
CANADA / JUDGMENT

Lai v. Griffin

2020 BCSC 377

COURT

Supreme Court of British Columbia

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2020 BCSC 377 Lai v. Griffin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lai v. Griffin,

2020 BCSC 377

Date: 20200313

Docket: M162401

Registry: Vancouver

Between:

Linh Dinh Lai

Plaintiff

And

Danny Griffin

Defendant

Before: The Honourable Madam Justice Jackson

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

October 7-11, October 15-18, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 13, 2020

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I. INTRODUCTION

- [1] The plaintiff, Linh Dinh Lai, seeks damages from the defendant, Danny Griffin, for injuries from an accident that occurred on May 11, 2014, at approximately 4 p.m. (the "Accident").
- [2] The Accident occurred at the intersection of West 10th Avenue and Stephens Street in Vancouver, BC. The plaintiff was riding his bicycle westbound on West 10th Avenue in a dedicated bike lane. He observed the defendant approaching from his right side. The defendant initially slowed his vehicle but failed to stop at a stop sign. Instead, he continued through the intersection toward the plaintiff. In an effort to avoid being hit by the defendant's SUV, the plaintiff swerved but ultimately had to decide whether to let the defendant's vehicle hit him or jump off his bike. The plaintiff jumped, landing on his back and side.

II. ISSUES

- [3] The defendant admits liability for the Accident. The defendant also admits the Accident caused the plaintiff's physical injury to his back and right leg. The issues for determination relate to the assessment of the plaintiff's damages, specifically whether the Accident contributed to the aggravation of the plaintiff's pre-existing diagnosis of post-traumatic stress disorder ("PTSD"), whether the Accident caused the plaintiff's medical release from the military and, more generally, what heads of damages are properly recoverable by the plaintiff and in what amounts.

III. CREDIBILITY AND RELIABILITY

- [4] The defendant challenged the plaintiff's evidence on several points and so the plaintiff's credibility and the reliability of his evidence must be addressed.
- [5] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296:

- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [6] The plaintiff testified in a forthright and direct manner. He had a good recollection of past events including details, but not unreasonably so. However, the dangers of relying solely upon in-court demeanor are well established: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356-358; *R. v. S.H.P.*, 2003 NSCA 53 at paras. 28-30 and, therefore, I place relatively little weight on this factor in my analysis of the plaintiff's credibility.
- [7] There were no material or significant differences between the plaintiff's direct evidence and the testimony he gave under cross-examination. Further, the plaintiff's evidence on many points is in harmony with the evidence of other collateral witnesses whose evidence I accept as credible and reliable. I find the plaintiff is a credible witness and his evidence is reliable.

IV. THE PLAINTIFF'S BACKGROUND AND ORIGINAL CONDITION

- [8] The plaintiff was born in Ho Chi Minh City, Vietnam, in 1973. At the age of six, he immigrated to Canada with his father and older brother. His mother and younger brother joined them several years later. The family settled in Prince George, BC and later moved to North Vancouver when the plaintiff was 15. After graduating from high school, the plaintiff obtained a marketing and sales diploma from Langara College. However, after graduating, he realized a career in marketing was not something he would enjoy. Instead, he enlisted as a reservist in the Canadian Armed Forces ("CAF"). The plaintiff testified he joined the military because he wanted to give back to the country that welcomed him as a refugee so many years earlier.
- [9] The plaintiff was physically active prior to the Accident. He played badminton and participated in track and field in high school. As an adult, he continued to enjoy many physical recreational activities. He went hiking about once a week in all seasons. He was a commuter cyclist, travelling from Burnaby to his workplace at the Jericho Division on the west side of Vancouver three to five times per week. One year he also participated in the ride to conquer cancer, which involved cycling from the Jericho Division to Whistler. The

plaintiff also enjoyed mountaineering and ice climbing in the summer months, typically every second week for the weekend, and was an avid trail runner averaging 10 km approximately three times per week.

- [10] As a reservist, the plaintiff undertook an hour of physical activity prior to each workday. This often involved lifting weights in the gym and cycling or trail running. For the plaintiff, engaging in physical activity was both a prerequisite for his employment as a reservist and an important means to deal with the stresses of life and work.
- [11] The plaintiff described his pre-Accident physical health as "great", noting the military sent him to physical competitions across the country as the representative of his unit. This was confirmed by numerous collateral witnesses, including Nathan Enge, who attended boot camp with the plaintiff in 1998 and later worked with him as a signals operator in the 744 Communications Regiment. Mr. Enge described the plaintiff as "the most fit and healthy of us all", with no functional limitations, and as a positive person with a playful personality. Mr. Enge and the plaintiff worked together until 2005, when Mr. Enge left the military to pursue civilian work. The two were also good friends, and engaged in all types of physical activities together prior to the Accident.
- [12] The plaintiff's excellent pre-Accident condition was also echoed by other collateral witnesses, including Master Corporal Douglas Summers and Alexa Von Fersen. Master Corporal Summers was a fellow member of the CAF and often accompanied the plaintiff on physical activities such as mountaineering and hiking. The plaintiff and Ms. Von Fersen are friends whose friendship began when they attended basic training together in 1998. They both enjoyed physical activities, and often went hiking and trail running together. They travelled together to Iceland in 2011, met up in Jordan in 2012 and walked the entire day, and competed in the "Tough Mudder" competition Whistler around 2012. According to Ms. Von Fersen, prior to the Accident the plaintiff was a positive person, not someone to be described as moody, and had no functional limitations.
- [13] The plaintiff is married with two small children. He currently lives in Port Moody in an attached house with a yard and garden. The plaintiff's wife, Rosalyn Choi, also testified at trial and her evidence supported the plaintiff's description of himself prior to the Accident. She described the plaintiff as an extremely physically fit person. Ms. Choi confirmed that prior to the Accident the couple enjoyed travelling and outdoor activities were a large part of their life. She described the plaintiff as hard-working, communicative, and fun to be with. Her evidence was the plaintiff appeared to enjoy his work, was not considering any career changes, was getting along with his coworkers, and appeared to be on a leadership track within the CAF.

- [14] Other than a fractured elbow, which had healed prior to the Accident, the plaintiff had no physical limitations and no chronic illnesses. He had no mood or cognitive problems and no trouble sleeping, although on cross-examination he acknowledged the combination of stress in preparing for his wedding and several work deadlines was causing him some sleep disturbances in the time period leading up to his wedding.
- [15] In March 2014, the plaintiff had a disturbing dream in which he was unable to help colleagues in a battle situation. He was referred to a counsellor and a psychiatrist, Dr. Colonel Tuka. Dr. Tuka diagnosed the plaintiff with PTSD. The plaintiff's work did not suffer before or after his PTSD diagnosis and he missed no time from work until the Accident. Although she was aware the plaintiff was diagnosed with PTSD prior to the Accident, Ms. Choi, who was trained as a nurse, did not observe the plaintiff having any sleep problems or displaying mood changes, nor did she observe him to have any physical or functional limitations prior to the Accident.
- [16] I find the plaintiff had no restrictions, injuries, chronic illnesses, or functional limitations prior to the Accident.

V. THE PLAINTIFFS POST ACCIDENT CONDITION

A. The Aftermath of the Accident

- [17] Immediately upon hitting the pavement, the plaintiff experienced back spasms and had to lie in a fetal position to avoid pain. A bystander called the ambulance, and the plaintiff was put in a C-spine brace, placed on a stretcher, and taken to Vancouver General Hospital ("VGH") in the ambulance. The ambulance ride was extremely painful because the plaintiff had to lie straight and could not curl up.
- [18] The plaintiff's wife attended at the hospital and observed the plaintiff to be in obvious pain. X-rays showed nothing was broken and the plaintiff was placed on pain medication and discharged. In the days that followed, Ms. Choi observed the plaintiff was constantly uncomfortable.
- [19] The plaintiff followed up with his military physician, Dr. Campbell, approximately four days after the Accident. At that time, the plaintiff was still experiencing back pain and had also developed leg pain the morning after the Accident. Dr. Campbell prescribed Tylenol with codeine and ordered that he take further days off work. Dr. Campbell saw the plaintiff again on May 20, 2014. The plaintiff was still having lower back pain and experiencing a lot of accompanying back spasms. At that time, Dr. Campbell referred him to physiotherapy, however, the plaintiff was unable to be seen by physiotherapist until May 30, 2014.
- [20] Thereafter, Dr. Campbell asked to see the plaintiff weekly. Sometime around May 27, 2014, he saw the plaintiff again and assessed his pain management. Dr. Campbell suggested the plaintiff try to work two hours per day but restricted that activity to clerical duties only and directed him to avoid any lifting and ensure he changed his position frequently.

- [21] However, over the month of June 2014, it became apparent that efforts to increase the plaintiff's hours resulted in increased pain and so the plaintiff was again directed to take time off work. Dr. Campbell saw the plaintiff at the end of June 2014, and observed that the plaintiff had not only not improved but that his physical condition and pain level had worsened.
- [22] Dr. Campbell began considering the need to place the plaintiff on a Temporary Medical Category ("TCAT"), rather than directing the plaintiff to take executive short periods of time off work. TCATs typically involve a period of six months' leave from work, and are then reviewed and potentially extended for a further six months. If there has been no improvement following a second TCAT, a member may be assigned a Permanent Medical Category ("PCAT").
- [23] In August 2014, Dr. Campbell concluded the plaintiff was limited in the type, duration, intensity, and frequency of physical activities he could perform and placed the plaintiff on his first TCAT.
- [24] At this time, Dr. Campbell also ordered an MRI of the plaintiff's spine for further investigation. According to Dr. Campbell, the MRI revealed "a tear in the annulus fibrosus at the level of L4/L5 along with a corresponding disc herniation".
- [25] In response, Dr. Campbell referred the plaintiff to the VGH Spine Clinic to obtain an opinion about whether surgical intervention was necessary. The plaintiff saw Dr. Bishop and then Dr. Nadeau at the Spine Clinic several times over the next year. It was recommended that the plaintiff continue physiotherapy and receive a cortisone injection in his back. The plaintiff received the injection in November 2014, which provided only temporary relief. Surgery was considered multiple times but not recommended.
- [26] The plaintiff underwent a series of MRIs thereafter to monitor his spine for any sinister changes.
- [27] After the expiry of the first TCAT, Dr. Campbell delayed the plaintiff's reassessment until the investigative MRIs were undertaken. However, in July 2015, the plaintiff was placed on a second TCAT.
- [28] In January 2016, the plaintiff was still making no further progress, and Dr. Campbell decided to recommend PCAT. Dr. Campbell's recommendation was forwarded to the Director of Medical Policy (the body responsible for oversight of CAF base physicians and the assignment of permanent disability status).
- [29] On November 8, 2016, on the advice of the Director of Medical Policy, the Director of Military Careers Administration (the "DMCA", which is the body responsible for administrative review of decisions to release CAF personnel) made their final decision recommending the plaintiff be released on the basis of failing to meet the "Universality of Service" requirement of the CAF.

B. Expert Evidence on the Plaintiff's Condition

- [30] Two physicians were qualified to give expert opinion evidence in the areas of physical and rehabilitative medicine. The plaintiff relied on Dr. Zeesham Waseem, a physiatrist, who examined the plaintiff on May 27, 2019. Dr. Waseem prepared two reports: a report dated May 29, 2019, which set out the results of his assessment of the plaintiff, as well as his diagnosis, prognosis, and opinion on the cause of the plaintiff's injuries (the "Waseem Initial Report"), and a rebuttal report (the "Waseem Rebuttal Report") which commented on the initial report prepared by the defendant's expert, Dr. Joseph Wong (the "Wong Initial Report"). Dr. Wong also prepared a subsequent report (the "Wong Response Report"), portions of which were objected to by the plaintiff. Following a voir dire, I ruled portions of the Wong Response Report inadmissible.
- [31] In the Wong Initial Report, Dr. Wong set out his findings that the plaintiff had slight tightness in the right neck at the C5-6 level, his right side rhomboid muscles were slightly stiff and tender, and he suffered from mild stiffness and moderate tenderness to the right side of his upper sacral spine and gluteal muscles. Like Dr. Waseem, in Dr. Wong's opinion, the plaintiff's symptoms were likely caused by the Accident. The main difference between Dr. Wong and Dr. Waseem's opinions is that Dr. Wong is of the view the plaintiff only suffered soft tissue injuries in the Accident, whereas Dr. Waseem is of the view the plaintiff suffered an annular tear.
- [32] Both Dr. Wong and Dr. Waseem agree the Accident caused the plaintiff to suffer lower back pain, which has continued, and right leg pain, which has resolved but has left the plaintiff with periodic numbness. Both doctors also agree the plaintiff's injuries and symptoms are permanent. However, the two physicians reach those conclusions based on two different diagnoses. Dr. Waseem diagnosed the plaintiff with "an annular tear of the lumbar spine": Waseem Initial Report at 12. Dr. Wong diagnosed the plaintiff with a mild myofascial injury to the right side of his upper back and the right side gluteal area: Wong Initial Report at 8. Those two diagnoses each carry a different level of risk the plaintiff's condition could worsen in the future.
- [33] I prefer the opinion of Dr. Waseem. Under cross-examination, Dr. Wong acknowledged he failed to consider a number of medical records and consultation reports which were provided to him, and which he conceded were important in forming a proper diagnosis. In addition, while Dr. Wong stated in his report that the plaintiff was not taking pain medication, he acknowledged two of the medications the plaintiff was taking were indicated for the treatment of pain. As well, there were inconsistencies between the pain diagram Dr. Wong prepared which formed part of his clinical file and his clinical notes with respect to which areas of the body the plaintiff was experiencing pain. Further, although Dr. Wong testified the plaintiff's 2016 MRI was the most reliable and therefore important, because a dye agent had been used as part of that test, there was no reference to that point in either of his reports. In addition, Dr. Wong's testimony contained internal inconsistencies. Finally, despite my advising Dr. Wong during his initial direct examination that he was to limit his

answers to providing the clarifications of his reports, he repeatedly attempted to expand on his evidence to further bolster and substantiate his opinion. This causes me concern that he viewed his role as an advocate for the defendant rather than as an independent expert whose primary duty was to the court. For all these reasons, I am concerned with the reliability of Dr. Wong's opinion. In contrast, I have no concerns with respect to the reliability of the Dr. Waseem's opinion. Therefore, I prefer Dr. Waseem's opinion with respect to the plaintiff's diagnosis.

- [34] Dr. Waseem is of the view that because the plaintiff's spine is compromised as a result of the annular tear, he is at risk of developing worsening back pain if the integrity of his L4-L5 disc erodes, thereby further weakening the spine in exerting more pressure on the exiting L5 nerve root. Under cross-examination, Dr. Waseem rejected the suggestion that this is a common risk associated with aging. In his opinion, the risk of degeneration of the plaintiff's spine is a function of his compromised spine, which was caused by the Accident. Dr. Waseem also testified that while the plaintiff's spine has been stable for four years, spinal degeneration can be linked to, and expedited by, physical activity. If the plaintiff were to increase his level of physical activity, the risk of degeneration would increase.

C. The Plaintiff's Post-Accident Condition

- [35] The plaintiff has had no real improvement in his back pain since the Accident, except some temporary relief following the nerve root injection in November 2014. In his words, back pain has become his "normal". The plaintiff could not recall the last time he woke up in the morning free of back pain. However, the plaintiff candidly acknowledged his leg pain improved after a period of time and has now fully resolved, although he experiences numbness if he sits for too long.
- [36] Physical exercise was a significant form of the stress relief for the plaintiff, and he lost this as a result of the Accident. The plaintiff gained weight after beginning his prescribed medications and his overall lifestyle has become very sedentary as a result of being unable to engage in his previous physical pursuits. He watches a lot of television and he and his wife go for occasional walks, although the plaintiff cannot go far because any incline causes him back pain.
- [37] After the Accident, there was also a change in the plaintiff's mood and personality. He was often downcast, and he became short-tempered and irritable at times. Mr. Enge testified that every time he saw the plaintiff after the Accident, "it was as if the light in him was diminishing". The plaintiff became concerned that he would not be able to meet the physical requirements of the CAF, which became like a "looming cloud" over him. While before the Accident the plaintiff had taken care in his physical appearance, after the Accident he appeared unkempt and melancholy. After the Accident, the plaintiff no longer felt the same sense of purpose in his life. These mood changes have not resolved.

- [38] As a result of the plaintiff's physical limitations following the Accident, the plaintiff has difficulty performing housekeeping duties he used to perform because the twisting causes back pain after extended periods. The plaintiff can sweep the floor, do light vacuuming, and do some work clearing garden beds. However, if he reaches out with tools such as gardening shears, he experiences pain in his back, and he is not able to vacuum for any extended period of time. Instead, all of those responsibilities fall on Ms. Choi. Since the Accident, Ms. Choi has largely become a caregiver to the plaintiff. These efforts, as well as caring for the couple's two young children, have placed an increased burden on her. Ms. Choi also testified, and I accept, the couple's intimate relationship has suffered. The couple have been seeing a marriage counsellor for the last year, in part to deal with the plaintiff's grief resulting from his release from the CAF and the need to adjust to significant changes in the couple's life, including a career change for the plaintiff and his permanent physical limitations.
- [39] The plaintiff has continued physiotherapy treatment since the Accident. The frequency has been reduced from once per week to every second week. In addition to the physiotherapy, the plaintiff was directed by Dr. Campbell to undertake massage therapy. He began massage therapy in 2016, and has continued to pursue this course of treatment to the date of trial. He now undertakes massage therapy once every two weeks, alternating with the physiotherapy. The plaintiff underwent acupuncture for short period in 2017, on the recommendation of Dr. Johnson, another military physician based at the Jericho Garrison. The acupuncture treatment was discontinued because it did not provide significant relief and was therefore not seen as beneficial.
- [40] The plaintiff is now doing kinesiology, which he began in the fall of 2018 on the recommendation of his occupational therapist. In addition, the plaintiff is in the process of getting authorization from Veterans Affairs to receive chiropractic treatment, again based on a recommendation by his occupational therapist. No other treatments have been prescribed or recommended to the plaintiff.
- [41] The plaintiff sees Dr. Campbell once a month to see how his medication is doing and to update Dr. Campbell on pain. The plaintiff is currently taking 60 mg of Cymbalta and 600 mg Gabapentin daily.
- [42] The plaintiff began regularly seeing Dr. Tuka after the Accident because psychotherapy was recommended as a way to relieve PTSD symptoms since he could no longer alleviate them with physical activity. Similarly, the plaintiff sees Dr. Nancy Probert for cognitive behavioural therapy.

- [43] The plaintiff testified he would be willing to pursue all of the recommendations set out in the report of Ralph Cheesman, a registered occupational therapist, which included three months' active rehabilitation, six to eight sessions per year of physical therapy, 12 massage therapy sessions per year, continuing with psychiatric counselling, undergoing an ergonomic assessment if he pursued desk-oriented employment in the future, obtaining assistance with heavy home maintenance, and accessing a community fitness facility.

VI. THE PLAINTIFF'S PRE-ACCIDENT EMPLOYMENT

- [44] In 1998, at the age of 25, the plaintiff joined the CAF in the 744 Communications Regiment (the "744") of the Army Reserve at the rank of a private. The plaintiff was part of the Signal Regiment based out of the Jericho Garrison, and later, the 39 Canadian Brigade headquarters located adjacent to the Burrard Street Bridge. The plaintiff entered the CAF as a "signaller" and his duties involved manning the detachment, setting up communications, and doing radio watch.
- [45] The plaintiff was thought of as very observant, stoic, and authoritative. He was described as someone with gravitas, and someone people listened to when he spoke. Early in his military career, the plaintiff distinguished himself through his leadership qualities. He was made "corps senior" and led his platoon of 30 during boot camp. The designation was a recognition of his leadership skills and potential even at that early stage in his career.
- [46] Ms. Von Fersen similarly described the plaintiff as stoic, balanced, very well grounded, compassionate, and wise beyond his years. She viewed the plaintiff as someone you would want beside you when things were not going well because of his ability to remain calm and think things through strategically. She testified the plaintiff loved the military, there was a spark when he spoke about it, and it was a common understanding between them that membership in the military was part of their identity.
- [47] Mr. Nathan Enge, who attended boot camp with the plaintiff in 1998 and later worked with him as a signals operator in the 744, also observed the plaintiff upon his return from all his overseas deployments, and observed no adverse changes in his mood or personality. In fact, Mr. Enge's evidence was when the plaintiff returned from his first overseas deployment, it appeared to have solidified his intention to pursue a career in the military in order to help others. He became more focused on his professional development within the CAF, and even more dedicated to the service and his career.
- [48] These observations of the plaintiff's pre-Accident character and skills within the military were echoed by Captain Donald Willis. Capt. Willis met the plaintiff in 1998 when the plaintiff was a private and Capt. Willis was the sergeant of the 744. Capt. Willis was the plaintiff's supervisor at the 744 for approximately eight years and over the course of that, performed seven or eight formal evaluations of the plaintiff's performance. In 1999 Capt. Willis was deployed to Whitehorse to participate in the Y2K deployment and was assigned the plaintiff and three other privates for that tour. Capt. Willis was very impressed by the

plaintiff, who he described as always exceeding his expectations when assigned to any task. The plaintiff's work during that tour was on time, of good quality, and the product of his strong work ethic. His performance evaluations were positive and described him as "an excellent candidate for immediate promotion", who had "mastered" (the highest score possible) problem solving, working with others, leading change, and teambuilding, as well as accountability, reliability, and the ethics and values of the CAF. Performance evaluations involved a collaborative ranking of the best overall members by all officers involved. The plaintiff always ranked in the top third, and was well respected by his peers and his supervisors. The plaintiff was very dedicated to his job.

- [49] On each occasion when the plaintiff returned from overseas deployments, Capt. Willis observed that his performance continued to be good and testified there had never been a drop in his performance. The plaintiff enjoyed going to work and would joke he was a "lifer".
- [50] Throughout the tenure during which Capt. Willis was the plaintiff's supervisor, the plaintiff continued to exceed the military's expectations. The plaintiff was steadily promoted in rank from private, to corporal, to master corporal, to sergeant, and finally warrant officer, each with a corresponding increase in salary. The plaintiff's duties throughout his employment with the CAF involved physical work and administration.
- [51] Deployment for a reservist is voluntary. The plaintiff volunteered for two domestic deployments, including one that involved managing a team of approximately 12 people, and four international deployments. The plaintiff was deployed to Syria in 2002, after he successfully completed deployment training and mental health screening. He remained in Syria for seven months and underwent a mental health screening process upon his return which noted no problems. In the spring of 2003, the plaintiff was deployed to Bosnia, where he managed radio communications there for three months. In 2006, the plaintiff was deployed to Afghanistan after undertaking six months' training in austere conditions. The plaintiff was deployed again to Afghanistan in 2011 after doing the same six months' of training.
- [52] At the end of all four of his international deployments, the plaintiff returned to work without incident or missed days and with no problems noted. The plaintiff had no mental health problems prior to his PTSD diagnosis in 2014. He planned to do a further deployment in 2015, however, he was ineligible for further deployments because he was injured in the Accident
- [53] Selection for leadership training in the CAF is based on meritorious work history and an assessment that a member has the potential to increase in rank. The plaintiff was sent to leadership courses in 2001, 2008, and 2009. The plaintiff credits his drive to learn and improve as the basis for his ongoing efforts to move forward in the military.

[54] When the plaintiff joined the reserves in 1998, he began contributing to the Reserve Force Pension Plan and did so until 2007. At that point, owing to a policy change within the CAF, full-time reservists were able to convert their pensions to a full pension plan. The plaintiff qualified and bought back his pension, which was only calculated in 2014.

[55] In addition to his pension, as a reservist, the plaintiff was entitled to extended health benefits for himself and his family.

[56] From 2009 through to 2014, the plaintiff's annual income fluctuated based on the nature of the contract he held each year.

VII. THE PLAINTIFF'S POST-ACCIDENT EMPLOYMENT

[57] The DMCA released the plaintiff from the CAF on military grounds effective August 9, 2018.

[58] As a result of his early medical release, the plaintiff was not entitled to a full pension, but did obtain partial pension benefits. At the time of his release, the plaintiff had 18 years and 47 days of pensionable service. Since January 2019, the plaintiff has received \$1,469.32 per month in pension benefits. In addition, in August 2019 he began receiving \$513.94 per month as a "bridge benefit". The bridge benefit will continue until the plaintiff turns 65. The pension benefit is payable for life.

[59] In preparation for his release, the CAF works with members to transition them. It assists members in registering for the provincial medical services plan, assists with securing a non-military physician, and provides career transition assistance. Based on research the plaintiff undertook, he sought an opportunity to increase his education to be able to pursue work as an electrician. He made this choice on the basis that it was work that was not overly physically demanding and would not adversely impact his physical condition. To date, the plaintiff has completed his first year in the electrician course. He was waitlisted to begin his second year in October 2019, but did not get called and so will be beginning his second year in January 2020. He is currently working as an apprentice with Mott Electric as part of the slab crew. There are five different types of crews at Mott Electric, which increase in physical demands associated with the work. The plaintiff has been on the slab crew for eight months, which is the second least physically demanding crew. He expects to finish his apprenticeship in one half to three years [vs: not sure what means by one half to three years].

[60] At Mott Electric, he is currently earning \$1,500 per paycheck [net], with an hourly rate of \$21.

[61] In addition, the plaintiff receives a top-up employment benefit through the military. For the first two years following his medical release, if the plaintiff's income is lower than his previous income as a reservist, his pay is topped up to 90% of his former income. Manulife provides 75% of that top up and Veterans Affairs provides the other 15%. Those benefits are partially due to payments the plaintiff made. He got his first top up benefit in October 2018. He still contributes to Manulife.

VIII. CAUSATION

[62] As earlier noted, the defendant concedes the Accident caused the plaintiff physical injury to his back and right leg. However, the defendant's position is the Accident did not aggravate the plaintiff's pre-existing PTSD or cause the plaintiff's medical release from the military.

A. Did the Accident Aggravate the Plaintiff's PTSD?

[63] Although the fact the plaintiff was diagnosed with PTSD was agreed to by the parties, there was no expert opinion evidence led with respect to the veracity of that diagnosis, its content, or the impact it may have had on either the plaintiff's condition after the Accident or his medical release from the CAF. I note Master Cpl. Summers testified that he and his entire unit were flagged for PTSD upon their return from Afghanistan in 2006, and he was diagnosed with PTSD. However, despite that diagnosis, Master Cpl. Summers continues as an active member of the CAF, as had the plaintiff.

[64] While Dr. Tuka (the plaintiff's psychiatrist) and Dr. Prober (the plaintiff's psychologist) both testified, they were called as fact witnesses and not as medical experts. Their evidence was limited to what they observed the plaintiff do and say. Before the Accident, Dr. Tuka observed the plaintiff's mental status was generally good and the plaintiff reported he was able to multitask, his energy level was okay, and he did not have any significant anxiety. Dr. Tuka testified the first time the plaintiff indicated he was having trouble coping with his job was after the Accident and the plaintiff attributed it to his back pain. Although Dr. Prober began seeing the plaintiff before the Accident, the only notation of the plaintiff missing any work post-dated the Accident. She also testified that the plaintiff's inability to deal with stress through physical activity as a result of his physical injuries and rehabilitation remained the theme throughout the plaintiff's treatment.

[65] There was no expert medical opinion evidence led by the defendant that supports a conclusion that absent the Accident, the plaintiff's PTSD probably would have aggravated. Similarly, there was no expert medical opinion evidence led by the plaintiff that the Accident aggravated the plaintiff's PTSD. In short, there was no evidence of any kind about what PTSD is, how it manifested in the plaintiff before the Accident, or what role, if any, it played in the plaintiff's career trajectory after the Accident. Accordingly, I am unable to draw any conclusions with respect to those issues.

[66] The plaintiff bears the onus of proof on the issue of whether the Accident caused him damage by aggravating his PTSD. In the absence of any medical expert opinion evidence on that point, he has not met this burden.

B. Did the Accident Cause the Plaintiff's Medical Release From the Military?

[67] As noted, deployment for reservists is voluntary. However, fitness for deployment is a mandatory condition of initial and continued employment for all members of the CAF: CAF Policy DAOD 5023-1, Minimum Operational Standards Related to Universality of Service (the "Universality of Service" principle). The Universality of Service principle requires each

member to have a specified level of physical fitness and be able to serve as a soldier first, regardless of their trade. Universality of Service requires each member to be physically able to be deployed overseas.

- [68] A medical condition that renders a member unable to deploy is a "career ender". Once a member is placed on medical restriction, their career progression stops. They cannot take courses aimed at advancement. Accordingly, because the plaintiff remained on medical restriction, his opportunities for career advancement within the CAF terminated when he was injured in the Accident.
- [69] In 2016, the plaintiff "got word" he would be released from the CAF because he no longer met the Universality of Service requirement. The plaintiff sought permission to be retained but while an extension was granted, it was only for two years. The plaintiff was released on August 9, 2018 on the basis that he no longer met the Universality of Service requirement for continued employment in the military because he was unfit for the five generic tasks required of all CAF members. I find the Accident caused the plaintiff's medical condition, and his medical condition rendered him unable to satisfy the Universality of Service requirement which was the cause of his medical release from the CAF. I find the Accident caused the plaintiff's medical release from the military.

IX. DAMAGES

[70] The Plaintiff seeks to recover under the following heads of damages:

- a. loss of housekeeping capacity;
- b. non-pecuniary damages;
- c. past and future loss of earning capacity;
- d. costs of future care; and
- e. special damages.

A. Loss of Housekeeping Capacity

- [71] It is well established that domestic services, including childcare, have a monetary value and a plaintiff may claim for loss of housekeeping and related capacity, even where the services are provided gratuitously by family members: *Liu v. Bains*, 2016 BCCA 374 at para. 25; *Campbell v Banman*, 2009 BCCA 484. Relying on *Sekihara v. Gill*, 2013 BCSC 1387, the plaintiff seeks to recover damages for loss of housekeeping and related capacity in the amount of \$40,000.
- [72] However, as noted by Justice Milman in *Wolford v. Shlakoff*, 2017 BCSC 2043:

- [184] The claim for compensation under this head of damage must be scrutinized carefully. A relatively minor adjustment of duties within a household will not justify a discrete award under this head of damages. The court should ask whether the services went above and beyond the ordinary give and take to be expected in a home and were required by the plaintiff's injuries or would have been performed in any event: *Tabet v. Hatzis*, 2013 BCSC 1167 at para. 79.
- [73] Subsequent to *Wolford*, the Court of Appeal released its decision in *Riley v. Ritsco*, 2018 BCCA 366. Justice Groberman, writing for the Court, held:
- [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 v. Jansen* (1995), 123 D.L.R. (4th) 652 (B.C.C.A.) 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 defendant submits the appropriate approach is to factor this aspect of the plaintiff's loss into the assessment of the plaintiff's non-pecuniary award. This approach was taken by Justice Joyce in *Eaton v. Regan*, 2005 BCSC 3 at para. 46, and *Bains v. Park*, 2014 BCSC 1818 at para. 57. I am convinced it is the appropriate approach in this case. The evidence does not establish the plaintiff is or probably will be unable to do housekeeping and regular gardening work, but rather that he suffers some pain when doing certain types of housekeeping and yard-related tasks. Occupational therapist Mr. Cheesman's evidence is the plaintiff's functional capacity is only limited with respect to rigorous yardwork. Further, there was no evidence the plaintiff is unable to care for his children, or that the care Ms. Choi provides to them goes above and beyond the ordinary give and take typically expected in a home, for example when people have demanding careers, as the plaintiff seems to have had prior to the Accident. Therefore, I do not make any additional or separate award for loss of housekeeping capacity, including loss of ability to provide childcare. However, I will revisit Mr. Cheesman's evidence on this point when I address the plaintiff's claim for damages associated with his future care costs.

B. Non-Pecuniary Damages

[75] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Trites v. Penner*, 2010 BCSC 882 at para. 188. The compensation awarded should be fair and reasonable to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 261. While fairness is measured against awards made in comparable cases, each case depends on its unique set of facts: *Trites* at para. 189.

[76] Non-pecuniary damages are to be assessed in accordance with the non-exhaustive list of factors articulated in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

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

[77] In addition, the plaintiff suggests I should also to take into account his loss of membership in the CAF and his loss of identity associated with that life change. I find it is appropriate for me to do so. In *Dabu v. Schwab*, 2016 BCSC 613 at para. 23, Justice Steeves observed that the ability to work may impact a person's enjoyment of life, and therefore is relevant to consideration of nonpecuniary damages. Justice Steeves made reference to the dissenting opinion of Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 368:

Work is one of the most fundamental aspects in a person's life. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

[78] The evidence establishes the plaintiff's military career was an essential part of his sense of identity, feeling of self-worth, and emotional happiness, and the loss of his membership in the CAF has caused him significant grief and sorrow. His career in the CAF was not only a source of professional satisfaction for the plaintiff, it was also his family and community. His medical release from the military ended that connection and left him feeling like "just another civilian".

- [79] The plaintiff submits the appropriate award for non-pecuniary damages is \$170,000. The plaintiff relies on the following cases: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 (\$180,000 awarded for non-pecuniary damages); *Sebaa v. Ricci*, 2015 BCSC 1492 (\$180,000); *Ali v. Padam*, 2017 BCSC 1849 (\$180,000).
- [80] The defendant submits appropriate award for non-pecuniary damages is \$100,000. This award would compensate the plaintiff for his pain and suffering, including the back pain associated with certain housework, yardwork, or exerting himself physically when playing with his children. The defendant relies on the following cases: *Beagle v. Cornelson*, 2012 BCSC 1934 (\$90,000, or \$100,000 adjusted for inflation); *Klein v. Sangha*, 2016 BCSC 1864 (\$90,000); *Sahota v. Choongh*, 2014 BCSC 2415 (\$70,000); *Rutter v. Allen*, 2012 BCSC 135 (\$65,000, or \$72,500 adjusted for inflation).
- [81] *Pololos* is the case most similar to the facts of this case. The plaintiff in the case before me was 40 years old at the time of the Accident and in the prime years of his life. He worked hard and his career was on an upward trajectory. He had found his life partner and was on the threshold of beginning a family. The Accident occurred shortly before his wedding, a day that is typically one of the most important days in a person's life. The plaintiff's back pain necessitated him to be on pain medication at his wedding, which prevented him from fully and freely enjoying that life event. Further, the Accident occurred shortly before his first child was born. During this busy time in his life, his injuries required him to be away from his family in order to fully engage in his efforts to remediate his pain and suffering.
- [82] The plaintiff's pain was excruciating in the immediate aftermath of the Accident. While his ongoing back pain is bearable, it is constant and permanent. The plaintiff has lost the ability to engage in physical activity, which was both a recreational pursuit that gave him immense joy and his means of coping with stress, loss, and negative emotions. Taking into account the *Stapley* factors and my finding that the plaintiff's back injury caused his medical release from the military and caused him to suffer significant loss of purpose, self-identity, and fulfilment, I find an appropriate award for non-pecuniary damages is \$170,000.

C. Past and Future Loss of Earning Capacity

1. Assessing Past and Future Loss of Earning Capacity

- [83] An assessment of both past and future loss of earning capacity involves consideration of hypothetical events. The hypothetical will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati* at para. 27; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.

[84] Once a real and substantial possibility of loss is shown, the plaintiff may prove the valuation of that loss of earning capacity, either on an earnings approach, whereby the court compares what the plaintiff probably would have earned but for the injury with what they will probably earn in the injured condition, or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Under either approach to damages, the court makes an assessment as opposed to a mechanical calculation: *Grewal* at para. 54.

[85] Further, since the assessment exercise involves predictions based on hypothetical events, allowance must be made for general and specific contingencies, both positive and negative: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at paras. 92 and 93.

[86] The court must be satisfied of the overall fairness and reasonableness of the award: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

2. The Plaintiff's Claim for Past and Future Loss of Earning Capacity

[87] The plaintiff's past and future loss of earning capacity claim is based on the hypothetical that, but for the Accident, he would have been promoted to master warrant officer in 2015, and then commissioned to the rank of captain in 2016 and thereafter to major by 2022.

[88] CAF members can apply for positions one rank above or below their current rank. In order to commission to the rank of captain, the plaintiff would have needed to achieve the rank of master warrant officer and then be recommended to be commissioned to the rank of captain. A master warrant officer position must be available before a member can be promoted to that rank. There is a program of education available to prepare members for that position, but its completion is not a prerequisite for assuming the position and people can be promoted "acting lacking" if the course is not readily available.

[89] It is not unusual for a truly deserving member of the CAF who has been identified early in their career as having leadership potential and encourage through various promotions and training to pursue a "leadership track", to commission from ranks.

[90] Success in achieving the rank of master warrant officer depends on a member's previous meritorious performance and the recommendation of their supervisor, which in the plaintiff's case was Capt. Willis. Capt. Willis testified, and I accept, the plaintiff's career trajectory prior to the Accident mirrored his own. Capt. Willis was commissioned through the ranks to captain. Capt. Willis testified that at the time of the Accident, his plan was to recommend the plaintiff to be his replacement, just as his predecessor, Capt. Buller, had done for him. Capt. Willis had applied for a new position and was simply awaiting confirmation. He had told the plaintiff of his intention to make that recommendation.

- [91] The plan was for the plaintiff, as warrant officer, to be made acting G6 (which is the chief communications officer and a captain's position). The G6 position would then be advertised-- first locally for three months and then nationally for three months. If there were no qualified candidates, meaning no one with the necessary skills already at the rank of captain, the plaintiff would be promoted to master warrant officer and then commission to the ranks of captain. According to Capt. Willis, the process would take a total of 18 months.
- [92] Because of the specialized nature of the 744 Communications Branch, it is difficult to find replacements for people at the captain level when personnel transition out. This increases the chances a reservist will be commissioned through the ranks to take over the G6 position. In fact, that is exactly how Capt. Willis received the G6 position. After the CAF was unsuccessful in finding a qualified candidate, Capt. Willis was commissioned to the rank of captain and offered the position permanently after serving in an acting capacity for a time.
- [93] Both Capt. Lum and Capt. Willis commissioned to the rank of captain from master warrant officer. Both Capt. Lum and Capt. Willis, like the plaintiff, worked in the communications unit. In addition to Capt. Lum and Capt. Willis, Capt. Willis testified his predecessor, Capt. Buller, also commissioned to the rank of captain. I am satisfied based on the totality of evidence that, but for the Accident, it was a real and substantial possibility the plaintiff would have been promoted to master warrant officer and commissioned to the rank of captain as Capt. Willis, Capt. Buller, and Capt. Lum had done before him. The plaintiff was by all accounts excellent member of the CAF who was identified as having leadership potential. He was dedicated to a future career in the military, a hard worker, well respected by his peers and supervisors, and employed in a unit within which commissioning to the ranks of captain had occurred numerous times.
- [94] However, Capt. Willis only received confirmation he would be leaving his G6 position in June 2014, by which time the plaintiff was on medical restriction. According to Capt. Willis, that change in the plaintiff's medical status was a "game changer", and he was unable to recommend the plaintiff be commissioned to the rank of captain to replace him, as he had planned to do.
- [95] When Capt. Willis moved to the recruitment centre in 2014, his position was filled by an infantry officer because there were no qualified signal officers available. Capt. Willis testified this was not optimal because an infantry officer does not have the specialized knowledge for the position and must rely on those below him for that expertise. I find it is a real and substantial possibility that, but for the Accident, the plaintiff would have continued in the military until age 60, achieved the rank of master warrant officer by October of 2015, and the rank of captain by October of 2017.
- [96] The plaintiff also argued he would have been further promoted to the rank of major as early as 2022, based on positions that were available, a timeline that matched up with his progression in the military, and the aging out and retirement of those of higher ranks. However, no evidence was called with respect to the process associated with promotion to

the rank of major or whether that further promotion would have been a real and substantial possibility for the plaintiff. I am not satisfied there was a real and substantial possibility that, but for the Accident, the plaintiff would have been further promoted from captain to the rank of major. I agree with the defendant there is insufficient evidence regarding the specific career path that could have led the plaintiff to the promotion of major. While it was a possibility, based on the evidence I am not satisfied that it moves beyond the realm of speculation.

3. Quantifying the Plaintiff's Claim for Loss of Future Earning Capacity

[97] Mandatory retirement in the CAF is age 60. Thereafter, the plaintiff's plan was to receive his pension and do contract work and consulting for the military, particularly in the area of communications. It is a fairly common practice for higher rank officers to become consultants or contractors after their retirement, based on their knowledge and expertise. The plaintiff planned to use the contacts and experience he had accumulated during his time in the CAF to undertake consulting and contract work.

[98] Two witnesses provided expert opinion evidence on the quantification of the plaintiff's loss of earning capacity claim: Robert Carson (the plaintiff's expert) and Mark Szekely (the defendant's expert). Both Mr. Carson and Mr. Szekely included amounts attributed to past and future wage loss and future pension loss in their opinions. Both experts used the earnings approach to quantify the plaintiff's loss.

[99] Both Mr. Carson and Mr. Szekely relied on information published by the CAF to determine the salary scales and pay increments used to assess the plaintiff's loss of past and future income associated with his medical release from the military[1]. They both also used census data, including income of electricians and life expectancy of men in BC.

[100] In assessing the plaintiff's without-accident wage loss, Mr. Carson assumed the plaintiff would remain in the military until mandatory retirement at age 60, and then the plaintiff's work from ages 60-70 would follow that of other men in BC with similar education to the plaintiff.

[101] Mr. Carson was not comfortable applying a general labour market analysis to the plaintiff's CAF employment. He did not apply any specific negative contingencies attributable to the plaintiff's employment in the CAF because he believed the complexity of such an analysis, which would involve extensive research and not have the benefit of accumulated census data, was disproportionate to the size of the claim and potentially unreliable. Instead, Mr. Carson assumed the specific negative contingencies were balanced out by specific positive contingencies, such as the extensive retraining programs and other benefits available to CAF members.

[102] Mr. Carson did apply the negative contingencies applicable in a general labour market analysis to the plaintiff's income as an electrician. This effectively equated to the plaintiff's full retirement at age 65.

[103] The defendant's economist, Mr. Szekely, took a different approach. Mr. Szekely assumed the plaintiff would have remained in the military until age 60. He applied a 5% negative contingency to account for the difference between the regular labour market contingencies and enhanced risks he associated with employment in the military, however, he acknowledged the 5% factor was not based on any particular information or data. He also assumed that, absent the Accident, the plaintiff would not have worked past the age of 60 and so assumed no income past 60. He based that assumption on a further assumption that the positive contingency the plaintiff would work past the age of 60 would be set off by negative contingencies. Mr. Szekely testified that if the assumption the plaintiff would fully retire at 60 was removed from his analysis and substituted with the assumption the plaintiff would work until the average age of retirement, his wage loss estimate and Mr. Carson's wage loss estimate would be close.

[104] I find the assumptions made by Mr. Carson were more reasonable and, with the exception noted below, I prefer his opinion to Mr. Szekely's on the issue of the plaintiff's wage loss. I find it is a real and substantial possibility that but for the Accident the plaintiff would have continued in the CAF until age 60, and thereafter continued on in the CAF as a contractor until the age of 70.

a) Past Loss of Earning Capacity

[105] If the plaintiff had followed the career trajectory in the CAF I have found was a real and substantial possibility, he would have earned \$342,117 up to the time of trial. The plaintiff's actual income during the period between the Accident and the date of trial was \$326,070, resulting in a gross past loss of earning capacity of \$16,047.

[106] Section 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, limits damages for past income loss to net (i.e., after tax) income. Both the plaintiff and the defendant say the plaintiff's past loss of earning capacity award should be discounted by 20% to account for tax: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106. Tax rates and rules vary widely and frequently. I agree a "rough-and-ready approach to income tax deduction" to estimate the net past wage loss is appropriate: *Martin v. First Truck Centre Vancouver Inc.*, 2020 BCSC 240 at para. 173; *Moini v. Liang*, 2016 BCSC 702 at para. 85. I also agree a discount of 20% is appropriate.

[107] I assess the plaintiff's net past loss of earning capacity to be \$12,800.

b) Future Loss of Earning Capacity

[108] If the plaintiff had followed the career trajectory in the CAF I have found was a real and substantial possibility, the present value of his future loss is \$1,127,385 (for work up to age 60) and \$204,376 (for work between age 60-70), for a total \$1,331,761. I also find it is a real and substantial possibility that because of the Accident, the plaintiff will work as an electrician and earn the income set out in Mr. Carson's report, having a present value of \$965,723. However, I agree the risk of disability set out in Mr. Cheesman and Dr. Waseems's

reports is a real and substantial possibility and that the plaintiff's future income as an electrician should be discounted by 25% to account for that contingency.

[109] With respect to the plaintiff's pension loss, Mr. Szekely's opinion was based on the actual amount of pensionable service of the plaintiff (33.24 years) rather than 35 years as assumed by Mr. Carson. I prefer Mr. Szekely's approach to the pension assessment, given there was no evidence with respect to the applicable rules governing the plaintiff's ability to buy back any additional period of pensionable service. The present value of \$54,897 (rounded to \$55,000) more accurately reflects the plaintiff's future earning capacity loss attributable to his pension.

[110] In addition, the plaintiff lost other benefits associated with his military service (beyond his pension benefits). Based on Mr. Carson's evidence, I find those other benefits would add about 10% to the value his future wages, but only on his income to age 60. Thereafter his work for the CAF would have been as a contractor and there was no evidence such benefits are available to contractors. I find the plaintiff's loss for non-pension benefits to be \$113,000.

[111] In summary, I assess the plaintiff's loss of future earning capacity at \$774,461 (assessed based on \$1,331,761, plus \$54,000 for lost pension benefits and \$113,000 for foregone non-pension benefits, less future with accident earnings of \$724,300).

4. Are the Plaintiff's Collateral Pension Benefits Deductible From the Award?

[112] The defendant argues the pension benefits the plaintiff began to receive after his medical release from the military should be deducted from his tort award, relying on *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 973.

[113] The plaintiff acknowledges the pension monies he received are collateral benefits: *M.B. v. British Columbia*, 2002 BCCA 142 at para. 16, rev'd on other grounds 2003 SCC 53. However, the plaintiff argues his pension benefits are non-deductible benefits: *Guy v. Trizec Equities Ltd. et al.*, [1979] 2 S.C.R. 756; *IBM Canada Limited v. Waterman*, 2013 SCC 70.

[114] I agree with the plaintiff. Whether directly or indirectly, the plaintiff paid for his pension benefits and I find they are not deductible from his tort award.

D. Cost of Future Care

[115] In *Andrews* at 241-242, Dickson C.J. described the purpose of an award for cost of future care:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum* is not possible. Money is a barren substitute for health and personal happiness, but to the extent within reason that money can be

used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

- [116] In *Warick v. Diwell*, 2017 BCSC 68, aff'd 2018 BCCA 53, Justice Schultes set out the legal principles that determine an award for the cost of future care:
- [202] With respect to the standard of proof to be met, "[a] plaintiff who seeks compensation for future pecuniary loss need not prove on a balance of probabilities that she will require future care because of the wrong done to her. If the plaintiff establishes a real and substantial risk of future pecuniary loss, she is entitled to compensation...": *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).
- [203] Claims made for future care must be both medically justified and reasonable. An award "should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at paras. 199 and 201; aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.).
- [204] This requirement of medical justification, as opposed to medical necessity "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact": *Harrington v. Sangha*, 2011 BCSC 1035, at para. 151.
- [205] The question has often been framed as being whether a reasonably-minded person of ample means would be ready to incur a particular expense: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at p. 245.
- [206] The evidence with respect to the specific care required does not need to be provided by a medical doctor: *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63, (S.C.) at para. 182. However, there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
- [207] Damages for the cost of future care are assessed, not mathematically calculated: *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28-31. There is an inherent degree of uncertainty and discretion in making such awards. Because awards are made "once and for all" at the time of trial, judges must "peer into the future" and fix the damages "as best they can". This includes allowing contingencies for the possibility that the future may differ from what the evidence at trial indicates: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at para. 21.
- [208] While no award should be made in relation to an expense that the plaintiff will not actually incur (*Izony v. Weidlich*, 2006 BCSC 1315 at para. 74), the focus of inquiry when a justified item or service was previously unused, is whether it is "likely to be incurred on a going forward basis": *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 251.

[209] A plaintiff is not entitled to an award for that portion of their costs of future care that will be publicly funded. However, the risk that access to public funds may be lost in future is a proper basis to provide a contingency in the award: *Boren v. Vancouver Resource Society for the Physically Disabled*, 2003 BCCA 388 at para. 25.)

[Footnote omitted.]

[117] The plaintiff called Ralph Cheesman, a registered occupational therapist licensed to practice in BC, who was qualified as an expert to give opinion evidence on the plaintiff's functional capacity and cost of future care.

[118] Mr. Cheesman assessed the plaintiff's functional abilities and limitations related to injuries he sustained in the Accident. The assessment took place on June 25, 2019 over the course of approximately eight hours.

[119] In addition to his observations and the results of the various tests of the plaintiff conducted as part of the assessment, Mr. Cheesman also relied on the plaintiff's medical records, including the Waseem Initial Report.

[120] As a result of the objective and subjective findings of his assessment, and based on the medical information he considered, Mr. Cheesman opined the plaintiff is partially disabled from engaging in "prolonged exposures to strenuous or laborious functional activity requiring task intensive positioning or quick torsional spinal mobility", but he would be able to work full-time performing the tasks associated with being a journeyman electrician in his current physical condition.

[121] However, Mr. Cheesman noted the plaintiff's ability to continue as a journeyman electrician through to retirement could be jeopardized if he were to experience an escalation in his chronic spinal pain as a result of a further degeneration of his L4/5 disc impairment. While Mr. Cheesman was of the view that the plaintiff was able to do most housekeeping and outdoor gardening tasks, he would probably require assistance for rigorous yard work. Since it was unknown whether the plaintiff would have undertaken those types of strenuous yard maintenance activities himself in the absence of the Accident, Mr. Cheesman suggested \$300 per year be budgeted to address that contingency.

[122] Based on the evidence of Dr. Waseem, Mr. Cheesman, and the plaintiff, I am satisfied the evidence establishes there is a real and substantial risk the plaintiff will incur the following future care costs, as set out in the plaintiff's written submissions:

- (a) 12 weekly physical therapy sessions for review and exercise progression purposes \$948.00 (\$79.00 per visit);
- (b) 24 kinesiology sessions implemented at the community fitness centre - \$3,048 (\$127.00 per visit includes the session fee of \$78.00 a travel fee of \$39.00 and a fitness centre fee of \$10.00);

- (c) Annual physical therapy sessions ranging in cost from \$474.00 to \$632.00;
- (d) Annual massage therapy sessions at a cost of \$960.00 (\$80.00 per session);
- (e) Annual psychological counselling sessions at a cost of \$780.00 (\$195.00 per session);
- (f) Ergonomic services from an Occupational Therapist at a cost of \$500.00;
- (g) Annual access to a community fitness facility at a cost of \$410.00 annually until age 65 and thereafter at a decreased cost of \$308.15;
- (h) Intermittent contract services to replace his ability to perform future rigorous home maintenance/repair activities;
- (i) Gabapentin (600 mg 3 doses per day) - per dose cost is \$0.21, with an annual cost of \$269.95; and
- (j) Cymbalta (60 mg single dose per day) - per dose cost is \$1.11, with an annual cost of \$445.15.

[123] The plaintiff's economist, Mr. Carson, who was also qualified to give expert opinion evidence on the costs of future care, estimated the current value of the costs of the plaintiff's future care, as recommended by Mr. Cheesman over the course of the plaintiff's remaining estimated life expectancy, to be \$95,922. I find the assumptions of fact relied on by Mr. Carson in reaching his opinion are reasonable. I assess the plaintiff's damages for the costs of his future care at \$95,922.

E. Special Damages

[124] The parties agree on special damages payable in the amount of \$7,443 for costs incurred by the plaintiff for massage therapy and in the amount of \$2,916 for mileage costs incurred by the plaintiff travelling to various medical treatments, for a total of \$10,359. However, the defendant disputes an additional amount, being \$6,231.11 the plaintiff testified he incurred because he is no longer able to do yard care and exterior painting of his home.

[125] I find the plaintiff's career advancement and growing family would likely have placed increasing demands on his time and his home is quite large. Based on the evidence overall, I am not satisfied that the plaintiff would not have incurred these costs even if he had not been injured in the Accident.

[126] I award \$10,359 in special damages.

X. CONCLUSION

[127] In summary, I award the plaintiff the following damages:

Non-pecuniary Damages

\$170,000

Past Loss of Earning Capacity (net)

\$12,800

Future Loss of Earning Capacity

\$774,461

Cost of Future Care

\$95,922

Special Damages

\$10,359

Total

\$1,063,542

XI. costs

[128] Subject to further submissions on the issue, the plaintiff is entitled to his costs.

"Jackson J."

[1] Although Capt. Lum provided some alternative salary figures, his overall evidence on this point was less than clear. Further, the plaintiff relied on Mr. Carson's assumed salaries in advancing his future loss of earning capacity claim.

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CASE PAGE <https://chat.esheria.ai/case-law/canada/lai-v-griffin-2020>

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