need to address.

"N. Smith J."

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