

CANADA / JUDGMENT

Klein v. Sangha

2016 BCSC 1864

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 1864 Klein v. Sangha

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Klein v. Sangha,

2016 BCSC 1864

Date: 20161011

Docket: 159554

Registry: New Westminster

Between:

Steven Samuel Klein

Plaintiff

And

Sonya Sangha and Sukhjinder Kaur Sangha

Defendants

Before: The Honourable Mr. Justice Jenkins

- and -

Docket: M163661

Registry: New Westminster

Between:

Steven Samuel Klein

Plaintiff

And

Navneet Kaur Gill and Gurmeet Kaur Gill

Defendants

Reasons for Judgment

Counsel for the Plaintiff:

S.G. Price

D. Nundal

Counsel for the Defendants:

B. Turner

Place and Date of Trial:

New Westminster, B.C.

April 27, 28 and 29, 2016

Place and Date of Judgment:

New Westminster, B.C.

October 11, 2016

- [1] The plaintiff claims damages arising from injuries suffered in two motor vehicle accidents which occurred in 2012 and 2013. In both cases, liability is admitted and this Court's task is limited to an assessment of damages. Nevertheless, these cases involve uncommon circumstances, including a general acceptance by the defence of the plaintiff's credibility in his description of his pain and suffering and a report from the plaintiff's family doctor which is less supportive of the plaintiff's assessment of injuries than the defence expert's assessment.

The Plaintiff Prior to the Accidents

- [2] The plaintiff was 39 years of age at trial. Prior to the accident, the plaintiff was an experienced carpenter, having obtained journeyman certification in 2005 and subsequently obtained a mould remediation certification. He is also qualified as a fire, water and smoke technician. Mr. Klein lived and worked in Alberta until 2010. In 2005, he incorporated a business called Revolution Carpentry & Renovations Ltd. ("Revolution") through which he provided carpentry services. He worked through Revolution until 2009, at which point he worked for a restoration contracting business in Edmonton called First General Services.

- [3] Mr. Klein, who was a single father, moved from Alberta to Chilliwack with his teenage daughter in 2010. Shortly after moving, he commenced employment with First On Site Restorations. He started in water remediation, but was soon promoted to the position of construction project manager. By March 2011, he had taken a carpenter position, which he preferred over the administrative work of a project manager. As a carpenter, Mr. Klein generally worked for 40 hours a week. However, at times, he had unlimited overtime work available, which he often accepted.
- [4] Mr. Klein had an active lifestyle before the accident. He participated in rock climbing, snowboarding and 4x4 off road driving. He described himself as being the "epitome of health" prior to the accident.

The First Accident and Injuries Arising From the First Accident

- [5] The first accident occurred on April 12, 2012 when the plaintiff's cargo van was "t-boned" by a driver travelling through a red light at the intersection of Kingsway and 14th Avenue in Burnaby. The impact caused Mr. Klein's van to spin out of control and across the intersection. Photographs of his van were entered into evidence and helped indicate the impact of the accident. They revealed that the shelving the plaintiff had built into the van for his tools and supplies had largely been torn apart in spite of "being well secured". The van was not driveable after the accident.
- [6] The plaintiff testified that, after the accident, he was shaking, in shock and required attention from paramedics. They advised that he go to a doctor. He was also inspected by a safety officer. Touching his spine caused so much pain that an ambulance was called to take him to a hospital. Mr. Klein was released from hospital later that day and received a ride home. He felt sore and stiff the next day, and so he went to a doctor and stayed home from work. His doctor recommended a course of physiotherapy, which he attended; however, his pain did not subside.
- [7] Mr. Klein testified having neck and low back pain as well as headaches following the first accident. He had trouble sitting and standing, and stated that "it took me 15 minutes to roll over in bed as the stiffness and pain was getting worse and worse". On April 25, 2012, Mr. Klein experienced such intense pain that "it took me 45 minutes to get out to my car" and he had to drive to the Chilliwack Hospital Emergency Department to seek treatment. After the staff took an X-ray of his back and coccyx there, he testified he was told that he had fractured his coccyx. He was given Tylenol 3, occycottin, and percocet. He was unable to drive home.
- [8] Eventually, Mr. Klein went to a new family doctor who told him to limit his movements and to "do nothing" for six to eight weeks. Mr. Klein was unable to do everyday tasks; he could not complete housework and it took him 20 minutes to pull on his pants due to pain. On May 17, 2012, he took up physiotherapy involving stretching and massage two to three times per week, but he continued to be in pain.

- [9] During the first few months after the first accident, Mr. Klein also testified about experiencing lower and upper back pain, pain in his shoulders, headaches, ear aches, jaw ache and eye strain. He added that his back and coccyx hurt much more than other areas. His headaches, ear, jaw and back pain continued into August 2012. He could not eat, his trapezoids were inflamed and tilting his head aggravated the pain and caused numbness in his hands and arm. His recovery became a full time activity.
- [10] On July 2, 2012, Mr. Klein began a "work-hardening program" at Fraser Valley Physiotherapy, which included physiotherapy for his strength, cardio exercise, work with weights and various other tasks. The program aimed to return him to work and included simulations of tasks he would perform at work. He was required to attend five times per week. He also obtained massage treatment and acupuncture. He was eventually "pulled" from the program, at which point his back pain improved, but his neck pain worsened. On August 24, 2012, he was told to stop the program, to refrain from all exercise and to go for a CT scan.
- [11] As of October 27, 2012, Mr. Klein had still not returned to work. After being released from the work-hardening program, he continued a regime of stretching and attending a steam room. He saw his family doctor weekly or bi-weekly and was instructed not to return to work. As of October 2012, he was gradually improving, but his headaches continued and so he continued with a treatment plan of relaxation, physiotherapy, acupuncture, electro-stimulation and pool exercise. He also began to resume some jogging and other physical recreation.
- [12] Mr. Klein returned to the work-hardening program in December 2012, but soon his insurer told him that he had to go back to work as his injuries did not justify him continuing the program. Once off the program, his pain lessened, but his health did not return to its pre-accident state. Mr. Klein wanted to go back to light duty work, but his manager did not think he could justify paying Mr. Klein light duty work wages, and therefore did not take him back. Having been cut off from the work-hardening program, Mr. Klein decided he had to attempt a return to work.
- [13] Mr. Klein returned to work on January 2, 2013. He needed to take on easier jobs, rest more and work decreased hours compared to what he had done before. He had a "near miss" on a ladder one day, which resulted in him not being permitted to work at heights or on ladders. He had difficulty working four or five hours per day, but eventually progressed to working five days per week. He turned down overtime work.
- [14] A "week or so" prior to the second accident, Mr. Klein testified that he applied to be transferred back to Alberta but his transfer could not be accepted unless he overcame limitations on his capacity to work full time. A representative of his employer showed up at his home and took his van and keys.
- [15] Not long after commencing work on a full time basis, the second accident occurred.

The Second Accident, Injuries Sustained from the Accident and Aggravation of Previous Injuries

- [16] On May 24, 2013, Mr. Klein's van was struck from behind while he was stopped due to heavy traffic on Highway 1 near the 232nd Street exit in Abbotsford. Mr. Klein testified that once he came to a stop, he noticed that the driver of the vehicle behind him was looking down and did not see he had stopped. She struck the rear of his van without braking. His vehicle was pushed into a truck in front of his van. He felt a jarring sensation in his neck and back and experienced spasms.
- [17] After being attended to by emergency paramedics, he drove to the emergency department at the Chilliwack Hospital. He described his condition that evening as involving his "neck and back immediately tighten[ing] up", his "muscles spasming visually", and his pain requiring muscle relaxants and pain killers. He did not go to work the next day as he was "super stiff and sore" and felt [he] was "going back a year to the first accident"
- [18] He continued to see his family doctor and to receive massage therapy treatment, which he paid for himself. Since he did not have funds for physiotherapy, he used techniques he had learned following the first accident for self-treatment.
- [19] Between May 24, 2013 and July 1, 2013, Mr. Klein did not work. He testified that "if I was able to get up and move, I would go to the gym or the steam room or whatever I could to get better". On many days this was all he could do. In May and June 2013, he began to improve.
- [20] On July 1, 2013, Mr. Klein moved back to Alberta. His daughter had become depressed after undergoing a surgery and had moved back to Alberta to live with her mother. Being unable to physically move his belongings, Mr. Klein received assistance from his friends in moving back to Alberta.

The Plaintiff after Moving Back to Alberta

- [21] Mr. Klein moved into a friend's house in Sherwood Park, Alberta. In exchange for free rent, Mr. Klein completed some renovations for his friend. Mr. Klein estimates that the work took approximately eight months to a year to complete. Prior to the accident, the same task would have taken Mr. Klein only a couple weeks.
- [22] Mr. Klein attended the gym regularly and eventually was strong enough to take on another job for a friend. While doing this job, Mr. Klein learned that working for himself worked well, since he could stop and rest. When he worked for others, he simply was not able to work full time. He stated that he "had learned my limits" and that he now knew he could not do repetitious work such as shovelling, tile work, ceiling work and flooring.

- [23] In 2014, Mr. Klein also restored his company, Revolution. He was able to obtain tax free dividends from the company, due to previous losses. He also hired helpers and began to take on construction work. He testified that the helpers could not work full time because "I can't be there all the time". He stated that, from 2014 up to trial, he did between "40 to 60%" of what he used to do, and that "I have lots of work and do all I am capable of".
- [24] As of the date of trial, Mr. Klein stated that "I would work full time if I could". Mr. Klein has continued to complete renovation work through Revolution under contracts with Alliance Property Management, who wanted him to work for them full time.

Mr. Klein's Current Condition

- [25] When asked about his current condition compared to his condition before the first accident at trial, Mr. Klein replied, "It's changed my entire life, how I feel I get angry now because I have a temper because I get frustrated and incapable of doing shit. I hurt all the time physically I am not the same person, I have so many limitations and it is just frustrating". He described the work he can no longer do. He added that he is unable to continue recreational activities such as mountain biking, wakeboarding, rock climbing and snowboarding. Despite trying to avoid taking pain meds, he described taking sleeping pills as sleeping aides and taking pain relief medicine two or three times per month.
- [26] Mr. Klein stated that his health has improved since the accidents, but that he did not experience any significant improvement in the year before trial. He testified "ideally I want to get more help and continue to work but it takes time I need the flexibility of being self-employed I do not see a 40 hour work week in my future".

Cross-examination of Mr. Klein

- [27] Counsel advised that the emphasis on cross-examination would be on Mr. Klein's claim for loss of earnings for Revolution. Mr. Klein acknowledged that in the 2011 calendar year, his total income was \$63,413, not \$70,000 or \$80,000 as he had previously stated in direct examination; 2011 was, of course, the last full year in which he worked prior to the first accident.
- [28] Mr. Klein acknowledged having received advances from claims from the defence from the first accident in a total amount of \$32,523.16 (Volume 3, Tab E2) plus \$1,740 for past wage loss (Volume 3, Tab E4) and \$1,200 on account of the second accident (Volume 3, Tab E3). The latter payment related to total disability benefits to June 28, 2013.
- [29] During cross-examination, references were made to Mr. Klein's evidence on direct examination when he described being told he had suffered a fractured coccyx during the first accident and to a medical imaging report from Chilliwack General Hospital which was inconclusive about whether he had suffered a fracture.

- [30] Mr. Klein was cross-examined at length on the issue of whether he had resigned from his job in B.C. before moving to Alberta. His evidence was that he had been offered a job in Edmonton with First On Site but that it was contingent on him working full time. Mr. Klein confirmed that, in the end, he never worked for the Edmonton branch of the company. I conclude from his evidence on this issue, including the report that stated that he resigned from the company, that if he could have worked full-time in Edmonton, a job would have been available to him. Whether he resigned is not, in my opinion, particularly relevant since he was unable to work full time when he relocated to Alberta and there is no evidence that he has become able to do so ever since, save a statement from Dr. Oyama which I will refer to later in these reasons. Mr. Klein's evidence concluded with his statement that he had been in a relationship with a woman who worked at First On Site and that the breakup of that relationship resulted in some misunderstandings between him and his employer.
- [31] Mr. Klein was asked what other jobs he had applied for since moving to Edmonton. Mr. Klein explained that he did not apply to full time jobs due to his inability to sit or stand for most of the day. He described trying to get by with his knowledge and experience of the construction industry instead, and using employees at Revolution to perform the physical work he was unable to do.
- [32] Mr. Klein acknowledged that he had received an offer from Alliance Property Management to work full time and rejected the offer due to his inability to work full time.
- [33] Finally, Mr. Klein answered questions about Revolution's financial problems in or about 2008 and 2009 which he attributed to "large overhead" for a custom millwork shop that housed expensive equipment, the costs of which caused the company to fail. Revolution was dissolved in 2009 and restored in 2014 by Mr. Klein as a vehicle for his construction activities.
- [34] Regarding his income prior to the accident, the evidence discloses the following amounts for the two years prior to the first accident:
- 2010 - Employment income - \$50,704
 - RRSP income - \$2,029
 - Total Income: \$52,733
 - 2011 - Employment income - \$63,413
 - Workers' Compensation - \$763
 - RRSP income - \$209
 - Total income: \$64,385
- [35] Since the first accident, Mr. Klein's earnings have been as follows:
- 2012 - Employment income - \$16,193

RRSP income - \$209

Total income: \$16,402

· 2013 - Employment Income - \$22,774

Net Business income - \$5,504

RRSP income - \$209

Total Income: \$28,487

· 2014 - Net Business income (Revolution) - \$20,965

RRSP income - \$210

Total Income: \$21,175

· 2015 - Taxable amount of dividends (Revolution) - \$37,760

RRSP income - \$209

Total Income: \$37,969

[36] For 2015 and to date in 2016, the plaintiff has received dividends from Revolution that do not reflect the company's earnings, especially since the earnings of Revolution are much less. Mr. Klein deposed that, in 2015, he did not receive the full amount of the dividends reported above and only received \$27,000 as part of a loan repayment from him to Revolution in the years prior to his move to B.C.

[37] The shareholder loan, the dividends that have been paid out of Revolution in 2015 and Revolution's income since it was restored following Mr. Klein's return to Alberta complicate a determination of Mr. Klein's actual income.

Assessment of Mr. Klein's Credibility

[38] Regardless, overall, I found Mr. Klein to be a credible witness who expressed great frustration at his inability to return to carpentry, who no longer participates in the recreational pursuits which he had previously enjoyed and who has continuing difficulty sleeping and continues to suffer pain, particularly in his lower back following activity. Although Mr. Klein has not undertaken the comprehensive fitness recommended to him by Dr. Rickards, the defence expert orthopedic surgeon, he has continued exercising and stretching. He has had a relatively small income since the accidents and his insurer has ceased payment for his treatment.

[39] Mr. Klein was not cross-examined to any significant degree regarding the pain he has suffered from for several years since the first accident or about his complaints regarding pain whenever he attempts to undertake carpentry work.

[40] I would add that throughout his evidence, Mr. Klein was clearly uncomfortable sitting in the witness box which resulted in much fidgeting, stretching and movement on his part. His appearance in the witness box was consistent with his description of the effect of his injuries on his ability to sit for any significant period of time. Generally, I find he exhibited stoicism in attempting to work and that he wishes to be able to participate in life in the manner he had before the accidents.

Medical Evidence

[41] The plaintiff submitted a report prepared by Dr. Sonnie Oyama into evidence. Dr. Oyama was not required to attend at trial for cross-examination.

[42] Dr. Oyama examined Mr. Klein on December 21, 2015. He is a family physician practicing in Sherwood Park, Alberta, with a special interest in injury management and rehabilitation medicine. His report was not particularly favourable to the plaintiff's claim. Considering the date of Dr. Oyama's examination, almost four years after the first accident, it is difficult to assess the value of his opinions regarding Mr. Klein's complaints about his injuries before December 21, 2015.

[43] Included in Dr. Oyama's report are the following statements:

- Regarding the physical examination, Dr. Oyama stated "He was not in overt distress and appeared comfortable throughout the interview and examination".
- Regarding the examination of his neck and cervical spine, he stated "No muscle atrophy was evident Tenderness was reported on palpitation of the upper trapezoid muscles and cervical/thoracic para-spinal muscles "
- Regarding his upper extremities, Dr. Oyama stated "Motor strength in both extremities was normal at 5/5 and equal bilaterally".
- Under Diagnosis and Prognosis Dr. Oyama stated:

It is my opinion that the examinee has developed myofascial (chronic) pain syndrome. The Prognosis is usually good. However, although Myofascial pain syndrome can resolve with ideal treatment regimens, some patients with myofascial pain syndrome have lingering symptoms for years.

- Under Facts and Assumptions, Dr. Oyama stated:

Following the impact from the MVAs referenced, the examinee developed whiplash associated disorder

. the direct effect of the MVAs in question should have resolved by now.

Optimal treatment would be a multifaceted approach. This can include education of the patient, stress reduction, stretching and exercise programs as well as physical therapy, sleep improvement and medications [4] all best coordinated in a multidisciplinary pain clinic.

· Under whether the complaints of Mr. Klein have been caused by the motor vehicle accidents, he stated:

The reported muscular pains are most likely attributable to the referenced motor vehicle accidents.

· Regarding whether there is any permanent disability or an estimate of the length of any temporary disability, Dr. Oyama stated:

From the history and physical examination, Mr. Klein is not totally disabled as a result of the reference MVAs. It is my opinion that with appropriate management in a multidisciplinary pain setting, he should be fully able to do his pre-accident duties in two months.

[44] Dr. Robin Rickards was the defence's expert orthopaedic surgeon, who conducted an independent medical examination of Mr. Klein on January 6, 2016. In his January 24, 2016 report, he opined that Mr. Klein suffers from lumbar facet joint irritation in the low back area. He also found degenerative disease in Mr. Klein's cervical spine.

[45] Dr. Rickards elaborated on lumbar facet joint syndrome at page 7 of his report:

Typically, a patient with facet syndrome will often have a Positive Kemp's Test with pain being triggered by rotation, lateral flexion and extension [arching backwards] of the involved spinal segment [see Kemp's Test Lumbar Spine] - In Lumbar Facet Joint Syndrome [see Lumbar Facet Joint Syndrome Detailed Explanations - Appendix C], standing may be somewhat limited but sitting and riding in a car is often the worst. So-called "limited duty" (sitting) assignments for patients with low back pain are paradoxically bad. When at its height of pain and disability, the muscle spasm is so continual that it fatigues the muscles, which in turn, repeats the cycle.

Previously, on page 6 of his report, when reporting on his physical examination of Mr. Klein, Dr. Rickards stated:

. . . Passive motion of the low back into lateral flexion to the left combined with lateral rotation to the left and extension provoked left sided low back and buttock pain [positive Kemp's test]. This same maneuver performed towards right side provoked no pain. Spring test was positive.

[46] Dr. Rickards also reported finding degenerative disease in the cervical area which he stated occurs naturally in some young people.

[47] Regarding causation, at page 8 of his report, Dr. Rickards stated:

Probable Lumbar Facet Joint Syndrome

The relationship in time between motor vehicle accident of 2012 and onset of low back symptoms suggestive of facet joint irritation suggest these 2 events are related in a cause-effect relationship.

He also confirmed on cross-examination that Mr. Klein's low back pain was not degenerative. However, he acknowledged that there was "some" degenerative disc disease present in Mr. Klein's cervical spine but that Mr. Klein's susceptibility to spinal degenerative disease was common to other 39 year olds.

[48] Under Recommendations and Treatment at page 9 of his report, Dr. Rickards stated:

The 'cornerstone of treatment' for inflammatory or soft tissue difficulties in any region includes the following:

- Nonsteroidal anti-inflammatory medication regulated and followed by the patient's family physician in order to avoid secondary effects
- Muscle strengthening to address shoulder girdle, neck, low back and pelvic girdle musculature.

He later added that a weight loss program combined with an exercise program was of primary importance.

[49] At pages 11 and 12 of his report, when responding to questions put to him by the instructing lawyer, Dr. Rickards stated:

Issue Number 4:

....

Prognoses:

1. Probable Lumbar Facet Joint Syndrome: Probable improvement with non-interventional treatment. Spinal injection therapies may be required. No long-term or permanent difficulties anticipated. No increased risk of development/acceleration of pre-existing degenerative lumbar spinal disease.

Issue Number 5:

...

It is likely that symptoms suggest above lumbar facet joint irritation are directly related to the motor vehicle accident of April, 2012.

Issue Number 8:

....

Low back symptoms are likely directly related to the motor vehicle accident of 2012.

Issue Number 13:

. . . . symptoms in both neck and low back area will affect physical activities such as sports as well as prolonged and repetitive bending/lifting.

[50] On cross-examination, Mr. Nundal was able to obtain the following admissions from Dr. Rickards in addition to the admission referred to above regarding Mr. Klein's susceptibility to spinal degenerative disease:

- Dr. Rickards agreed that Mr. Klein was in "relatively good shape, was a reliable historian, he was in pain, a little overweight" and that his pain was consistent with his physical observations.
- Dr. Rickards acknowledged that strenuous activities are expected of a heavy and finishing carpenter and would create an expectation of pain. He also stated that Mr. Klein's occupation was a major factor in his pain.
- Referring again to Issue Number 8 of the letter of instruction, regarding the extent of injuries attributable to the accident, Dr. Rickards acknowledged he was not surprised that Mr. Klein still suffers from low back pain, especially since Mr. Klein is a carpenter, that "yes' it is possible the injury is debilitating" and that facet irritation was aggravated by twisting activities.
- When asked about alleviating some or all of the pain, Dr. Rickards stated that Mr. Klein had taken lots of physiotherapy and treatments by a kinesiologist and that treatment has not alleviated the pain to any significant degree. Also, Dr. Rickards acknowledged that an exercise program and other treatment can make life "a little bit more bearable but is not curative".

Findings of Fact Regarding Injuries and Causation

- [51] It is clear on the medical evidence, particularly Dr. Rickards' evidence, that Mr. Klein probably suffered Lumbar Facet Joint Syndrome as a result of the first accident and that, as a 39 year old male who had suffered "some" degenerative disc disease to his cervical back area, he was susceptible to such an injury.
- [52] Dr. Rickards found Mr. Klein to be a good historian. This finding is consistent with Dr. Rickards' physical findings about Mr. Klein's pain. Dr. Rickards believed that his pain was possibly debilitating and that it could be aggravated by the twisting motions Mr. Klein would experience as a carpenter.
- [53] Although Dr. Rickards did not opine on Mr. Klein's ability to return to full time work as a carpenter, he stated that he was not surprised that Mr. Klein still suffered from low back pain at the time of the trial, especially considering the movements expected of a carpenter.
- [54] Dr. Oyama's evidence was not particularly helpful to Mr. Klein's cause or to the Court. Additionally, certain inconsistencies between his report and Dr. Rickards' were unusual. For example, Dr. Oyama stated that Mr. Klein was not in overt discomfort from his injuries and appeared comfortable throughout the examination whereas Dr. Rickards stated that Mr. Klein was in pain and that the pain was consistent with his physical observations and that an exercise program could relieve some of this pain. I conclude that it is unlikely that the

proposed treatment will cure Mr. Klein's back problems, but believe that it may provide some relief. I conclude from Dr. Rickards' conclusions that Mr. Klein is unable to continue as a full time carpenter and that his pain is likely to continue and to be chronic.

- [55] It is also apparent from reading the reports that Dr. Rickards' examination and report were much more comprehensive than those performed by Dr. Oyama save that Dr. Oyama found that Mr. Klein suffered from chronic pain almost four years after the first accident.

Non-Pecuniary Damages

- [56] The leading authority on the assessment of non-pecuniary damages in British Columbia is *Stapley v. Hejslet*, 2006 BCCA 34, and in particular, paras. 45 and 46 where the court stated:

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

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

[Emphasis added.]

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

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

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

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

- (h) impairment of physical and mental abilities;
 - (i) loss of lifestyle; and
 - (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).
- [57] Considering the inexhaustive list of common factors influencing an award of non-pecuniary damages referred to above, I note the following factors are particularly applicable:
- (a) The age of the plaintiff. Mr. Klein was in his late thirties at the time of the first accident in a well-established occupation which provided financial and personal satisfaction to him. But for the accident, Mr. Klein would have had many more years of job satisfaction.
 - (b) The nature of the injury. Mr. Klein's injury, specifically to his spine, affects all aspects of life including work, play, sleep and everyday chores.
 - (c) The severity of pain. Mr. Klein's pain has left him bed-ridden for prolonged periods of time, interfered with his graduated return to work and led to much pain and frustration over four years.
 - (d) The disability. Mr. Klein's disability meant he could only return to work on a part-time basis before the second accident. He has only been able to undertake some of the tasks he was able to complete before the accident and only with resulting pain.
 - (h) Impairment of physical abilities. This is obvious from Mr. Klein's evidence and Dr. Rickards' report.
 - (i) Loss of lifestyle. Mr. Klein is no longer able to participate in sporting activities, except for a very short period of time. He cannot continue his chosen line of work which gave him great satisfaction in the past, i.e. working with his hands. He has suffered loss of sleep and cannot maintain a home without assistance. He now relies on friends for help whereas he was previously very independent. He has expressed considerable frustration in spite of his efforts to improve including physiotherapy, exercise, acupuncture and more. Nonetheless, he has been told to expand his efforts at establishing an exercise program.
 - (j) The plaintiff's stoicism. Mr. Klein has exemplified stoicism by attempting to return to work, to establish and restore a construction business in a modified scenario from his pre-accident work and to continue to support his daughter who was suffering from depression while Mr. Klein was dealing with his injuries. Every aspect of his life has been affected by his injuries.
- [58] Plaintiff's counsel submitted that an appropriate award for non-pecuniary damages would be in the range of \$150,000 to \$175,000. That range of awards is not reflected in the authorities referred to me by counsel which were:

- a) Jackson v. Jeffries, 2012 BCSC 814, in which a 29 year old plumber's apprentice was working toward becoming a journeyman when he was involved in an accident. He suffered from back and wrist pain, became socially withdrawn and no longer enjoyed his recreational pursuits. The plaintiff was awarded \$75,000 in non-pecuniary damages.
 - b) Jang v. Ritchie, 2013 BCSC 2459, a decision of Fenlon J., as she then was, in which a 61 year old plaintiff was struck in the back by a cyclist. He suffered a shattered wrist and lost his ability to work as a sushi chef. The plaintiff was awarded \$80,000 in non-pecuniary damages.
 - c) Sahota v. Choongh, 2014 BCSC 2415, in which Verhoeven J. awarded \$70,000 in non-pecuniary damages for injuries which limited and interfered with the plaintiff's enjoyment of life. His condition "somewhat interfere[d] with his work" and he was "able to continue to work in his present work indefinitely" but was precluded from undertaking heavy work, including work at his former place of employment, Richmond Plywood Corporation Limited. He was 53 years old at the time of trial.
 - d) Madill v. Sithivong, 2010 BCSC 1848, in which the court ordered \$110,000 in non-pecuniary damages to a plaintiff who was 43 years old at trial and was an operations manager at a cargo yard. His life and personality changed after the accident, such that he could no longer ride his motorcycle due to loss of balance. He also suffered from serious headaches and a mild traumatic brain injury.
- [59] The defence submits an award of \$40,000 to \$60,000 for non-pecuniary damages is appropriate, relying upon:
- a) Fiorda v. Say, 2011 BCSC 1293, which resulted in the plaintiff initially being awarded \$40,000, an amount which was reduced by 20% because of the plaintiff's failure to mitigate her injuries, including neck pain, tightness in her back, headaches, chest pain as well as arm and knee injuries. The plaintiff was unable to continue in her profession as a movie costume designer.
 - b) Lowen v. Kovacevic, 2005 BCSC 1520, where the plaintiff was awarded \$40,000 for back pain, which took into account the plaintiff's inability to return to work but also his failure to mitigate by not pursuing physiotherapy as recommended. The plaintiff was 19 years old at the time of the accident.
 - c) Wernicke v. Logan, 2007 BCSC 1899, where a 27 year old diesel engine mechanic plaintiff was awarded \$45,000 for back pain, wrist pain, neck stiffness and headaches suffered after an accident and aggravation of pre-existing degenerative disk disease. After the accident, the plaintiff was unable to engage in any of his previous recreational activities.
 - d) Shearsmith v. Houdek, 2008 BCSC 997 which resulted in an award of \$60,000 in non-pecuniary damages for a 43 year old plaintiff, a part-time cleaner who suffered severe back pain and chronic pain syndrome from a motor vehicle accident. She was unable to partake in her previous recreational activities.

- [60] Reviewing the authorities submitted by the plaintiff, I find that those authorities do not support an award in the range proposed by plaintiff's counsel.
- [61] Compared to the factual situation in the case before me, I find that the comparisons in the defence authorities are not appropriate in that the injuries had an effect on the plaintiffs' lifestyles but less of an effect than in the case of Mr. Klein and, in at least two cases, included a failure to mitigate.
- [62] Mr. Klein expressed considerable frustration at his inability to function at work and in all other aspects of his life. I found his evidence in this respect to be credible. He also thinks, quite reasonably, considering his experiences since the accident, that he will likely be affected by the injuries for a considerable time to come.
- [63] I have also considered Dr. Rickards' evidence about a rehabilitation program he proposed to Mr. Klein to minimize or possibly overcome the effect of his injuries. I have considered his injuries to date and the likelihood that he may never totally recover from them in the above assessment of non-pecuniary damages. Considering all of the evidence and authorities, I find an appropriate award of non-pecuniary damages to be \$90,000.

Past Loss of Income

- [64] These cases present considerable challenges in determining an appropriate award for past loss of income.
- [65] The plaintiff suggests that the past loss of income claim should be calculated based upon the plaintiff's income in 2011, the last full year before the first accident, when he earned \$63,413 while working for First On Site and setting off his actual income since the accidents to the date of trial. The plaintiff has not submitted evidence indicating any increases in his rate of pay that may have been available to him since the date of the first accident.
- [66] The defendant also submits that Mr. Klein's 2011 income should be the benchmark against which his actual income is to be set off. Issues arise in attempting to determine Mr. Klein's actual income in the years 2014 and later, which is complicated by the income Mr. Klein earned through Revolution.
- [67] Complicating factors include the fact that the year ends for Revolution are not calendar year ends and the dividends paid out of Revolution in 2015, according to the plaintiff, relate back to a shareholder's loan made years before the accident.
- [68] The defence also submits that I should calculate past wage loss net of income tax that would have been paid as determined in *Laxdal v. Robbins*, 2010 BCCA 565. The tax payable was calculated by the defence by using the respective annual income tax rates and claiming basic personal exemptions, CPP contributions payable as non-refundable tax credits and other deductions previously claimed by Mr. Klein. The defence submissions also assume the 10 months of net income of Revolution for the fiscal year ending February 29, 2016 would be received personally by Mr. Klein in 2015 and that the first two months of 2016 of

Revolution's income will be received by Mr. Klein in 2016. Also, net income for Revolution for March and April 2016 are assumed to be equal to that earned in the February 2016 year prorated for 2 months, as set out in Appendix "A" of these reasons for judgment, a document which was prepared and submitted by the defence. There was no response from the plaintiff challenging those calculations.

- [69] Based upon the above, I generally accept the calculations set out in Appendix "A" save that the small amount of Mr. Klein's RRSP income should not be included in his income as that income would have been earned irrespective of the accidents. I will leave the adjustment in the RRSP income to the parties to calculate. If they are unable to agree, they may make submissions.
- [70] Accordingly, the plaintiff is entitled to \$141,387 as his net loss of income to the date of trial subject to adjustment for his RRSP income in each of the applicable years.

Has Mr. Klein's Continued Work as a Carpenter Amounted to a Failure to Mitigate?

- [71] The defence submits that if the plaintiff is unable to continue with his pre-accident line of work in the future, he has a duty to seek out alternate occupations which would be less likely to exacerbate his back problems. I agree that the burden is on the plaintiff to prove on a balance of probabilities that he could not earn a comparable income from some other occupation; see: *Parypa v. Wickware*, 1999 BCCA 88 at para. 67.
- [72] The defence adds that Mr. Klein has an obligation to take reasonable steps to investigate other opportunities to mitigate his loss and has not done so. The defence seeks a 15% reduction for the failure to mitigate.
- [73] It is correct that there is no evidence that Mr. Klein has investigated other employment opportunities.
- [74] Mr. Klein's response is that he has all of the qualifications necessary to be a carpenter. He knows the construction industry and runs a construction business that seeks work and uses employees or subcontractors as much as possible to lessen the physical demands of being a carpenter on him.
- [75] Mr. Klein also testified that he is unable to work full time in a position where he would either be stand or sit for long periods or all day. He stated that part time jobs would not pay anywhere near what he had been earning before the first accident. He adds that he is unfamiliar with occupations where he could work full time considering his limitations.
- [76] I conclude that Mr. Klein's submissions on his inability to work for others on a full time basis have merit. Hence, his failure to seek out full time work would appear to be a sensible decision.

- [77] Dr. Rickards has acknowledged that Mr. Klein should undertake an "all encompassing" rehabilitation program including a fitness regimen complemented with physiotherapy and possibly acupuncture, massage and other therapy before returning him to full time work, possibly as a carpenter. His failure to pursue a strict rehabilitation program to date could have delayed his ability to return to full time employment and constitutes a failure to mitigate.
- [78] I also agree with the defence in that Mr. Klein has not submitted any evidence of his attempts to find well-paying employment outside of construction or to find work that he could perform on a full time basis.
- [79] However, based on the limitations referred to by Mr. Klein, I am convinced that it would be very difficult to find employment where he could work full time without undertaking considerable physical activity or significant periods of sitting or standing. Accordingly, I will reduce the award for past loss of income by an arbitrary percentage of 10% as opposed to the 15% arbitrarily suggested by the defence.

Future Earning Capacity

- [80] *Perren v. Lalari*, 2010 BCCA 140 is regularly relied upon by this Court in respect of the onus of proof and means of assessing claims for future loss of earning capacity. The most commonly referred to paras. are 32 and 33 which state:
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
- [33] On the facts of this case, the trial judge found that there was no substantial possibility of a future event leading to an income loss. That should have been the end of the enquiry. That was a reasonable conclusion on the evidence because there was no evidence that she was limited in performing any realistic alternative occupation.
- [81] I also refer to the decision of *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144, at para 32, regarding assessing a claim for future earning capacity:

- [32] In my view comparator cases are of limited utility in the assessment of awards for future losses, generally. It is well settled that an individual's earning capacity is a capital asset: *Parypa v. Wickware*, 1999 BCCA 88 at para. 63. An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. The degree of impairment to the plaintiff's earning capacity depends upon the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue.
- [82] There is no evidence before me such as an expert functional evaluation assessment, as is commonly the case in cases with future earning capacity claims. However, there is evidence of the plaintiff's earning power before and after the accidents. I can assume for this assessment that Mr. Klein will continue to work in the construction industry like he testified he would and that his condition will likely improve over time so long as he adopts the rehabilitative strategy recommended by Dr. Rickards.
- [83] Were it not for the accidents, the plaintiff would likely have continued working as a carpenter. It would be reasonable to assume that his wage rate would increase over time but that there would be uncertainties regarding overtime, the demand for carpenters and other market factors. I find that there is a real and substantial possibility that he would earn less than he would have expected to over approximately three years from the date of trial had the accidents not occurred.
- [84] I give little weight to the statement by Dr. Oyama that "with appropriate management in a multidisciplinary pain setting, he should be fully able to do his pre-accident duties in two months" and am somewhat puzzled about why his report formed part of the plaintiff's case. Dr. Oyama saw Mr. Klein on one occasion almost four years after the first accident and his assessment of injuries was less supportive of the plaintiff's case than Dr. Rickards'. I doubt that Mr. Klein would have fully recovered within two months and been able to perform his pre-accident duties.
- [85] Considering all of the evidence, including the likelihood of a gradual increase in the wage Mr. Klein would have earned, his desire and ability to continue work as a carpenter and his previous successes in the construction field, I suspect his income would have grown at a modest rate. This increase was evidenced by his income records since the accident. I assess a fair amount for future loss of income over the three year period to be \$60,000 pre-tax.

Claim for Cost of Future Care

- [86] Counsel acknowledged that no evidence was led on the cost of future care which may have contributed to Mr. Klein's return to full time work and to a more pain free life.

Special Damages

[87] The parties have agreed that the award for special damages is in an amount of \$8,150 and I so order.

Advances

[88] The total amount of the award should be reduced by the amount of advances received by the plaintiff for the two accidents which I am advised amounted to \$35,463.16.

Costs

[89] I assume there are facts of which I am not aware which should be considered in an award of costs. Accordingly, counsel may schedule, through Supreme Court Scheduling in New Westminster a one hour hearing on the subject of costs.

Summary

[90] Subject to a reduction in RRSP income in the calculation of past loss of income and submissions on costs, the plaintiff will recover the following damages, less advances in the amount of \$35,463.16:

- a) Non-pecuniary damages: \$90,000;
- b) Past loss of income: \$141,387 less 10% for a failure to mitigate;
- c) Future earning capacity: \$60,000; and
- d) Special damages: \$8,150.

"Jenkins J."

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