

CANADA / JUDGMENT

Lynch v. McPhee

2021 BCSC 433

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Supreme Court of British Columbia

DECIDED

11 March 2021

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2021 BCSC 433 Lynch v. McPhee

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lynch v. McPhee,

2021 BCSC 433

Date: 20210311

Docket: M173348

Registry: Vancouver

Between:

Juston Barrie Lynch

Plaintiff

And

Scott William Lewis McPhee

Defendant

Corrected Judgment: the text of the judgment was corrected on the first page on March 19, 2021

Before: The Honourable Mr. Justice Basran

Reasons for Judgment

Counsel for Plaintiff:

K. Stewart

Counsel for Defendant:

J. Cahan

Place and Date of Trial:

Vancouver, B.C.

November 23-27, 2020, November 30, and December 1-3, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 11, 2021

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CONCLUSION. 38**COSTS. 38****INTRODUCTION**

- [1] On May 28, 2015, Juston Lynch arrived at work at 6:45 a.m. and drove into the parking garage. To his surprise, the defendant reversed out of a parking stall and t-boned Mr. Lynch's car. The force of the collision shattered the rear window of Mr. Lynch's vehicle and spun it 90 degrees (the "Accident"). The defendant admits liability for the Accident. Mr. Lynch was active and in good shape physically and mentally prior to the Accident. The collision caused injuries to the right side of his neck, shoulder, and upper back. He also developed psychological symptoms including depression, anxiety, and sleeplessness after the Accident.
- [2] Mr. Lynch seeks damages for his pain and suffering, loss of past earning capacity, loss of future earning capacity, cost of future care, and past loss of homemaking capacity. He also seeks special damages.

[3] For the reasons that follow, I have concluded that Mr. Lynch is entitled to:

- \$120,000 for pain and suffering;
- \$32,714 for loss of past earning capacity;
- \$100,000 for loss of future income earning capacity;
- \$113,502 for cost of future care;
- \$7,970 for past loss of homemaking capacity; and
- \$18,765 for special damages.

CREDIBILITY ASSESSMENT

- [4] The evidence of Mr. Lynch, his wife, Julie Lynch, his father, Barrie Lynch as well as his friends and acquaintances, Brad Rimek, Jeremy Parsons, Jordan Guindon, Chad Wren and Mike Donoghue, was entirely credible. They testified clearly and consistently. All of them described Mr. Lynch as an extroverted, active, and fun-loving person prior to the Accident. He played a variety of sports and was energetic and enthusiastic in all of his endeavours.
- [5] They all recalled that this changed substantially after the Accident. Mr. Lynch, his family and friends all described his sadness and disappointment, particularly in regards to his inability to become a firefighter and play with his young son. He is no longer the positive, outgoing, and energetic person that he was prior to the Accident. The details of these changes were specific, consistent, and clearly described by Mr. and Mrs. Lynch, Barrie Lynch, and the other witnesses. There was no indication of exaggeration or embellishment in any of their evidence. I accept the evidence of Mr. Lynch, his family members, and friends. I also find the evidence of Chief Timothy Wilkinson to be credible. I make no finding in respect of Mr. McPhee's evidence because it was not necessary to the determination of the issues before me.

PAIN AND SUFFERING

Relevant Legal Principles

- [6] Mr. Lynch must prove that the Accident caused his injuries. He need not establish that the admitted negligence of the defendant was the sole cause of his injuries, but he must demonstrate a substantial connection between the Accident and his physical and psychological injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28-30, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458.
- [7] Some of the relevant factors in assessing damages for pain and suffering include:
- Age of the plaintiff;
 - Nature of the injury;

- Severity and duration of the pain;
- Disability;
- Emotional suffering;
- Loss or impairment of life;
- Impairment of family, marital, and social relationships;
- Impairment of physical and mental abilities;
- Loss of lifestyle; and
- The plaintiff's stoicism (as a factor that should not penalize the plaintiff).

Stapley v. Hejslet, 2006 BCCA 34 at para. 46.

Plaintiff's Position on Pain and Suffering Damages

- [8] Mr. Lynch submits that he suffered pain symptoms in his neck, shoulder and upper back immediately after the Accident. He subsequently developed depression, anxiety, and sleeplessness as a result of these injuries.
- [9] Mr. Lynch suggests that in applying the factors set out in Stapley, the Court must consider that he is relatively young and has multiple injuries including daily pain in his neck, shoulders, and upper back. He also experiences ongoing depression and anxiety. His pain ranges from tolerable to moderate and is worsened by working at his physically demanding job. He is a parks maintenance labourer with the City of Burnaby. His symptoms have been ongoing for almost six years so his prognosis for a full recovery is guarded.
- [10] He further points out that the change in his physical and psychological condition is significant from his pre-Accident state. Prior to the Accident, he had no health issues relating to his neck, shoulder or back, his physical ability was unrestricted, and he did not have ongoing psychological issues. Now, he suffers from daily, intermittent pain, depression, anxiety, emotional suffering, and impairments of family, marital, and social relationships.
- [11] Mr. Lynch submits that the following cases provide guidance in assessing the amount that should be awarded to him for his pain and suffering:
- Mattson v. Spady, 2019 BCSC 1144;
 - Gill v. Lai, 2018 BCSC 101 (varied on other issues: 2019 BCCA 103);
 - Ferguson v. Watt, 2018 BCSC 1587; and
 - Xu v. Balaski, 2020 BCSC 940.

[12] Based on these cases, Mr. Lynch submits that he should be awarded \$150,000 in damages for pain and suffering.

Defendant's Position on Pain and Suffering Damages

[13] The defendant concedes that the Accident caused moderate soft tissue injuries to Mr. Lynch's neck and shoulder and mild mood issues. The defendant relies on the following cases with respect to the quantum of Mr. Lynch's pain and suffering damages:

- Gleason v. Yoon, 2015 BCSC 586;
- Jawanda v. Samra, 2013 BCSC 138;
- Minenko v. Minenko, 2014 BCSC 628;
- Abraha v. Suri, 2019 BCSC 1855;
- McCully v. Moss, 2019 BCSC 81; and
- Khademolhosseini v. Ji, 2019 BCSC 854.

[14] The defendant submits that Mr. Lynch is managing his soft tissue injuries fairly well and ought to receive damages for pain and suffering of \$75,000 to \$80,000.

Factual Findings on Pain and Suffering Damages

[15] Mr. Lynch was born on August 4, 1982. He was 32 years old at the time of the Accident and 38 at the date of trial. On May 28, 2015, the vehicle driven by Mr. Lynch was struck by the defendant in the parking lot at the City of Burnaby office. Mr. Lynch saw the defendant's vehicle just before it reversed into him but he was unable to avoid the collision. The rear window of Mr. Lynch's vehicle shattered and it spun from the force of the impact.

[16] Prior to the Accident, Mr. Lynch was an avid athlete. He began playing hockey when he was seven years old and has continued playing since then. Starting in 2005, he played on a men's division one hockey team in Coquitlam. This is the highest level of recreational hockey. For at least one season prior to the Accident he concurrently played on another division one hockey team in Delta, BC. He did not play hockey in 2014 when he was hired by Richmond Fire and Rescue ("RFR"). In addition to playing hockey, he has coached at various levels since 2003.

[17] Mr. Lynch was also a keen slow-pitch/softball player. Prior to the Accident, he typically played on two to three teams per year and played up to three games a week. In addition to these team sports, he exercised in a gym four to five times per week.

[18] Barrie Lynch, Mr. Lynch's father, described his son as positive, outgoing, effervescent, and charismatic. People were drawn to Mr. Lynch and he frequently took on leadership positions on his sports teams. After the accident, he is quieter, sad and not as fun loving as he used to be.

- [19] After the collision, Mr. Lynch developed neck, shoulder and upper back pain on his right side. His pain symptoms impacted his mood. Starting in 2016, he obtained counselling from Dr. James, a psychologist. His family physician, Dr. Cordoni, prescribed antidepressant medication. Notwithstanding this treatment, Mr. Lynch does not consider his psychological issues to be well managed.
- [20] Mr. Lynch experiences daily chronic pain in his neck, and trapezius muscle in his upper back and shoulder. Between the date of the Accident and 2017, he experienced some improvement but his symptoms plateaued by the end of 2017. He considers the pain in his acromioclavicular joints ("AC joints") to be well managed with the use of cortisone injections.
- [21] He finds that his pain symptoms are aggravated by the physical nature of his work. His work duties include installing playgrounds, construction work, heavy lifting, pushing/pulling, and overhead work. These activities aggravate his pain symptoms. Mr. Guindon, Mr. Lynch's foreman, assists him with these tasks or avoids assigning him tasks that aggravate his symptoms. Despite these accommodations, Mr. Lynch frequently has no energy left at the end of a work day.
- [22] Due to pain symptoms, Mr. Lynch did not play softball in 2015 and hockey during the 2015-2016 season. His mental state suffered during the year he did not play softball and hockey. He felt depressed, irritable, and was short-tempered with his wife and son.
- [23] Mr. and Mrs. Lynch were told that it was extremely unlikely that they would be able to have a child. Against long odds, Mrs. Lynch became pregnant and in September 2013, the son they affectionately describe as their "miracle baby" was born.
- [24] Mrs. Lynch understands that Mr. Lynch expends significant energy at work and suffers from pain and psychological issues but she resents that she is doing virtually all of the work involved in maintaining their household and raising their son. She observed changes in Mr. Lynch's mood and behaviour after the Accident. He became irritable, sore, easily agitated, and depressed. These symptoms contributed to conflict in their marriage and their intimacy has been adversely affected. The consequences of the Accident have caused a significant adverse impact on their relationship including the security of it. They have discussed separation. Mrs. Lynch's assessment of Mr. Lynch is that he is "not the man I married".
- [25] Mr. and Mrs. Lynch both described Mr. Lynch's inability to participate in a range of activities with his son. This is extremely disappointing because Mr. Lynch was an avid athlete throughout his childhood and until the Accident. He looked forward to playing sports and participating in his son's athletic activities by playing with him and coaching his teams. His ability to do these things is impaired by his ongoing pain symptoms and he feels a profound sense of loss and disappointment with being unable to play with his son on a regular basis. He sadly recounted that he is sometimes unable to pick up and play with his son and instead has to explain that "daddy is sore today".

- [26] Mrs. Lynch is saddened by Mr. Lynch's inability to be the father he wants to be to their son. He is unable to do many of the typical activities that parents do with their children and this hurts him deeply. His inability to do these things made him feel like a failure as a father.
- [27] Mr. Lynch resumed playing hockey and softball in 2016. He was sore after playing but he took what he described as a "risk/reward" approach to playing in which he balanced his passion for playing these sports, his desire to socialize with friends and maintain his mental well being against the inevitable pain he suffered afterwards. He took anti-inflammatory medication prior to hockey games and Tylenol 3 afterwards to manage his pain symptoms.
- [28] Mr. Lynch plays hockey and softball at a lower level of ability, intensity, and frequency than he did prior to the Accident. He goes to the gym to do rehabilitation but is not able to lift weights as he did prior to the Accident. He jogs but at a reduced pace.
- [29] Barrie Lynch noted his son's reduced activities, depressed mood, and the impact this had on his relationship with his young son. He testified that Mr. Lynch socializes less frequently with his extended family because of his feelings of depression.
- [30] After the Accident, Mr. Lynch was diagnosed with sleep apnea. He sometimes has difficulty falling asleep because he cannot find a comfortable position.
- [31] Mr. Lynch experienced a further lowering of his mood in late 2019. Dr. Cordoni increased his dosage of antidepressant medication. Mr. Lynch's pain symptoms continue to affect many of his daily decisions. For example, he constantly assesses the risks and rewards of playing the sports he enjoys and doing activities with his young son.

Medical Expert Evidence

Dr. Aaron MacInnes - Anesthesiologist and Pain Specialist

- [32] Dr. MacInnes was qualified as an anaesthesiologist and pain specialist. He assessed Mr. Lynch virtually on April 9, 2020 and in person on June 8, 2020. He produced a report dated July 16, 2020.
- [33] Dr. MacInnes found that Mr. Lynch sustained chronic whiplash associated disorder, chronic mechanical neck pain, chronic myofascial pain syndrome, mood and anxiety symptoms and sleep disturbance as a result of the Accident. He believes that Mr. Lynch's symptoms are chronic and therefore unlikely to resolve and that he will be left with ongoing daily pain symptoms for the rest of his life. His overall prognosis is guarded because once a person has chronic pain for two to three years, it is unlikely that these symptoms will significantly improve or resolve.

- [34] Dr. MacInnes does not believe that the pain Mr. Lynch experiences in his AC joint is related to the Accident. Although Mr. Lynch reported pain in his shoulders as a limiting factor, I accept that he intended to refer to the pain in his trapezius muscle and not his AC joints. He considers the pain associated with his AC joints to be well managed with the use of regular cortisone injections.

Dr. Chris Babbage - Psychiatrist

- [35] Dr. Babbage, a psychiatrist, assessed Mr. Lynch on March 19, 2020, and produced a report dated July 27, 2020. He believes that Mr. Lynch developed chronic musculoskeletal pain and persistent somatic anxiety as a result of the Accident. He testified that Mr. Lynch meets the diagnostic criteria for Somatic Symptom Disorder with predominant pain and has persistent anxiety and psychological stress about his health and pain symptoms. Mr. Lynch worries about the seriousness of his pain and other symptoms and the impact they will have on him in the future. He is frustrated that his pain affects his ability to perform his daily activities and fears that the symptoms will not subside. He also noted persistent sadness and accordingly diagnosed Mr. Lynch with Somatic Symptom Disorder ("SSD") with moderate to severe symptoms and impairments that limit his basic functional capacity. He explained that SSD involves a person's perception of pain and an aspect of this psychiatric diagnosis is the distress with which the person perceives their pain.
- [36] As a result of Mr. Lynch's termination from RFR, Dr. Babbage opined that Mr. Lynch "likely was diagnosable" with Adjustment Disorder at the time. He explained that this is a condition in which a person has trouble coping or dealing with a particular stressor. It can manifest in anxiety, depression or behavioural issues and will commence within three months of the onset of the stressor and usually resolves within six months.
- [37] Dr. Babbage also diagnosed Persistent Depressive Disorder ("PDD") as a result of the Accident. In his view, Mr. Lynch has had only partial remission with sadness, fatigue, and low interest persisting despite treatment with antidepressants and psychotherapy. While he believes that Mr. Lynch was more vulnerable to PDD because of the Adjustment Disorder caused by his dismissal from RFR, he did not have a pre-existing and ongoing psychiatric condition unrelated to the Accident.
- [38] Dr. Babbage's prognosis for Mr. Lynch's ability to maintain his current functional ability is guarded due to ongoing chronic pain, poor coping, and vulnerability to worsening anxiety and depressive symptoms, including the possibility of developing a major depressive disorder.

Dr. Khan - Physiatrist

- [39] Dr. Khan was qualified as an expert in physical medicine and rehabilitation. He examined Mr. Lynch on June 23, 2020, and produced a report on August 11, 2020. Dr. Khan diagnosed a cervical spine sprain/strain and a bilateral trapezius/posterior shoulder girdle sprain/strain. His prognosis for a complete resolution of Mr. Lynch's symptoms is guarded.
- [40] Dr. Khan concluded that "from a physical perspective" Mr. Lynch's accident related injuries have not "significantly" limited his ability to work as a playground maintenance worker and will not "significantly" limit his ability to work in this capacity in the future. He went on to state that from a "physical perspective" there is no accident related "physical" diagnosis, structural pathology or impairment for which he would restrict or prevent Mr. Lynch from independently performing his vocational functions.
- [41] These conclusions are puzzling in light of Dr. Khan's acceptance that Mr. Lynch continues to suffer from ongoing pain symptoms that are unlikely to resolve and his recommendation that he attend a chronic pain clinic for a trial of pain medication and/or injection based therapy for his ongoing pain symptoms.
- [42] Orthopaedic surgeons who testify in these types of cases often distinguish between pain symptoms and a diagnosis of "physical" symptoms that are objectively measurable and observable. Inherent in these opinions is the suggestion that the subjective descriptions of pain, without a direct physical source, should be assessed with suspicion and caution. It is unusual for a physiatrist to adopt this approach because the practice of physical medicine and rehabilitation involves the treatment of all symptoms of pain, regardless of origin. Subjectively experienced pain is nevertheless real and limiting. Overcoming it is not merely a matter of education and acceptance as suggested by Dr. Khan.
- [43] In his report, Dr. Khan found that Mr. Lynch suffers from a partial disability in respect of his reduced endurance while performing physical tasks due to neck and shoulder pain and self-limitation due to pain from physical activities. At trial, Dr. Khan resiled from this opinion. He testified that Mr. Lynch described being partially disabled and that this was his own perception, but not Dr. Khan's opinion. This testimony is confusing because the question Dr. Khan answered, in the portion of the report in which he found that Mr. Lynch had a partial disability, asked for his opinion on any restrictions or limitations faced by Mr. Lynch as a result of accident related injuries. Dr. Khan appears to have provided this opinion but then retracted it.
- [44] In light of Dr. Khan's repudiation of the opinion contained in his report and his unexplained minimization of Mr. Lynch's pain symptoms, I am not satisfied that Dr. Khan upheld his obligation to objectively provide opinion evidence to the Court. Instead, he appeared to be advocating on behalf of the defendant. Where Dr. Khan's opinions conflict with those of the other medical experts, I attach no weight to his evidence.

Dr. Solomons - Psychiatrist

- [45] Dr. Solomons was qualified as an expert in psychiatry. He examined Mr. Lynch on July 14, 2020, and produced a report on August 21, 2020. He found that Mr. Lynch's current mental state was quite normal and free of any signs of psychiatric difficulties. He believes that Mr. Lynch had mild-to-moderate depression in May 2017, when he was prescribed antidepressant medication.
- [46] Dr. Solomons opined that the emotional symptoms experienced by Mr. Lynch after being fired from RFR were congruent with those he experienced since the Accident. Now that Mr. Lynch was pursuing an alternative career path he would not have any further significant emotional difficulties.
- [47] Dr. Solomons purports to have reviewed the detailed counselling records of Dr. James. In these records, Dr. James refers to Mr. Lynch's ongoing depression, concerns about pursuing firefighting, depressed mood, chronic pain, the connection between this pain and his mood, the impact on his marriage, his reduced ability to participate in sports, reports of low energy, poor sleep, and feelings of hopelessness that he would never recover from injuries. Dr. Solomons agreed that pain affects mood. However, he summarized Mr. Lynch's treatment with Dr. James as relating to "fluctuations in his mood, ongoing concerns about his working future, particularly about his inability to pursue firefighting, his good response to antidepressants and exercise, and to him doing well in school." In my view, Dr. Solomons deliberately understated the severity of Mr. Lynch's psychological symptoms.
- [48] Dr. Solomons suggests that "It is puzzling that he has received as many psychotherapy sessions as he has in relation to this seemingly minor accident, the minor nature of his injuries, the lack of interference in his work and the resumption of his sporting activities within the same year as the accident." Each of these statements is incorrect. The Accident was not minor nor were Mr. Lynch's injuries. The effects did interfere with his work because he required and obtained unofficial accommodations from Mr. Guindon. Mr. Lynch did not resume his sporting activities within the same year as the Accident. He missed a full season of both softball and hockey.
- [49] Dr. Solomons also dismissively concluded that Mr. Lynch had received "more than enough counselling to help him adjust and adapt to changes in his career from whatever factors brought this about." He asserts that Mr. Lynch does not require any further counselling in relation to the Accident nor is there any requirement for ongoing antidepressant treatment because of it.
- [50] Dr. Solomons also mistakenly observed that Dr. Cordoni gave Mr. Lynch the "green light" to pursue returning to firefighting.

- [51] Dr. Solomons overlooked the role that daily chronic pain has had on Mr. Lynch's desire to become a firefighter, deliberately understated his symptoms and slanted his evidence in favour of the defendant. Dr. Solomons' evidence is more in the nature of advocacy on behalf of the defendant than objective opinion evidence. Accordingly, I attach no weight to it.

Analysis of Pain and Suffering Damages

- [52] I accept that Mr. Lynch was in good health physically, mentally, and emotionally prior to the Accident. His family and friends, whose evidence I accept without reservation, described him as fun loving, outgoing and extremely active with absolutely no physical restrictions. He enjoyed playing a variety of sports, most notably hockey and softball, and was an extrovert who socialized frequently with his many friends.
- [53] Mr. Lynch's physical injuries were caused by the Accident. There is no evidence that there was any other cause of these injuries. Mr. Lynch suffered from sadness and depression after losing his firefighting position with RFR but he recovered and began applying for other firefighting positions by the end of 2014. Based significantly on the evidence of Mr. Lynch and Dr. Babbage, combined with the corroborating evidence of Barrie Lynch, Julie Lynch and several of Mr. Lynch's friends, I am satisfied that there is a substantial connection between the Accident and Mr. Lynch's psychological problems.
- [54] All of Mr. Lynch's family and friends who testified noted that his personality changed following the Accident. He was no longer the outgoing, charismatic, and optimistic person that he was prior to the accident. He became withdrawn, somewhat short-tempered, irritable, and sad.
- [55] Mr. Lynch is extremely disappointed by his inability to play with and coach his young son. He expected to teach the son he never expected to have how to throw, catch, skate, shoot, and play a wide range of sports. These hopes were largely dashed by the Accident because Mr. Lynch's ongoing pain symptoms prevent him from regularly doing these activities with his son. This is a significant loss.
- [56] Mr. Lynch's relationship with his wife has also suffered. Both described reduced intimacy and frustration over Mr. Lynch's inability to assist with housekeeping and childcare. Their relationship is under strain and in peril as a direct consequence of the Accident.
- [57] The observations of Mr. Lynch's family and friends are consistent with his evidence and with the observations and opinions of Dr. Cordoni, his family physician, Dr. Babbage and Dr. MacInnes. I am satisfied that his physical and psychological injuries, including depression, and anxiety, were caused by the Accident.

- [58] Mr. Lynch's pain and psychological symptoms are ongoing over five and a half years after the Accident. The medical experts agree his prognosis is guarded. Mr. Lynch's physical symptoms plateaued in 2017 and have not improved since then. He suffers from daily chronic, intermittent pain. The nature of his work exhausts him and leaves him unable to fully engage with his wife, son, other family members and friends. His relationship is in peril and his ability to parent and engage with his son is restricted.
- [59] I have considered all of the relevant cases referred to by the parties. However, each case must be assessed on its own facts. Taking into consideration Mr. Lynch's circumstances and prognosis, I conclude that he is entitled to \$120,000 in damages for pain and suffering.

LOSS OF PAST EARNING CAPACITY

Relevant Legal Principles

- [60] The principles applicable to the assessment for loss of past earning capacity are:
- An assessment of a loss of income involves a consideration of hypothetical events.
 - The plaintiff need not prove these hypothetical events on a balance of probabilities.
 - A hypothetical possibility will be taken into account provided that the plaintiff establishes that it is a real and substantial possibility, and not mere speculation.
 - Once a hypothetical possibility is established, the Court must consider the likelihood of the event occurring in determining the measure of damages.
 - A causal connection must be established, on a balance of probabilities, between the Accident and the pecuniary loss claimed.
 - It is up to the trial judge to determine what approach to use to quantify the loss (i.e., an earnings approach or a capital asset approach).

See: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 (Goepel J.A. in dissent, but not on this point); *Griffioen v. Arnold*, 2019 BCCA 83 at para. 67; *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36-37; and *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 186.

Plaintiff's Position on Loss of Past Earning Capacity

- [61] Mr. Lynch was in the process of applying for firefighting jobs when the Accident happened. He submits that there is a real and substantial possibility that he would have found another job as a firefighter by 2016.
- [62] Mr. Lynch believes that he could have overcome his performance issues at RFR and become a firefighter. He notes that after his termination, he made it to the interview stage with the Vancouver Fire Department in December 2014 and to the ride-along stage with the Surrey Fire Department in 2015. Mr. Lynch's further submits that it would have taken him at most two years to succeed in obtaining another firefighting position.

- [63] Applying the wage differential between firefighters and his actual income, Mr. Lynch seeks \$130,854 in respect of the difference between these incomes for the period from 2016 to 2020.

Defendant's Position on Loss of Past Earning Capacity

- [64] The defendant denies that Mr. Lynch is entitled to a claim for loss of past earning capacity. He submits that this claim is not supported by the evidence and ought to be rejected because Mr. Lynch's career aspirations were speculative and unlikely to develop, particularly in light of his dismissal from RFR. He notes that there is no affirmative evidence from any prospective employers suggesting that Mr. Lynch would have been rehired as a firefighter. He asserts that a negative inference can be drawn from his prior dismissal and absence of any subsequent job offers.
- [65] Chief Wilkinson of RFR testified that there were several deficiencies in Mr. Lynch's performance that resulted in his termination. He agreed that the physical deficiencies were not determinative; however, Mr. Lynch's failure to pass three of four quizzes and one subsequent re-test were the reason for his dismissal.
- [66] The defendant submits that Mr. Lynch's frustration in respect of his failure to become a firefighter is unrelated to the Accident and not compensable by the defendant. Specifically, he says that there is no real and substantial possibility of a loss of earning capacity as a result of the accident.
- [67] Alternatively, if a real and substantial possibility exists, the defendant further says that negative contingencies should be applied to any award including those which reflect the uncertain trajectory of Mr. Lynch's career following his dismissal from RFR and his present opportunities with the City of Burnaby. He therefore suggests that any award under this head of damages should reflect the very low chance of such a loss occurring. He notes that Mr. Lynch has not suffered any loss of income since the date of the Accident and that he has secure, unionized employment with the City of Burnaby that he does not intend to leave.
- [68] If the Court concludes that there is a real and substantial possibility of a loss of income earning capacity, the defendant suggests that the capital asset approach is more appropriate than the earnings approach in quantifying Mr. Lynch's loss.

Factual Findings on Loss of Past Earning Capacity

- [69] From a young age, Mr. Lynch wanted to be a firefighter. After graduating from high school in 2000, he worked on a temporary basis with the Parks Department at the City of Coquitlam for ten years. He did not work there during the winter months and used some of this time to prepare to apply for firefighting positions.

- [70] In 2007, Mr. Lynch attended a firefighting course in Texas. After graduating from that program, he began coursework at Kwantlen College in order to obtain 30 post-secondary credits. This is a requirement for most fire departments in Greater Vancouver. He also obtained a Level 3 Emergency Medical Responder certification, took a number of relevant courses through the Justice Institute, and obtained an auxiliary firefighter position with the Coquitlam Fire Department. In December 2011, Mr. Lynch completed the 30 credit requirement at Kwantlen College and began applying for firefighting positions throughout Greater Vancouver.
- [71] Firefighting applications involve multiple steps. These include a written examination, extensive physical abilities testing, ride-alongs, and interviews. He advanced to the interview stage with Vancouver Fire and was told that he should improve his interview skills. He worked with an interview coach to strengthen these skills.
- [72] Mr. Lynch has several friends and acquaintances who are firefighters. He sought their advice and guidance on strengthening his candidacy to join their ranks. He also worked hard to remain physically fit. He played hockey and softball several times per week and regularly exercised independently.
- [73] Starting in 2011, Mr. Lynch applied for all advertised firefighting positions in Greater Vancouver. He advanced through part of the process in Langley, Port Coquitlam, Surrey, Richmond, and the North Shore triple hire that recruited firefighters for West Vancouver, the City of North Vancouver and the District of North Vancouver.
- [74] The second time he advanced to the interview stage of the firefighting application process, with RFR, he was hired. He received the RFR offer in December 2013 and began working there in January 2014.
- [75] Chief Wilkinson of RFR testified that in the year Mr. Lynch was hired, there were approximately 500 applicants for 14 positions.
- [76] Chad Wren, Brad Rimek, and Mike Donoghue, all friends of Mr. Lynch and firefighters, attested to his determination to obtain another firefighting position after his dismissal from RFR. He sought their advice, tried to improve himself, and was motivated to find another opportunity to pursue his dream. They all testified that new firefighters range in age from their early 20s to early 40s. Mr. Lynch was within this range.
- [77] Mr. Rimek, a Fire Captain with the Surrey Fire Department, testified that candidates who make it to the ride-along stage have about a one in three or one in four chance of being hired.
- [78] Mr. and Mrs. Lynch had been trying to conceive since 2011. After Ms. Lynch miscarried, she was diagnosed with premature ovarian failure and told that she had very little chance of having a child. However, in January 2013, Ms. Lynch became pregnant and in late September 2013, their son was born.

- [79] As is the case for most first time parents, the newborn stage was both exciting and exhausting. Layered onto this, their son experienced respiratory and cardiac problems in his first few months of life. He was hospitalized on three occasions including on Boxing Day 2013. He suffered further health problems in the first few months of 2014. During this period, Mr. Lynch was overwhelmed while trying to keep up with the training at RFR, study for the tests and quizzes, care for his son, and assist his wife who was on maternity leave.
- [80] In April 2014, he took the first series of written assessments required by RFR: four quizzes. He failed three of them. He completed re-tests for the three failed quizzes and passed two of them but failed one.
- [81] In June 2014, his employment with RFR was terminated. He received a letter that stated in part:

Throughout your tenure with RFR you have failed to perform up to department standards in that you failed quizzes, formal exams and most recently, a failure on a retest of a critical and safety sensitive exam, "Fire Behaviour".

- [82] Mr. Lynch was shocked and devastated by his termination from RFR. His lifelong dream of becoming a firefighter came to an abrupt end. He felt like a disappointment to his wife and newborn son and he worried about his ability to support and care for them. Over the next few months, he experienced depressed mood and gained some weight. His wife, father, and friends all described him as being devastated by the loss of his position at RFR.
- [83] By the fall of 2014, Mr. Lynch resumed applying for firefighting positions. He applied in Vancouver, Surrey and Abbotsford. He advanced to the interview stage with the Vancouver Fire Department and the ride-along stage with the Surrey Fire Department but he did not obtain either position. During his December 2014 interview with Vancouver Fire, he was asked about his termination from RFR. He explained the circumstances and testified that he was told that the reason he was not hired for this position was that it was "too soon" after his termination from RFR.
- [84] Mr. Rimek is a Fire Captain with the Surrey Fire Department and a friend of Mr. Lynch. He recalls that Mr. Lynch was devastated by his termination from RFR but demonstrated hard work and dedication in his subsequent applications to become a firefighter.
- [85] Mr. Lynch also applied for parks maintenance positions with Metro Vancouver and the City of Burnaby. He received offers from both and chose the City of Burnaby because it also has a fire department and he thought working within that municipality would enable him to apply for a firefighting position as an internal applicant. He began working for the City of Burnaby Parks Department in May 2015 as a temporary full-time parks maintenance worker.

[86] After the Accident, Mr. Lynch wanted to continue pursuing firefighting positions but he was concerned that his pain symptoms would hinder him. He did not miss any time from work because he was in a new position and felt that he could not afford to miss time because he had limited sick leave benefits. He also did not seek a formal accommodation because of the stigma associated with that type of request. However, he had an informal agreement with Mr. Guindon who provided him with unofficial accommodations.

[87] Dr. Cordoni, Mr. Lynch's family physician, noted that:

- In July 2015, she recommended that he not apply for firefighting positions;
- In January 2016, she suggested that he further delay pursuing a firefighting position until he had completed active rehabilitation;
- In April 2016, he was not yet fit enough to apply to become a firefighter but he could resume playing softball and skating;
- In June 2016, she suggested that he resume playing recreational hockey and begin targeted exercises to prepare for the rigorous physical testing involved in applying to become a firefighter;
- In September 2016, she noted that hockey was making his neck and back pain worse and he was discouraged that his dream of becoming a firefighter was slipping away. Mr. Lynch reported reduced self-confidence and marital problems;
- In December 2016, Mr. Lynch's chronic neck and back pain prevented him from applying for firefighting positions;
- By March 2017, she encouraged Mr. Lynch to consider whether if hired as a firefighter he could sustain the responsibilities of this position;
- In May 2017, she advised him that his desire to become a firefighter may not be viable; and
- In July 2017, she told Mr. Lynch that even if he was able to pass the required physical test to become a firefighter, he would not reliably be able to do the heavy lifting required of this position.

[88] In 2017, Mr. Lynch realized and grudgingly accepted that he would not be able to pursue a career in firefighting. Instead, he began upgrading his education by commencing a local government administration program at Capilano University and completing an internal leadership program. His objective was to move into a less physically demanding position within the City of Burnaby by bridging his lack of seniority with enhanced education.

[89] He became a permanent employee of the City of Burnaby in December 2017. In September 2017, he enrolled in a local government program at Capilano University. He must complete two more courses to complete this program and intends to do so by June 2021. He completed a leadership program at the Justice Institute and applied to a masters program at Royal Roads University.

- [90] Dr. Babbage concludes there is a high likelihood that Mr. Lynch will need to take time off for SSD or PDD because his chronic depression is such that he will not be able to work durably and consistently. Furthermore, his marital difficulties combined with his parenting concerns pose a significant risk of aggravating his psychiatric condition. He is therefore vulnerable to missing work depending upon fluctuating future stressors.

Louise Craig - Physiotherapist and Functional Capacity Evaluator

- [91] Louise Craig was qualified to give expert opinion evidence as a physiotherapist and functional capacity evaluator. She assessed Mr. Lynch on February 25, 2020 and produced a report dated August 18, 2020.
- [92] Ms. Craig concluded that Mr. Lynch demonstrates the capacity to partially meet the job demands of his current occupation as a park maintenance worker, with limitations for reduced capacity for sustained neck and upper back postures, heavier lifting, pushing and carrying and repetitive and upper-level reaching. She believes that by continuing to do this work, he will continue to aggravate his neck, trapezius area/upper back and right shoulder. This may lead to time missed from work and a risk of reduced employment and loss of employment.
- [93] It is Ms. Craig's opinion that Mr. Lynch will not be able to work as a firefighter without substantial improvement in his overall function, upper back/shoulder strength, and pain management. A reduced scope of occupations are now available to him from a physical perspective, thereby leaving him with reduced competitive employability.
- [94] Dr. MacInnes found that the nature of Mr. Lynch's current position will likely cause ongoing challenges given his current symptoms and he may have difficulty maintaining his current employment. He noted Mr. Lynch is currently accommodated on an informal basis, but he may find it necessary to reduce his workload to adequately manage his pain symptoms. He also expects that there is a high likelihood that Mr. Lynch will have to take time off of work to manage his pain and psychological symptoms.

Analysis of Loss of Past Earning Capacity

- [95] Mr. Lynch had a longstanding ambition to become a firefighter. This was more than a mere dream and he devoted himself to this goal beginning in 2007. He completed a firefighting program in Texas in 2007, obtained the required post-secondary credits, completed emergency responder training, took a number of relevant courses at the Justice Institute, and volunteered as an auxiliary firefighter. He was physically active and exercised regularly in order to meet the rigorous physical testing requirements. He applied throughout Greater Vancouver and used the feedback he received to improve his candidacy for subsequent applications. He frequently sought advice and guidance from firefighting friends.

- [96] He achieved a significant milestone when he was hired by RFR as a trainee firefighter in January 2014.
- [97] Mr. Lynch also became a parent roughly three months before starting at RFR. This convergence was extremely stressful and overwhelming. He tried to balance the long days and challenges of learning to be a firefighter with the stress of helping care for a newborn with medical issues. He felt unable to give either task the required attention.
- [98] Mr. Lynch's employment with RFR was terminated on June 18, 2014, during his probationary period. Mr. Lynch's quiz grade was the main reason for his dismissal.
- [99] Mr. Lynch was understandably devastated. His wife, father and several friends testified that this was a difficult and disappointing period. Mr. Lynch was dismayed by this setback and took several months to recover.
- [100] By the fall of 2014, he resumed applying for firefighting positions. He progressed through the initial screening and physical testing phases, and advanced to the interview stage in Vancouver and the ride-along stage in Surrey. However, he did not obtain either position.
- [101] The explanation he received, that he did not progress further because it was "too soon", lends itself to several interpretations. On its face, it may suggest that a certain period of time must pass before another fire department would consider hiring him. It also may have been a vague yet polite way of conveying that his chances of being re-hired were adversely affected by his dismissal from RFR.
- [102] Mr. Lynch applied for and obtained employment with the City of Burnaby Parks Department. I accept his evidence that he chose this position over another offer because he believed that working with a specific municipality would improve his chances of obtaining employment with its fire department.
- [103] Chief Wilkinson, Mr. Rimek, Mr. Wren, and Mr. Donoghue all work in various capacities as firefighters. They all testified that the application process to become a firefighter is extremely competitive. Mr. Lynch's success in obtaining a position at RFR indicates that he was a competitive candidate. This also explains why his subsequent applications progressed in Vancouver and Surrey. However, his dismissal from RFR would have been a red flag, worthy of further investigation, on any subsequent application.
- [104] I am satisfied that there is a real and substantial possibility that Mr. Lynch would have received a second chance to become a firefighter. His commitment to this objective was beyond doubt. The unfortunate convergence of dealing with an ill newborn while managing the rigours of the firefighting training program were the reason for his dismissal from RFR. After recovering from this disappointment, Mr. Lynch began reapplying for firefighting positions and advanced in two of the processes he applied on.

- [105] Chief Wilkinson testified that the fact of dismissal would be a serious concern and would be difficult to overcome on subsequent applications. A prospective employer may not be willing to take a chance on someone who previously failed during the probationary period. However, the fact that Mr. Lynch was hired by RFR and subsequently progressed through several stages of the process in two subsequent applications suggests that he may have been a viable candidate. He was comfortably within the age range of new firefighters. I do not accept that one setback would have foreclosed the possibility that Mr. Lynch could become a firefighter. With renewed determination and effort, it is entirely possible that he would have received another opportunity to fulfill his lifelong ambition.
- [106] The Accident ended this dream because he was no longer able to endure the physical demands of firefighting fitness tests and the rigorous demands of this work. I accept Ms. Craig's conclusion that Mr. Lynch cannot do this type of work. If he were able to, I am convinced he would continue to pursue his desire to do it.
- [107] However, in my view, a negative contingency should be applied to account for the diminished likelihood that Mr. Lynch would have obtained another firefighting position in light of his dismissal from RFR and taking into account the vague "too soon" feedback he received on a subsequent application. Firefighting positions are extremely competitive. I accept Chief Wilkinson's evidence that dismissal from a fire department would be difficult to overcome. Balanced against this is the strength of Mr. Lynch's candidacy and his obvious determination to fulfill his ambition to become a firefighter. I assess Mr. Lynch's chances of obtaining a subsequent firefighting position at 25 percent.
- [108] Accordingly, while I accept Mr. Lynch's calculations for loss of past earning capacity, a 75 percent reduction is necessary to account for the possibility that he may not have obtained another firefighting position. On this basis, I conclude that Mr. Lynch is entitled to \$32,714 in loss of past earning capacity as a result of the Accident.

LOSS OF FUTURE EARNING CAPACITY

Relevant Legal Principles

[109] The principles applicable to the assessment of future loss of working capacity are:

- A plaintiff should be put in the position he or she would have been in absent the accident, to the extent possible.
- The court should compare the plaintiff's likely future working life absent the accident to what is likely to occur with the accident having happened.
- The assessment must be based on evidence, but is not a mathematical calculation.
- The court can employ the "earnings approach" or the "capital asset" approach in assessing the loss.

- The plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss.
- The earnings approach is more appropriate when the loss is easily measureable.
- When applying the earnings approach, the Court must consider the overall fairness and reasonableness of the award based on all of the evidence.
- Comparison to other cases is generally of limited utility, though other cases can provide some guidance.

See: Thompson at para. 119, citing to Pololos v. Cinnamon-Lopez, 2016 BCSC 81; Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at paras. 3-33.

- [110] Mr. Lynch's own perception that he has a diminished capacity to earn income in the future is insufficient. He must show that there "is a realistic possibility [that he] will be less able to compete in the marketplace--with economic consequences, not merely psychological ones": Kim v. Morier, 2014 BCCA 63 at para. 8.
- [111] Contingencies can increase (positive) or decrease (negative) a damages award. A party relying on a contingency must be able to point to evidence in support of the application of a contingency: Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229 at 253; Graham v. Rourke (1990), 74 D.L.R. (4th) 1 (O.N.C.A.) at para. 47.

Plaintiff's Position on Future Loss of Future Earning Capacity

- [112] The plaintiff submits that he has proven a real and substantial possibility of loss of future income earning capacity. He had no pre-Accident limitations when he started working at the City of Burnaby. After the Accident, Mr. Guindon, his foreman, provided unofficial accommodations such as assisting with lifting and moving him to positions and tasks that would be less physically demanding. As a result, other employees felt resentful and raised a complaint about Mr. Lynch not doing his share of the work. Mr. Guindon confirmed that his supervisor was aware of these concerns and this could become an issue in the context of Mr. Lynch applying for a promotion.
- [113] Mr. Lynch submits that but for the Accident, he would have secured a position as a firefighter within two years of resuming his applications for this type of position. Instead, he is trying to move into more senior positions with the City of Burnaby to avoid the physically demanding work that he currently does.
- [114] Applying the difference between his anticipated income with the City of Burnaby and the income earned by firefighters, Mr. Lynch calculates the present value of his loss of future earning capacity to be \$394,324. He further submits that many of the labour market contingencies do not apply to him because he has pushed through his pain, continues to work full-time, and will not voluntarily leave the workforce or work on a part-time or part-year basis. His employment with the City of Burnaby is secure.

[115] Mr. Lynch believes that several positive contingencies could lead to greater losses specific to his circumstances. These include:

- the risk identified by Ms. Craig that as Mr. Lynch ages, he will miss more work than he has to date;
- the risk to Mr. Lynch that his chronic pain and psychiatric symptoms could result in further time off work; and
- the risk that his coworkers' complaint regarding the distribution of work between them and Mr. Lynch could interfere with his chances of promotion.

[116] Mr. Lynch dismisses the possibility of a negative contingency in respect of the pain symptoms in his AC joints as speculative because there is no medical opinion or other evidence that supports disability from work due to this condition.

[117] Taking into consideration all of the factors in Mr. Lynch's case, he claims a loss of future earning capacity of \$400,000. Alternatively, if a 50 percent contingency is applied to account for the possibility that Mr. Lynch may not have obtained a firefighter position, he suggests that his claim would be \$200,000.

Defendant's Position on Future Loss of Earning Capacity

[118] The defendant submits that Mr. Lynch has not established that there is a real and substantial possibility that he will lose income in the future and that any such award would be speculative. The defendant notes that he has been working full-time since the Accident, has received positive feedback on his job performance, and anticipates progressing in his career and continuing to work at the City of Burnaby until he retires.

[119] The defendant submits that no evidence was adduced to establish that the plaintiff was likely to receive another firefighting job following his dismissal from the RFR.

[120] Alternatively, if a real and substantial possibility exists, the defendant asserts that negative contingency should be applied to reflect the uncertain trajectory of Mr. Lynch's career following his dismissal from RFR and his ability to continue working despite his injuries and pain symptoms. He also submits that the capital asset approach is appropriate in these circumstances.

Factual Findings on Loss of Future Earning Capacity

[121] See Section above on Factual Findings on Loss of Past Earning Capacity.

Analysis of Loss of Future Earning Capacity

[122] As described above, I am satisfied that there is a real and substantial possibility that Mr. Lynch would have obtained another firefighting position but for the Accident. The chances of him obtaining this position are 25 percent in light of his previous dismissal from RFR and subsequent inability to obtain a position before the Accident. In these circumstances, he is entitled to \$100,000 in respect of loss of future income earning capacity.

COST OF FUTURE CARE

Relevant Legal Principles

[123] The principles applicable to the assessment of costs of future care are:

Providing adequate damages for future care for an injured plaintiff is of paramount importance. The purpose of such an award is to provide for assistance directly related to the injuries caused by the accident. The test for determining an appropriate award is an objective one based on medical evidence. The focus should be on the plaintiff with fairness to the other party being achieved by ensuring that the expenses are legitimate and justifiable. The plaintiff needs to show: (a) a medical justification for the items claimed; and (b) that the amount claimed is reasonable. "Medical justification" is broader than "medically necessary". Specific items of future care need not be expressly approved by medical experts; it is sufficient if the totality of the evidence supports the award for specific items. Common sense should be employed in this assessment. No award should be included for items that would be incurred in the absence of the accident.

See: Thompson at para. 149, citing *Dzumhur v. Davoody*, 2015 BCSC 2316.

The Parties' Positions on Cost of Future Care

[124] With reference to the recommendations of Drs. MacInnes and Babbage and Ms. Craig, Mr. Lynch seeks nine pain management sessions annually. These include physiotherapy, massage therapy and chiropractic treatments. He seeks \$18,365 for these treatments to age 75. He also seeks \$1,309 for kinesiology treatments; \$33,132 for eight sessions per year of psychological counselling to age 65, including a contingency; \$30,727 for annual medication; and \$73,939 for home services to age 65 including household cleaning, seasonal cleaning and handyperson services. All amounts are discounted to present value.

[125] The defendants submit that therapeutic treatments should not be provided beyond five years and that it is unlikely that Mr. Lynch will incur these costs for the remainder of his life. He further asserts that Ms. Craig's recommendations for home cleaning and yard maintenance are not costs which will likely be incurred by Mr. Lynch because his spouse is physically able-bodied, Mr. Lynch has the capacity to do this work, and the costs associated with their current residence are excessive. He submits that a cost of future care award of \$38,000 is appropriate in the circumstances.

Factual Findings and Analysis on Costs of Future Care

- [126] Dr. MacInnes recommends multimodal management of Mr. Lynch's chronic pain symptoms through the use of physiotherapy, massage therapy and chiropractic treatments. He indicates that these recommendations will not cure Mr. Lynch's condition but may assist in the management of his chronic pain and his overall quality of life. He believes that Mr. Lynch will require ongoing management of his chronic pain symptoms.
- [127] Dr. Babbage recommends psychotherapy on a long-term basis with a contingency for additional treatment because Mr. Lynch is at risk of developing a major depressive episode. He also recommends long-term treatment with antidepressant medication to manage Mr. Lynch's persistent depressive disorder. He further recommends regular access to a personal trainer or kinesiologist.
- [128] Ms. Craig found that Mr. Lynch is likely at or close to maximum physical rehabilitation. She recommends access to a combination of physiotherapy, massage therapy, or chiropractic treatment at a rate of 6 to 12 sessions annually. Ms. Craig recommended these therapies indefinitely because they will assist with pain management for symptom flares, and help maintain his function and ongoing exercise program. Dr. MacInnes recommends up to eight sessions of kinesiology per year whereas Ms. Craig recommends 12 initial sessions of kinesiology with periodic review.
- [129] In my view, nine annual sessions of physiotherapy, massage therapy or chiropractic treatments are medically justified and reasonable. This number is considerably lower than Mr. Lynch's current usage, which is four to six monthly treatments of chiropractic and massage therapy. He testified to the benefit he receives from these treatments and his intention to continue using them.
- [130] Mr. Lynch suffers from chronic pain and his condition is unlikely to subside. He receives benefits from therapeutic treatments and is entitled to receive them as recommended by Dr. MacInnes and Ms. Craig. Mr. Lynch is entitled to \$18,365 in respect of his choice of physiotherapy, massage therapy or chiropractic treatments, nine times per year to age 75. He is also entitled to 12 kinesiology sessions over a one-year period at a present value of \$1,309.
- [131] Turning next to the psychological counselling, I am satisfied that the claim for eight sessions per year is both medically justified and necessary. He has needed this treatment to deal with his psychological symptoms including the problems in his marital relationship, and the disappointment and guilt he feels in being unable to fully engage with his young son. The amount claimed is less than half the number of sessions recommended by Dr. Babbage and aligns with Mr. Lynch's actual usage of this treatment. It is reasonable to expect that he will need it for the rest of his working life, to age 65. Mr. Lynch is entitled to \$33,132 for this treatment to age 65. This amount includes \$868 in respect of a contingency for additional counselling.

- [132] Mr. Lynch uses Cymbalta, trazodone and naproxen to manage his psychological issues, sleep, and pain, respectively. In early 2020, his dosage of Cymbalta was increased to address his depression symptoms. In my view, it is reasonable to expect that he will need this medication for the rest of his life. I am satisfied that the amounts claimed for these medications are medically justified and reasonable. He is entitled to \$1,121 for Naproxen, \$27,329 for Cymbalta, and \$2,277 for Trazadone.
- [133] With respect to housekeeping, Dr. MacInnes concluded that Mr. Lynch will require assistance with heavier household tasks. Ms. Craig assessed Mr. Lynch's function with respect to household cleaning tasks and found that he does not meet the full physical demands for regular household cleaning, seasonal household cleaning, or household maintenance activities. She recommends two hours per month of regular household cleaning, taking into account the size of his current residence and the 50 percent of the housekeeping tasks that Mr. Lynch was responsible for prior to the Accident. With respect to heavier seasonal household cleaning and handyperson services she recommends 10 hours per year of assistance.
- [134] Mrs. Lynch's ability to do these household tasks is irrelevant. Spouses and other family members are not expected to fill in the gaps and provide services that were previously performed by an injured party. The evidence is clear that Mr. and Mrs. Lynch used to divide housekeeping tasks equally. Since the accident, Mr. Lynch is too exhausted from the physical demands of his work to contribute to household maintenance. Virtually all of these tasks fall to Mrs. Lynch.
- [135] I am satisfied that Mr. Lynch is entitled to amounts in respect of regular household cleaning services and heavier, seasonal household cleaning. These are activities that he used to do prior to the Accident. Compensation for his inability to do these tasks is both medically justified and reasonable. He is entitled to \$16,939 in respect of regular housecleaning and \$13,030 for heavier, seasonal cleaning. These amounts are present values of annual amounts to age 65.
- [136] I am not convinced that Mr. Lynch is entitled to an amount in respect of handyperson services. There was little evidence that he used to do this work or that either Mr. or Mrs. Lynch perform these activities with any regularity. The estimate used by Ms. Craig is based on aggregated data and does not take into account that Mr. and Mrs. Lynch live in a strata unit. I am not satisfied that handyperson services are reasonable in these circumstances.
- [137] Mr. Lynch is entitled to \$113,502 for the costs of future care.

PAST LOSS OF HOMEMAKING CAPACITY

Relevant Legal Principles

- [138] The principles applicable to the loss of homemaking capacity are:

- Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
- A plaintiff who has suffered an injury that would make a reasonable person in her circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
- Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, the loss may instead be compensated by a non-pecuniary damages award.
- As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
- Evidence of the loss of homemaking capacity is provided by the work being performed by others, even if done gratuitously.

See: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; and *Kim v. Lin*, 2018 BCCA 77 at paras. 28-34.

The Parties' Positions on Past Loss of Homemaking Capacity

- [139] Mr. Lynch submits that Mrs. Lynch does virtually all of the housekeeping since the Accident. This has contributed to the conflict in their marriage. They have paid for housekeeping in the past and more recently, a friend sent his housekeeper to assist them. Applying the amounts used by Ms. Craig to calculate the cost of future care, Mr. Lynch claims \$10,000 for the past loss of housekeeping capacity over the five and half years since the Accident.
- [140] The defendant relies on Mrs. Lynch's ability to do household tasks and denies that Mr. Lynch is entitled to any amount in respect of the past loss of housekeeping capacity.

Factual Findings and Analysis on Past Loss of Homemaking Capacity

- [141] Mr. Lynch has been unable to perform housekeeping tasks since the Accident. He does not do any cleaning or laundry. He relies on Mrs. Lynch to do these tasks. This fits squarely within the circumstances outlined by the Court in *Lin* as warranting consideration under its own category of pecuniary loss.
- [142] In my view, it is appropriate in the circumstances of this case to award Mr. Lynch \$819 per year for his inability to do regular household cleaning and \$630 per year for in respect of heavier, seasonal cleaning. For the reasons outlined above, I decline to award an amount in respect of handyman services. Mr. Lynch has been unable to do this work in the five and a half years since the date of the Accident. He is therefore entitled to \$7,970 for past loss of homemaking capacity.

SPECIAL DAMAGES

Relevant Legal Principles

[143] The principles applicable to the assessment of special damages are as follows:

Claims for special damages are subject to a consideration of reasonableness, taking into account the nature of the injury sustained, once causation is established. Medical justification for an expense is a factor as to reasonableness, but is not a prerequisite. Subjective factors, such as whether the plaintiff believes the treatment is medically necessary, may also be considered.

See: *Hancott v. Barnes*, 2015 BCSC 1308 at para. 164; *Derksen v. Nicolson*, 2015 BCSC 1268 at para. 78; *Devilliers v. McMurchy*, 2013 BCSC 730 at paras. 72 and 75.

Factual Findings and Analysis on Special Damages

[144] Mr. Lynch seeks special damages of \$18,765 in relation to expenses he incurred for pre-trial treatment, including physiotherapy, active rehabilitation, chiropractic treatment, massage therapy, psychological treatment, medications, and acupuncture less amounts that have been reimbursed.

[145] I am satisfied that the Accident caused the need for the treatments undertaken by Mr. Lynch.

[146] He has established that he reasonably incurred expenses in the amount of \$18,765 attributable to the Accident. He is entitled to special damages of this amount plus pre-judgment interest.

CONCLUSION

[147] Mr. Lynch is entitled to:

- \$120,000 for pain and suffering;
- \$32,714 for loss of past earning capacity;
- \$100,000 for loss of future income earning capacity;
- \$113,502 for cost of future care;
- \$7,970 for past loss of homemaking capacity; and
- \$18,765 for special damages.

COSTS

[148] If the parties wish to make submissions on costs, they may be filed within 30 days of the date of this judgment. If no submissions are received, the plaintiff will have his costs at Scale B.

"Basran J."

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