

CANADA / JUDGMENT

Lluncor v. Anderson

2020 BCSC 767

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 767 Lluncor v. Anderson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lluncor v. Anderson,

2020 BCSC 767

Date: 20200521

Docket: M181366

Registry: New Westminster

Between:

David Derek Lluncor

Plaintiff

And

Lyndsay Anderson and Ui Lee

Defendants

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:

J. Craig Moulton

Counsel for the Defendants:

R.A. Doran

Place and Dates of Trial:

New Westminster, B.C.

January 27-31, 2020

Place and Date of Judgment:

New Westminster, B.C.

May 21, 2020

Introduction

- [1] This action concerns the assessment of damages claimed by the plaintiff resulting from a July 7, 2014 automobile accident. Liability for this rear end collision is admitted by the defendants.
- [2] The plaintiff seeks general damages of \$85,000; past and future housekeeping capacity compensation \$30,000; cost of future care \$20,000; and special damages \$3,521 (after abandoning the costs of two MRI scans). The defendant argued that the plaintiff's non-pecuniary damages should be assessed between \$30,000 and \$40,000 and no awards should be made for housekeeping expenses or future care costs.

Background

- [3] The plaintiff is a 36 year old father of two children. He lives with his wife Vanessa Prada and their children in South Surrey, BC. Ms. Prada is the primary caregiver to the children and does not work outside their home. Their current residence is a townhouse purchased approximately one year after the subject accident.
- [4] The plaintiff has a diploma in business management from Douglas College and has studied graphic design and marketing courses at BCIT. He ended his formal education in 2009. Since then, he has been employed in sales and was working for a produce distribution company at the time of the accident in July 2014.
- [5] He testified that before the accident his health was perfect although he had been injured in a car accident in 2011; he was fully recovered from those symptoms by 2012 or 2013.
- [6] Under cross-examination, he conceded his pre-accident health was not perfect; he had significant stomach issues relating to stomach cysts that also caused some referred pain. This stomach ailment had existed for years before the accident but he said the condition was not active at the time nor was it causing any pain. Prior to the accident, he was not taking any medications and since the accident has suffered no other injuries.

- [7] Before the accident the plaintiff was active and involved in his children's lives; he would swim with his children on a regular basis and frequently took his family on outings that included walking three to four hours at a time. When they were hiking, he often carried their one-year child on his back.
- [8] During the summers, he would swim every day at the townhouse complex where they lived or at the South Surrey Recreational Complex.
- [9] Before the accident, he participated in household chores including dishwashing, sweeping and vacuuming. He did outside work including lawn maintenance. Overall he said he would attend to 80% of the household dishes and 40% of the overall household chores.
- [10] The plaintiff said that his family would take annual vacations to Mexico or Hawaii; these trips were influenced by his income at the time.
- [11] In the winter of 2013-2014, he said he was not active. He struggled to keep his weight down and was 255 lbs at the time of the accident. He acknowledged that his stomach muscles were weak at the time and he did not exercise frequently although he visited a gym from time to time. He was not involved in any sporting activities.
- [12] From the time of the accident, the plaintiff was national sales manager for International Herbs Ltd. and worked away from home seven to 14 days each month. This position involved extensive travel to other parts of Canada, the United States and South America. His duties required him to be absent for three to 14 days every month. He eventually obtained an account with Loblaw's in Eastern Canada and towards the end of 2014 he regularly travelled to Ontario two weeks each month to manage the opening of their operations. He interspersed these trips with trips to California, Peru and Columbia to meet with produce suppliers.
- [13] When the plaintiff was not travelling after the accident, he generally worked 10-12 hours a day out of his Vancouver office; his duties were a mixture of desk work and visiting clients. 50% of his time was desk work and 50% travel.
- [14] In January 2018, the plaintiff changed employment and began as a sales manager for Zenabis in medical and retail cannabis sales. Most recently in January 2020, he resigned from his employment in cannabis sales and began his own business.

The accident

- [15] The accident occurred at the intersection of King George Highway and Boundary Road while he was travelling to a mall in Vancouver. He was driving a 2008 Nissan that was stopped at a red light when it was struck with sufficient force to move his vehicle forward approximately one foot and causing his head to move towards the steering wheel (not hitting it) and back against the headrest. Immediately after the first impact, there was a second impact which caused his body to move towards the steering wheel and back again against the headrest.

- [16] He said that at the time of each impact, he grabbed the steering wheel to prevent his torso moving forward and applied his brake. Both impacts caused his vehicle to move forward but it did not strike the car in front. On the impacts, the plaintiff was facing forward to the front of his car; there was no warning before either impacts. The airbags in his vehicle did not deploy.
- [17] At the time of the accident his two year old child was asleep in the backseat; she was not awoken by the impact.
- [18] After checking with his child he observed an ambulance arrive; an attendant gave the plaintiff an ice bag but he did not go to a hospital. The plaintiff drove from the scene of the accident to pick up his wife about ten minutes away and she drove his car back to their home.
- [19] There was little visible damage to the plaintiff's car and the apparent cost of repair was between \$650 and \$700. The defendant Lindsay Anderson's vehicle sustained minor damage and was repaired at a cost of \$598 inclusive of taxes.

Post-accident

Neck

- [20] Immediately after the collision, the plaintiff began experiencing numbness and tension in his neck which progressed to tingling primarily on the left side. Initially the pain was constant but changed to intermittent pain. He noticed a pinching sensation in his neck that seemed to radiate up to his ear and jaw and to his upper head.
- [21] He said this neck pain has continued to affect him since the accident and that within the first six months' post-accident the neck pain was worse on the left side. He also contends he began having tension and neck pain on the right side of his neck that would come and go. He said pain continues to radiate from his ear to his jaw to his temples and notices more tension on the right side.
- [22] He told his family physician that symptoms in his neck and upper back had returned to normal by September 25, 2014. He reiterated this information to his doctor in October 2014, January 2015, April 2015, June 2015 and July 2015.
- [23] He testified that neck pain and tingling on the left side began immediately after the accident and has continued since. Recently, the pain began occurring on the right side.
- [24] Initially he had improvements in his neck but over the last two years feels those symptoms have gradually worsened. He finds the neck symptoms affect his ability to turn his head; turning to the left is worse than the right. When he drives for prolonged times, his left side neck symptoms seem to produce additional right-sided neck pain. He self massages his neck when in those situations. He believes his neck has become weaker over the last two years. Although he had improvement during two years after the accident he testified that

symptoms in his neck were gradually worsening and extending to his right neck.

- [25] The plaintiff had neck pain from his 2011 accident until 2013 but had no symptoms prior to this accident.
- [26] He has taken chiropractic treatments, massage treatments, physiotherapy and acupuncture treatments.

Shoulders

- [27] The plaintiff developed pain in his shoulders in an area he described as in his shoulder blades towards the back of his frame. Those symptoms were not frequent but started within the first few months of the car accident.

Lower back

- [28] The plaintiff's major concerns appear to be his low back pain. He describes the problems developing on the right side and migrating to the left. These low back problems began in the first one to two weeks after the accident and resulted in a pinching, burning and tingling sensation. After the accident, the pain was mostly on the left side but now occurs on the right side. The pain has never resolved since the accident. Sometimes the back pain is mild and other times extreme. The pain can appear either on the right side or the left side but not both sides at the same time.
- [29] The plaintiff believes the low back pain is worsening now with radiation into his legs, buttocks and hip down to his thigh. He said he has symptoms that go down his leg to his calf.
- [30] Long drives and prolonged sitting exacerbate his low back pain. If he is sitting in one spot for more than one hour, he gets pain in the hip, buttocks and thigh. He self massages those areas to deal with the symptoms.
- [31] The pain on the right side he described as "little pinches" with similar symptoms on the left. The way the plaintiff described his symptoms from the 2011 accident suggested to me that he was still experiencing some effects from that collision; he provided very little detail on this point. He said these symptoms interfere with his ability to enter his car, with some postures when using a toilet, and affect his intimacy with his partner.

Right hip

- [32] The plaintiff testified that his right hip problems are now the most painful aspect of his condition since the accident. He does not remember when the right hip became symptomatic but is certain it began within the first year after the accident. The right hip pain is mild on some days and extreme on others and there has been no long standing improvement. He obtains temporary relief from chiropractic treatment, physiotherapy, massage therapy and acupuncture.

Pelvis

- [33] He described pain in the pelvic region beginning on the left side but not the right side. Currently, the pain has occurred in his right hip approximately twice a month. The therapies he has pursued have provided him with some intermittent relief but not permanent relief.

Legs

- [34] The plaintiff said that the pain that begins in his hips radiates down to the front and side of his knees and then into his calf. Initially the symptoms affected his left leg down to his toes but now he finds right sided leg pain is worse. The left leg pain disappeared for some time but has since returned.
- [35] He believes the right leg pain occurred in the first month after the accident but has become much worse in the last two years; he said it is constant.
- [36] The plaintiff had no problems with his legs before the accident. He has been treated with massage therapy, chiropractic treatments, acupuncture, traction and physiotherapy. Overall, the left back to the right side are the worst symptoms he is experiencing. He said he is having some anxiety over the uncertainty about when, if ever, these symptoms will abate.
- [37] The plaintiff has been treated by his family doctor, Dr. J. Jaworski, Dr. Rickards and a Dr. Sosa.
- [38] He was examined by Dr. Marks who has provided an opinion to be relied on by the defendant.

Treatments

- [39] Since the accident, the plaintiff has lost approximately 20 pounds at the behest of his doctors and other treators. He has had chiropractic treatments from Dr. Jagpal, and Dr. Lepane.
- [40] He received physiotherapy treatments from Ms. Kate Kennedy and massage therapy from Grandview Massage Therapy Clinic. Finally, he has taken acupuncture; this treatment seemed to initiate new pain and was discontinued on the recommendation of Dr. Jaworski.

Impact

- [41] The plaintiff suffered no loss of income as a result of his injuries. It appears he has stoically stayed the course in his employment and managed to perform all of his duties without interruption due to symptoms.
- [42] The plaintiff says that his sleep has been interrupted as a result of the symptoms from the accident. Prior to 2014, he could sleep eight hours per night whereas now he is awoken every night. He uses a pillow between his legs to improve his sleep but has not been able to return to a full eight hour sleep. As a result, he is more fatigued during the days.

- [43] Although he was a vigorous swimmer before the accident, he is less so when taking his children to a pool. Against his pre-accident endurance of four to five hour walks with his family, he finds it harder to walk with his children and is not able to do more than one hour on a walking journey.
- [44] Since the accident he has not enjoyed hiking with the children; he is unable to do longer walks or hikes and cannot carry his children for more than five minutes before his wife steps in to assist.
- [45] He testified that his intimate life with his wife has also been affected by the symptoms.
- [46] The plaintiff said that his ability to do household chores has been significantly limited since the accident. Currently, he is unable to do the vacuuming; he develops a burning sensation, numbness and tingling when he is bent over. He has gradually reduced his role in doing family chores and now participates in less than 1% of those activities. He cannot bend or even fold clothes.
- [47] Approximately one-and-a-half years ago, the plaintiff hired a housekeeper because his wife could not keep up with the domestic chores that he is not able to do at this time. He said that his wife is a stay at home mother but without his participation in the household chores and maintenance, they could not keep their home clean.
- [48] The plaintiff testified that his involvement in household chores gradually diminished after the accident. He said the symptoms would worsen the longer he performed household chores such as dishwashing. He said he had an aversion to using a dishwasher in their home and preferred to hand wash the family dishes.
- [49] They have a maid service that provides two cleaners for two hours two times per month. The total cost is \$240 per month; he has paid \$2,500 to date. He said they would not have hired a housekeeper but for his limitations.
- [50] The plaintiff was doing outside chores before the accident but is not able to maintain lawns and other upkeep on the outside of their property. As a result, he has replaced the natural grass with an artificial turf surface to avoid the need to mow his lawns. That conversion cost \$2,500. He has also replaced other parts of the landscape with concrete because he was unable to bend and perform the chores necessary to maintain the property.
- [51] In cross-examination, the plaintiff was faced with challenges to his reliability. As an example, he testified that he only washed dishes by hand before the accident but his wife said he used the dishwasher before his injury.
- [52] He testified that he had ongoing right leg pain after the accident. However, at his October 2017 examination for discovery he testified that his leg was fine but he had some minor pain in his right thigh in the first year post accident that resolved after short while.

- [53] He could not recall his evidence at the discovery that his right leg pain came on one to one-and-a-half years after the accident; he eventually confirmed this assertion was true.
- [54] He could not recall his discovery testimony that his post accident headaches resolved within the first year. He continues to have some headaches but does not relate those events to the accident.
- [55] Next, he was asked about his neck pain. He said neck pain from the collision ended by the end of 2014. As more pain developed in his low back his neck and shoulders "got better". He said he was not certain if his current neck pain complaint was caused by his use of his pillow.
- [56] He said that by December 2015 he was 85% improved and experienced minor pain. His activity was normal, he had no numbness and had stopped chiropractic treatments. He was asked about this estimate of his recovery; he became defensive in reply to questions at trial.
- [57] He told his doctor he did all activities but had pain when he drove for long periods.
- [58] He said by February 2016 he was working out at a gym and was slowly improving. Around this he had a recurrence of stomach problems and experienced some pain.
- [59] He said numbness and tingling were restricted to his left leg.
- [60] The plaintiff said he did not remember when his left hip pain began but he reiterated his left leg pain started within one year of the accident.
- [61] Overall, flaws in the plaintiff's testimony did not appear deliberate; rather he struggled to recall events many years before the trial and the reliability of his trial testimony was undermined. However it is against the entirety of his evidence he now claims his accident related symptoms are worsening.
- [62] Finally, the plaintiff said that his chiropractic treatments cost \$55 per visit; acupuncture costs were \$95 per hour; physiotherapy cost between \$65 and \$75 per treatment.
- [63] The plaintiff also conceded his weight has always been an issue; he was 255 pounds at the time of the accident and was repeatedly advised to lose weight. Although he has lost some weight, his level of obesity remains an issue for him.

Plans for the future

- [64] The plaintiff plans to continue with his various treatment providers including chiropractic, physiotherapy and massage therapy. He has recently begun using some therapeutic oils which his wife massages into his back on a regular basis. He is also pursuing CBD products in the hope he will be able to reduce his levels of pain.
- [65] He continues exercising and hopes to hire a personal trainer once he can afford the cost. Previously his employer helped pay for his personal trainer in 2018.

- [66] The plaintiff is presently starting his own sales company in the cannabis industry. He will be managing clients and markets in order to improve access to retailers. This work will also require extensive travel around Canada.

Medical Evidence

- [67] Dr. David Zayonc became the plaintiff's family doctor in January 2012. In his December 21, 2015 report, he recited the plaintiff's description of the collision details with onset of symptoms of pain extending posteriorly to his left leg and pain in his upper thoracic and neck region. He said the plaintiff had symptoms in his cervical and upper thoracic area. He observed restricted lumbar range of motion and pain limiting his right lateral and forward flexion and extension. His lower back paraspinals were tight and tender. In his opinion, the plaintiff had dyskinesia in the lower lumbar and sacroiliac joints. The plaintiff also had signs of a left lateral disc herniation based on a September 28, 2015 MRI.
- [68] By December 2015, the plaintiff reported that he was overall 80% improved. The doctor said "he still experiences pain when he sits for extended periods of time or lifts heavier objects. He believed the plaintiff's symptoms in his lower back would slowly improve over the course of time. If the plaintiff's pain and numbness increase he could be referred to a neurosurgeon to discuss possible surgical disc repair, although this is considered an unlikely prospect.
- [69] Dr. Zayonc opined that the plaintiff's physiotherapy, chiropractic and massage treatments have helped to rehabilitate his injuries. The doctor thought some further therapy may assist in pain and stiffness relief when he has symptomatic flares.
- [70] Apparently the plaintiff reported that he had some lifestyle restrictions including performing house chores.
- [71] In Dr. Zayonc's follow-up report dated August 31, 2018, he said the plaintiff was continuing to have pain and discomfort in his low back sometimes radiating to the gluteal area. Pain is not present throughout all days but the discomfort has remained for several months. He also reported that heavy physical activity aggravated his pain.
- [72] He said that the plaintiff attributes some lower neck pain and stiffness to the accident and he had been headache free for one month.
- [73] He reported to the doctor that his low back pain occurs when he lifts his children and during intimate times with his wife. He noted that the plaintiff has altered his physical activities such as biking and "heavier lifting weights".

- [74] In his clinical impression and prognosis, Dr. Zayonc said the plaintiff's injuries were consistent with strain and sprain accompanied by symptoms "more in keeping with facet's synovitis and disc herniation." He believed that the plaintiff's symptoms would be present for a prolonged period. He recommended acupuncture treatments and a referral to a physiatrist for an assessment; the plaintiff cancelled that appointment for business reasons. He was encouraged to be as active as tolerable including ongoing swimming and stretching.
- [75] Under cross-examination Dr. Zayonc confirmed that he had previously trained as a chiropractor. He defers to radiologists in interpreting MRI investigations. He said he would not defer to an orthopedic surgeon regarding diagnosis because of his chiropractic training.
- [76] The doctor said that by December 2015 the plaintiff reported doing all activities but experienced pain when he sat for a long time.

Dr. J.S. Jaworski

- [77] Dr. Jaworski examined the plaintiff twice in 2019 and provided a September 11, 2019 report. He noted that the plaintiff complained of low back pain radiating to both thighs. He said in addition to the plaintiff's soft tissue neck and back injuries caused by the accident it was likely that the accident triggered an aggravation of pre-existing clinically silent degenerative changes in his spine. He thought the long-term prognosis for this pain was guarded considering the duration of his symptoms. The accident did not cause the degeneration in his spine but impacted his low back injury.
- [78] He speculated that some of the plaintiff's hip pain may be caused by ginned degenerative arthritic changes in the joint.
- [79] Dr. Jaworski recommended that the plaintiff maintain health and fitness and address his excessive weight. Passive modalities such as massage or acupuncture could be used to deal with intermittent pain flare ups. Similarly, analgesics and anti-inflammatory medications could be used as needed. Finally, Dr. Jaworski suggested that trigger point injections with local anaesthetic or Botox would ameliorate his myofascial pains.

Dr. Marks

- [80] Dr. Paul Marks examined the plaintiff at the request of counsel for the defendant. He examined the plaintiff on September 11, 2019 and provided a report dated October 17, 2019.
- [81] The plaintiff told Dr. Marks that his vehicle had been struck from behind following which he had "no immediate complaints of pain". One week after the accident his low back became painful on the right and left side. He had upper back pain. The plaintiff told Dr. Marks he had shoulder pain that began one year after the accident; he did not associate this area of pain with the accident.

- [82] He described the various treatments he had received from chiropractors, massage therapists and physiotherapists after the accident.
- [83] He reviewed the x-ray and MRI studies of the plaintiff's lumbar spine and hip. He had degenerative changes in the right hip and degenerative changes in his L4 - f5 spine region.
- [84] He described his pain complaints to Dr. Marks including some left sided neck pain with variable intensity; occasional nocturnal discomfort; and pain worse on the right side than the left.
- [85] He described mid back or thoracic pain as well as low back pain. Again this pain is worse on the right side than the left. It is constant on the right side with variable intensity. He also describes some pain into his right leg from the right buttock. He also told Dr. Marks about weekly headaches and pain in the shoulder. Dr. Marks summarized the plaintiff's examination including the comment that left shoulder pain started one year after the accident. His right hip pain started five or six months after the accident and left hip pain started one year after the accident. His right knee complaints started two years after the accident.
- [86] Dr. Marks said the delayed onset of complaints were not consistent with accident in this regard. He said "I find these complaints to be uncomplicated soft tissue injuries only without evidence of orthopedic sequelae. Presently, there is no objective evidence of ongoing accident related impairment". The plaintiff's reported complaints did not correlate with the objective findings observed by Dr. Marks. He felt the plaintiff's expected recovery would have been two to three months after the injuries.

Dr. Rickards

- [87] The plaintiff relied on an independent orthopedic opinion concerning his injuries suffered in the car accident. Dr. Robin Rickards provided a report dated October 31, 2018. Counsels instructing letter was attached to the doctor's report which clearly articulated a request for an opinion concerning the plaintiff's "injuries suffered in the above noted matter and treatment ". Dr. Rickards was also provided with a number of other documents including the general practitioner's records, records from other treating healthcare personnel and MRI scans.
- [88] Dr. Rickards' examination took place October 23, 2018. The plaintiff described his complaints to the doctor including pain in his right and left low back area with some radiation of pain into his right thigh and right groin region extending occasionally to the right leg below the knee. The plaintiff reported two episodes of painful clicking in the right hip region and occasional symptoms in the left groin/leg. He reported to the doctor that right and left groin pain was associated with sexual activity but this pain had decreased in frequency and severity over the previous few months. The doctor's clinical diagnosis included:

- a. probable lumbar facet joint syndrome; and
- b. possible labral tear right hip.

- [89] There was no confirmation in the evidence that the plaintiff suffered a labral tear to his right hip. Dr. Rickards used a positive Kemp's Test to diagnose the facet joint syndrome. That test triggers pain on rotation, lateral flexion and extension of the spinal segments involved. Muscle pain from this condition can fatigue muscles and cause a repetition of the pain cycles. He opined that the plaintiff's right hip symptoms were likely due to injury to the left hip sustained in the auto accident albeit the labral tear was not proved.
- [90] Dr. Rickards made various treatment recommendations including nonsteroidal anti-inflammatory medications for a period of 7 to 21 days. He recommended manipulative treatment such as chiropractic, massage and physiotherapy together with muscle strengthening exercises to address shoulder girdle, neck, low-back and pelvic girdle musculature. This program should be directed by a personal trainer or kinesiologist with four to six sessions per week with an independent trainer. He was also a candidate for medial branch blocks followed by radiofrequency ablation that often resolve symptoms on a long-term basis.
- [91] Dr. Rickards prognosis was that after "appropriate treatment, weight loss and muscle toning" the symptoms will likely improve. The muscle block and radio ablation were unlikely to be necessary to resolve his symptoms.
- [92] He also indicated that if the plaintiff had a labral tear, it could be repaired and such repair would dramatically improve his symptoms to pre-MVA status.
- [93] The doctor opined that travelling in restricted positions such as prolonged driving or airplane trips could continue to cause difficulty "until appropriate treatment has been carried out".
- [94] In cross-examination, Dr. Rickards conceded that the Kemps test was limited in its usefulness to diagnose lumbar facet joint syndrome. This diagnosis was not endorsed by either Dr. Marks or Dr. Jaworski.
- [95] It is significant to note that Dr. Rickards had been informed and was aware of the plaintiff's earlier complaints of neck symptoms and upper thoracic symptoms mentioned by the plaintiff in 2014. He had been requested to provide an opinion concerning the plaintiff's accident caused injuries and did not give any opinion concerning the plaintiff's claim of neck symptoms.

Conclusions: the Plaintiff's injuries

- [96] Three specialist physicians and one family doctor formed significantly different opinions concerning the plaintiff's current and ongoing medical problems arising from the accident. I accept the plaintiff had difficulty in providing accurate and reliable information to the

specialists and at trial concerning events that had transpired up to almost six years prior to trial. There were significant gaps between the accident and the plaintiff's complaints of shoulder pain, right hip pain and left hip pain. His complaints concerning these three areas were described to Dr. Zayonc's records as having begun five to six months after the accident (the right hip) and one year (at left hip) and one year for his shoulder complaints. His right knee complaints started two years after the accident.

- [97] On his own reports, his neck pain was resolved by 2015 and remained uneventful until after August 2016 when he reported symptoms (but he was unsure of the cause of neck pain at that time).
- [98] The plaintiff told Dr. Jaworski that his shoulder and neck became painful within 30 minutes of the accident. Dr. Jaworski did not record the timing of the onset of his knee and hip symptoms. The plaintiff told Dr. Rickards that the neck stiffness and low back symptoms began within one to two days after the accident.
- [99] Dr. Rickards opinion was limited to a diagnosis of his low back symptoms and right hip symptoms.
- [100] In contrast, Dr. Zayonc opined that by December 2015 the plaintiff's headaches and cervical pain had resolved without any prospect of future symptoms. By that date, the plaintiff claimed he was 80% recovered.
- [101] Although the plaintiff reported worsening symptoms after August 2016, there is no satisfactory explanation for the reappearance of symptoms. It is apparent the plaintiff reported that his recovery remained at 80% until August 2016.
- [102] It was after 2016 that the plaintiff made attempts to improve his strength and reduce his weight. There is no reasonable explanation as to why his symptoms would increase at the same time he was making those efforts.
- [103] Overall, I accept that the plaintiff suffered a low back injury at the time of the accident and symptoms from that injury have continued to impact his life on a day-to-day basis. Although the doctors examining the plaintiff are not agreed on the actual diagnosis, I find that plaintiff suffered a soft tissue injury to his low back that was likely superimposed on a pre-existing degenerative condition.
- [104] I do not accept that the plaintiff's continuing neck complaints or shoulder complaints stem from the car accident injuries although I accept he suffered some injury and symptoms to those areas at the time of the collision.
- [105] Although there is some question concerning the prognosis, the plaintiff relied on the evidence of Dr. Rickards including his view that with weight loss and muscle toning, his symptoms will likely improve and more significant interventions will not be necessary to resolve his complaints. On this basis, I do not accept that his long term prognosis is as guarded as described by Dr. Jaworski or unlikely to resolve as described by Dr. Zayonc.

Work

- [106] When the accident happened, the plaintiff had been inactive during the winter of 2013 - 2014. He was national sales manager for International Herbs Ltd. In this position the plaintiff travelled extensively throughout Canada, the US and South America. His work schedule required him to be away from home for two weeks each month. Towards the end of 2014 he obtained a customer in Ontario and was required to work in Ontario generally for 2 weeks at a time.
- [107] His injuries did not affect his life when travelling for work except that his co-worker took on some additional service work. When he was working in Ontario he had no time to pursue treatment for his injuries; his days began at 7 AM and ended at 10 PM. When he worked in BC, his schedule included 10 to 12 hour days; some of this time was travelling in the province and sometime working at his office.
- [108] In 2018 the plaintiff left his employment with International Herbs Ltd. and began as sales manager of a medical cannabis company. This job also involved travel in Canada and South America and involved 12 to 14 hour workdays. He travelled extensively in Canada.

Non-Pecuniary Damages

- [109] Non-pecuniary damages assessments are informed by the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34, at para. 46. Those important factors listed in *Stapley* are not exhaustive but address the many ways in which injured persons can be affected by the symptoms and limitations triggered by car accidents. These include the age of the plaintiff, the type of injury, the duration and severity of pain, disability, emotional suffering and overall loss or impairment of life's experiences.
- [110] Awards made by courts in other cases provide guidance and frameworks that can be considered in other cases. Nonetheless, each individual is uniquely impacted by injury, symptoms and the impact of same on their lives. It is the plaintiff's personal experience in coping with injury and the plaintiff's ability to articulate their experiences that underlie the assessment: see *Dilello v. Montgomery*, 2005 BCCA 56, at para. 25.
- [111] The plaintiff provided a number of authorities he believes include parallels to his circumstances that should convince the court to award non-pecuniary damages of \$85,000. These include:
1. *Andrusko v. Alexander*, 2013 BCSC 985, award of \$80,000: the plaintiff suffered injuries to his neck and shoulder, which were largely resolved within one year, but flared up about once per week, and injuries to his low back resulting in constant, sometimes severe pain and regular persistent numbness in his left leg. The injuries were chronic. The plaintiff was a young man, with a physical job; the court remarked that he was stoic and worked through the pain.

2. Ju v. Morpurgo, 2019 BCSC 194 [Ju], award including housekeeping capacity claim of \$80,000: the plaintiff suffered soft tissue injuries to her neck, right shoulder and low back; the symptoms were likely to continue into the foreseeable future.
 3. MacAulay v. Field, 2014 BCSC 937, award of \$75,000: the plaintiff was a very physically active 47 year old woman pre-accident and the accident took away her enjoyment of many recreational pursuits which were the center of her social life with family and friends. Her pain, including back and neck pain, was unlikely to ever disappear completely.
 4. Demarzo v. Michaud, 2010 BCSC 255 award of \$85,000: the plaintiff sustained a significant lower back injury and was expected to continue to experience intermittent pain. The plaintiff was unable to return to her former work as a landscaper or any of her former recreational activities at the same level, which was an important part of her life pre-accident. The accident depressed the plaintiff's mood, leading to issues in her marriage.
- [112] In contrast, the defendants rely on six authorities in suggesting that non-pecuniary damages be awarded in the range of \$30,000 to \$40,000. The defendants contend these authorities better inform the court with regard to damages this plaintiff is entitled to recover:
1. Janda v. Mackenzie, 2018 BCSC 168, award of \$40,000: the accident aggravated previous injuries and caused new soft tissue injuries; the plaintiff's soft tissue injuries were effectively resolved by trial with the potential for flare-ups of pain. The plaintiff had significant ongoing shoulder difficulties that were attributable to a previous accident. None of the injuries caused by the subject accident interfered with his ability to work (as a truck driver).
 2. Rogalsky v. Harrett, 2014 BCSC 1255, award of \$35,000: the plaintiff suffered several injuries including moderate soft tissue injuries, a rotator cuff tear, resolved thoracic outlet syndrome and carpal tunnel syndrome; she had persistent intermittent headaches associated with her neck, back and shoulder pain. The plaintiff was still able to participate in her pre-accident activities, but to a reduced degree and with diminished enjoyment.
 3. Dizon v. Losier, 2017 BCSC 431 [Dizon], award of \$30,000: the plaintiff suffered pain and discomfort for 18 months, after which he fully recovered except for some stiffness. Prior to recovery, the plaintiff's participation in his pre-accident recreational activities was reduced.
 4. Pavan v. Guolo, 2016 BCSC 324, award of \$40,000: the plaintiff suffered injuries to his right arm that were unlikely to fully resolve, however the injuries caused only momentary discomfort while performing certain activities. He suffered injuries to his right shoulder that were recovered other than occasional flare ups and mild low back pain that had resolved a few months after the accident.

5. Zajackowski v. Grauer, 2014 BCSC 711, award of \$40,000: the plaintiff suffered lower back pain that persisted to the time of trial, he had worked through the pain and the court accepted evidence that he had become irritable and had difficulty sleeping as a result of the pain.
 6. Rabiee v. Rendleman, 2015 BCSC 595, award of \$40,000: the plaintiff's injuries, including soft tissue injuries, were mild in severity but continued longer than expected. The injuries affected the plaintiff's ability to be physically and socially active, but did not prevent her from working.
- [113] The plaintiff highlights the Court of Appeal decision in Greenway-Brown v. MacKenzie, 2019 BCCA 137, to urge on the court that objective evidence of continuing injury cannot always be advanced in support of a genuine claim for compensation. It is important not to ignore relevant medical evidence and fail to consider objective qualities in an injured person's self-reports.
- [114] I have concluded that the plaintiff's injuries in this accident have continued to impact him on a regular but intermittent pattern.
- [115] At the time of the accident, the plaintiff and his wife had one child; he engaged in some activity with his child notwithstanding his extended work schedule. He would take his two-year-old child swimming from time to time when he was at home. His wife was a homemaker and the primary caregiver.
- [116] I accept the plaintiff's description of the impact of his symptoms on various aspects of his life. He sleeps with a pillow between his legs and the duration of his sleep is interrupted. His wife massages his back to relieve discomfort. His ability to walk has been reduced from three to four hours per event to 45 minutes. He is able and continues to swim but with less vigour than before the accident. He does much less hiking and cannot carry his children on his back during family outings. He has tried cycling but discomfort prevents him from longer cycling trips. Before the accident he did 40% of the chores in the house; he is now performing less than 1% of those chores. He had a particular interest in doing dishes by hand rather than using the machine and his injuries prevent him from dishwashing by hand. Finally, in his current residence he had the existing lawn replaced with an artificial surface requiring no upkeep.
- [117] While there is some uncertainty concerning the diagnosis and prognosis, I am satisfied that the plaintiff's low back injury and the symptoms radiating from that region have continued to cause him noticeable discomfort pain and interference in his day-to-day life. His ability to engage in activities with his children, with his wife, and to maintain his share of the household chores has been compromised. I also accept that the plaintiff has been emotionally downcast as a result of his injuries; he may not be clinically depressed but his wife spoke clearly about his changed personality since 2014.

- [118] Although the plaintiff had some initial symptoms in his neck and shoulders caused by the accident, I do not accept that his continuing neck complaints or shoulder complaints stem from the car accident injuries. The period from 2014 to 2016 during which he did not complain of neck symptoms was not adequately explained by any of the physicians in a manner that could persuade me that the development of symptoms in 2016 was, on the balance of probabilities, caused by the accident.
- [119] Although the reliability of the plaintiff's evidence has reduced my confidence in all of his assertions, I accept that his life before the accident and after was dominated by an arduous business life resulting in lengthy absences from home for two weeks of most months; he travelled by plane and car repeatedly. Following the accident, he performed his work duties without any time off due to his injuries and without any apparent interference with the performance of those duties.
- [120] The plaintiff was an active busy person before the accident and his injuries do not appear to have significantly affected his work life style. In my view, the plaintiff has simply overstated some of the post accident physical difficulties he has faced because he believes them to all stem from the accident. I do not agree.
- [121] I conclude that presently there are measures the plaintiff can take to ameliorate the impact of the pain and discomfort he suffers including medications and various therapies. Most important the plaintiff's orthopedic surgeon opines there is a likelihood his symptoms will diminish and resolve if he follows the recommended strategy. Regrettably, there is no estimate concerning the timing of that recovery.
- [122] Moreover, there is little in the evidence to inform the court on costs that might be necessary for him to achieve recovery. Since the accident, the plaintiff has taken 25 physiotherapy treatments, 17 massage therapy treatments, 46 chiropractic treatments, and five acupuncture treatments. He has spent \$5,471.
- [123] There are significant differences between the facts in the cases cited by the parties. As an example, in *Dizon* cited by the defence, Madam Justice Russell awarded \$30,000 non-pecuniary damages to a plaintiff who had recovered from her except for some residual stiffness and discomfort 18 months after the subject accident.
- [124] By contrast, the plaintiff cited *Ju* in which the plaintiff was awarded \$80,000 non-pecuniary damages in a case where the plaintiff's symptoms and circumstances were similar to those experienced by the plaintiff in this case. The court included in its non-pecuniary damage award an allowance for the plaintiff's loss of housekeeping capacity in reliance on *Kim v. Lin*, 2018 BCCA 77, at paras. 33 and 34, and *Riley v. Ritsco*, 2018 BCCA 366.

- [125] In this case, I am satisfied that the plaintiff experienced a modest loss of housekeeping capacity since the accident. He has been less able for some time to perform the heavier types of work he had previously completed and that in the near future he will continue to have some limitations. The plaintiff seeks a standalone award for damage to his capacity in the home of \$30,000.
- [126] The plaintiff also contends that because he engages a home cleaning service costing \$3,000 annually the court should also take into account the plaintiff's wife's extra labour which he suggests should be evaluated at \$10,000 annually. In my view, the approach of including a compensation reflecting the plaintiff's inability to perform household tasks within the non-pecuniary award is more appropriate in the circumstance. The plaintiff's loss is more in the nature of loss of amenities because of increased pain levels and discomfort when called upon to do house work. I am not persuaded that the evidence establishes that the plaintiff is unable to perform household chores; it appeared to me he declines to perform household chores which cause increases in pain and discomfort.
- [127] As an example, the plaintiff's wife said that he would load the dishwasher before the accident; he denied using the dishwasher before the accident but has relented to using the dishwasher because hand washing dishes increases his pain and discomfort. His injury does not prevent him hand washing dishes; rather he experiences pain or discomfort when he performs that chore.
- [128] Overall, taking into account some shortcomings in the reliability of the plaintiff's evidence, his reactions to his symptoms and my overall view of the evidence, I make an award of non-pecuniary damages at a level that includes consideration for the plaintiff's impaired housekeeping capacity. In the result, I award the plaintiff \$72,500 under this head of damage.

Costs of Future Care

- [129] The plaintiff seeks compensation under this head of damage at \$20,000. The evidence on this question was sparse. I was given an explanation of the treatment costs he has incurred with reference to some associated costs but there was no evidence to inform the court about the costs of a personal trainer. On review of all of his therapy treatments (not including his personal trainer costs) from 2016 to 2019, he seems to have spent in the order of \$1,000 per year. I infer that a trainer will be somewhat more expensive.
- [130] As above, I have found that only ongoing symptoms from the accident stem from the low back injury. The plaintiff is entitled to some costs of future care related to that back injury that are medically justified and reasonable. With sufficient attention to his physical condition by way of treatment and improved conditioning he is likely to achieve significant improvement or resolution of his current symptoms from the accident.

[131] In order to address the plaintiff's need for some ongoing pain relief medications, a weight loss and exercise program and some therapy to address his pain symptoms in the short term, I award \$7,500. This sum will more likely than not provide sufficient services to assist the plaintiff achieving substantial if not complete resolution of his symptoms.

Summary

[132] The plaintiff will recover:

Head of Damage

a. Non-pecuniary damages

Award

\$72,500

b. Costs of Future Care

\$7,500

c. Costs, subject to any issue the parties may

have concerning this issue.

TOTAL

\$80,000

"Armstrong J."

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