

CANADA / JUDGMENT

McCullagh v. Rozinbaum

2020 BCSC 429

COURT

Supreme Court of British Columbia

DECIDED

24 March 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 429 McCullagh v. Rozinbaum

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McCullagh v. Rozinbaum,

2020 BCSC 429

Date: 20200324

Docket: M176383

Registry: Vancouver

Between:

Shayne Pattrick McCullagh

Plaintiff

And

Nicoleta Maria Rozinbaum and Horia Claudiu Buzgar

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:

K. Stewart

Counsel for the Defendants:

C.C. Ham

H. Rai

A. Kim

Place and Dates of Trial:

Vancouver, B.C.

February 3-7, and 10-11, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 24, 2020

Table of Contents

I. Introduction. 3

II. The Facts. 3

A. Mr. McCullagh's Life Prior to the Accident 3

B. The Accident 5

C. Events Following the Accident 6

D. The Medical Evidence. 8

III. Liability. 9

IV. Damages. 12

A. Non-Pecuniary Damages. 12

B. Past Loss of Earning Capacity. 14

C. Future Loss of Earning Capacity. 18

D. Cost of Future Care. 20

i. Introduction. 20

ii. Medications. 21

iii. Ergonomic Supplies. 23

iv. Vocational Assessment 23

v. Pain Management Programme. 23

vi. Psychological Counseling. 24

vii. Occupational Therapy. 24

- viii. Household Aids. 24
- ix. Home Support 25
- x. Driving Rehabilitation. 25
- xi. Parenting Course. 26
- xii. Kinesiology. 26
- xiii. Gym/Pool Pass. 26
- xiv. Conclusion on Cost of Future Care. 26
- E. "In Trust" Claim.. 27
- F. Special Damages. 28
- V. Summary and Conclusion. 28

I. Introduction

- [1] On August 25, 2016, the plaintiff, Mr. McCullagh, was injured in a motor vehicle accident that took place at the intersection of 12th Avenue and 6th Street in New Westminster, British Columbia, when the vehicle he was driving was struck by another vehicle driven by the defendant, Ms. Rozinbaum.
- [2] Mr. McCullagh claims that Ms. Rozinbaum was entirely at fault for the accident. He also claims that the injuries he sustained on that occasion have left him in chronic pain and unable to work in his chosen career. He claims to be suffering from related psychiatric injuries that have severely reduced his enjoyment of life, particularly his relationships with family and friends. To compensate him for his various losses, he seeks damages totalling between \$1,138,334.39 and \$1,518,334.49.
- [3] The defendants deny liability. They contend that the accident was caused wholly, or at least partly, by Mr. McCullagh's own negligence. They also dispute the severity of the alleged injuries and their impact on Mr. McCullagh's life. They submit that if he is entitled to damages at all, a comprehensive award of between \$179,086.29 and \$229,086.29 would be sufficient compensation, and that any award should be reduced to account for Mr. McCullagh's contributory negligence.

II. The Facts

A. Mr. McCullagh's Life Prior to the Accident

- [4] Mr. McCullagh grew up in Vancouver. He has two children, a son born in 2004 and a daughter in 2007. He and their mother separated after having been together for approximately four or five years. They share parenting time equally. He subsequently had one other serious romantic relationship in his life, but it too ended after a few years.

- [5] He has always been an engaged parent. He took several months off work following the birth of each child. He testified that he did so because, at the time, his former partner had a better paying job than he did. He also thought it was important for him to spend time with the children. He described how he used to play with them as they were growing up. He often took them hiking, swimming and camping.
- [6] He says that before the accident, he was mechanically minded and particularly liked working with automobiles. He was fastidious about keeping his home tidy. Although he has always been a tenant, he liked performing routine household maintenance work such as changing sinks, cleaning draining systems and ducts. He built two gardens, mowed the lawn and trimmed the hedges. He grew a wide variety of vegetables and learned to can them.
- [7] He left high school to enter the workforce when he was 15. Thereafter, he worked in a variety of vocations but has generally preferred physically demanding jobs. He worked at a carwash, in ticket enforcement, in a warehouse for Raincoast Books, at TexCan Cables and as a service advisor in the automotive industry.
- [8] Until 2013, he worked as an aircraft refueler, line service attendant, and eventually in a managerial role at Million Air, an airline company that caters to wealthy travelers. He lost that job because, he says, he was wrongfully dismissed.
- [9] Thereafter, he worked at Seaspan for several years. He began at an entry level position with the paint crew. That work involved painting, sweeping and grinding metal decking. Eventually, he graduated from there to the Delta Maintenance Facility ("DMF"). After that, he moved to a full-time position at the Barge Maintenance Terminal ("BMT") in North Vancouver. While there, he earned just under \$20 per hour.
- [10] Although he enjoyed the work at the BMT, he found the two-hour commute to North Vancouver to be too onerous. He therefore opted for other work closer to home. He eventually found a full-time position at Samona (Summit Tools), where he earned between \$22 and \$33 per hour doing work that was somewhat less physically demanding than at Seaspan. Despite the change, he continued to take on part-time work at Seaspan with the intention, he said, to move back to the DMF when a full-time position became available there.

B. The Accident

- [11] In the early morning hours of August 25, 2016, Mr. McCullagh was driving northbound on 6th Street in New Westminster on his way to work at Summit Tools. He had just turned right onto 6th Street from 10th Avenue when he noticed that the traffic lights were not functioning properly at the intersection with 12th Avenue, two blocks ahead. The lights there were flashing amber. As he approached the intersection, he says he slowed down and then stopped completely because there was a truck ahead of him in the intersection making a left turn onto 12th Avenue. Both 6th Street and 12th Avenue have only one lane in each direction at that intersection.

- [12] He waited while two more vehicles entered the intersection from 12th Avenue, one from the east and the other from the west. Both turned left in front of him onto 6th Avenue. When he thought it was safe to proceed through the intersection, he did so. As he approached the cross-walk on the far side of the intersection, he felt another vehicle collide into the right rear passenger side of his vehicle. The force of the collision spun his vehicle 90 degrees so that it came to rest facing east.
- [13] Ms. Rozinbaum had been travelling westbound on 12th Avenue intending to turn left at the intersection and head south on 6th Street. She stopped at the stop sign at 12th Avenue. There was a stationary bus on her right side just ahead of her, possibly at a bus stop. The bus driver waved her on, so she signalled and commenced her turn. She recalls looking left, forward and right before proceeding. When the turn was almost complete, the right front bumper of her vehicle struck the rear passenger side of Mr. McCullagh's vehicle.
- [14] Neither driver had seen the other before their vehicles collided.
- [15] Immediately after the collision, Mr. McCullagh felt like he had been stabbed in the lower back. He soon began to feel pain also in his mid back, shoulder and neck. The pain grew more serious as the day wore on. Initially, however, he felt well enough to continue on to work. After exchanging information, both drivers drove away themselves.

C. Events Following the Accident

- [16] The pain spread and grew more intense once Mr. McCullagh arrived at work. He had difficulty lifting heavy equipment. His supervisor sent him home after noticing his discomfort.
- [17] Later that day, he attended at a walk-in clinic in Surrey (he did not have a family physician at the time). At the clinic, he was told to apply heat and cold and to resume his normal activities gradually. He was assured that he would feel better soon. He did not. The pain continued to worsen over the next several days. He eventually decided to seek a second opinion at another walk-in clinic, this time in Vancouver. He was put on anti-inflammatory medication and told to stay off work for two weeks.
- [18] He eventually found a family physician closer to his home in Surrey. He was referred to physiotherapy and told that he would be unable to return to work until the inflammation improved.
- [19] In October 2016, his mother moved in with him to help him cope. She assisted with the cooking, cleaning and looking after the children. After a year, she left in order to take a job in Kelowna. Following the departure of his mother, Mr. McCullagh moved into a less expensive two-bedroom basement suite in Vancouver. He sleeps on a sofa in the living room so that the children can have the bedrooms when they are with him.

- [20] He never returned to work at Summit Tools because his former position there was eliminated in a corporate reorganization. Seaspan eventually contacted him to advise that a new position had become available at the DMF. He set up a meeting to discuss that opportunity, only to cancel it at the last minute because his back had given out on him.
- [21] He has tried since the accident to find less physically demanding work, but with only limited success. He spent a few months painting parking lots and attending to the ropes for window washers, but in each case the work aggravated his symptoms and he was unable to continue.
- [22] Since October 2018, he has been working part-time at Creative Transportation Solutions, where he is supervised by his sister. The work includes counting cars, installing traffic cameras and painting. Although that work too tends to aggravate his symptoms, he has been approved by his family doctor to work for up to four hours per day, on three days per week. He earns \$16.50 per hour.
- [23] He hopes to retrain with a view to finding less physically demanding work in an office setting or as a counselor. To that end, he has taken courses to obtain his high school equivalency, but his progress has been slow thus far because his pain symptoms prevent him from taking more than one course at a time.
- [24] Without steady work, his financial position has deteriorated. He has had to move apartments. He sold his belongings and took out loans. He has had to rely on financial assistance from friends and family. He sometimes takes meals at the food bank.
- [25] He has tried various treatments in an effort to alleviate his pain. He has had saline injections from his neck to his lower back. He has had laser treatments and dry needling. He has had counseling and learned meditation techniques. He has tried physiotherapy, chiropractic and occupational therapy. He has received vocational counseling in an effort to find work and to retrain.
- [26] He testified that his headaches have become less frequent - they no longer occur every day but just a few times per week. On the other hand, the pain in his lower and mid back, neck and shoulder have generally been constant. He says that the pain also radiates occasionally into his legs causing numbness in his feet.
- [27] He does not drive as much as he did before. He attributes this to his driving anxiety and his inability to afford to insure a vehicle. He finds that driving aggravates his shoulder pain. He has both gained and lost weight since the collision due to stress, lost muscle mass from not being able to work, and not being able to afford food.
- [28] He has become socially isolated due to his depression. His relationship with the children is not what it was before because he is often irritable and frustrated.

D. The Medical Evidence

- [29] Mr. McCullagh adduced expert opinion evidence from three physicians: Dr. Krassioukov (a physical medicine and rehabilitation specialist), Dr. Janicki (a neurosurgeon) and Dr. Babbage (a psychiatrist).
- [30] Dr. Krassioukov assessed Mr. McCullagh on January 12, 2019. He concluded that Mr. McCullagh has developed a left L5/S1 disc herniation and right S1 radiculopathy (that is, damage to the nerves at those locations) and that he has suffered soft tissue injuries (that is, damage to the muscle skin and joints) in the neck, mid and lower back. These injuries have led to cervicogenic headaches, depression and anxiety, cognitive deficits, posttraumatic stress disorder and chronic pain. Dr. Krassioukov's prognosis for a successful recovery and return to work is guarded.
- [31] Dr. Janicki assessed Mr. McCullagh on October 3, 2019. He concluded that Mr. McCullagh suffered an L5-S1 disc herniation with chronic predominant discogenic back pain greater than radicular features as well as cervical, thoracic and lumbar soft tissue injuries. Dr. Janicki recommended steroid injections, a discectomy and a spinal fusion. Mr. McCullagh has since tried the steroid injections but they did not improve matters. He is therefore now on a waitlist for the recommended surgical procedures. The evidence was that the waitlist for a fusion surgery is between 1 and 1.5 years and that Mr. McCullagh will require a year of rehabilitation following the procedure. Dr. Janicki believes that the surgery is likely to be successful, although the overall prognosis is more guarded because the injuries to the soft tissues will not be addressed.
- [32] Dr. Babbage assessed Mr. McCullagh on July 11, 2019. His opinion was that Mr. McCullagh suffers from both chronic Somatic Symptom Disorder (SSD) and Major Depressive Disorder (MDD). According to Dr. Babbage, these are mutually exacerbating conditions that have contributed to Mr. McCullagh's poor response to treatment. Dr. Babbage believes that although Mr. McCullagh's mood and level of interest will likely improve with anti-depressant medications, full recovery is unlikely due to the chronicity of his MDD and SSD. His residual symptoms of anxiety, poor motivation, and decreased stamina are likely to persist. Mr. McCullagh's psychiatric prognosis is said to be guarded. Dr. Babbage's view is that the psychological symptoms have become independent and may not resolve even if the surgery is partially successful in alleviating some of the physical pain. Moreover, if Mr. McCullagh is disappointed with the results of the surgery, his psychiatric symptoms could worsen.
- [33] The defendants called no medical evidence.

III. Liability

[34] In assessing who was at fault for the accident and in what proportion, one must begin with the governing legislation. Sections 131(3), 144(1), 174, 175 and 186 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 are all relevant to the analysis. Those provisions state, in relevant part, as follows:

131 (3) When rapid intermittent flashes of yellow light are exhibited at an intersection by a traffic control signal,

- (a) the driver of a vehicle facing the flashes of yellow light may cause it to enter the intersection and proceed only with caution, but must yield the right of way to pedestrians lawfully in the intersection or an adjacent crosswalk

144 (1) A person must not drive a motor vehicle on a highway

- (a) without due care and attention,
- (b) without reasonable consideration for other persons using the highway, or
- (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

175 (1) If a vehicle that is about to enter a through highway has stopped in compliance with section 186,

- (a) the driver of the vehicle must yield the right of way to traffic that has entered the intersection on the through highway or is approaching so closely on it that it constitutes an immediate hazard, and
 - (b) having yielded, the driver may proceed with caution.
- (2) If a vehicle is entering a through highway in compliance with subsection (1), traffic approaching the intersection on the highway must yield the right of way to the entering vehicle while it is proceeding into or across the highway.

186 Except when a peace officer directs otherwise, if there is a stop sign at an intersection, a driver of a vehicle must stop

- (a) at the marked stop line, if any,
- (b) before entering the marked crosswalk on the near side of the intersection, or

- (c) when there is neither a marked crosswalk nor a stop line, before entering the intersection, at the point nearest the intersecting highway from which the driver has a view of approaching traffic on the intersecting highway.
- [35] The effect of these provisions was explained by Myers J. in *Coffey v. Sabbaghan*, 2019 BCSC 2202, as follows, at paras. 51-57:
- [51] With respect to the law, s. 174 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 sets out the applicable legislation governing left-hand turns. Counsel are familiar with that particular section, and I will not read it.
- [52] As stated by the Court of Appeal at para. 33 of the decision in *Nerval v. Khehra*, 2012 BCCA 436:
- [33] The principles laid down in *Pacheco* lead to the conclusion that the starting point of the analysis is that when a left turning driver is assessing making a left turn in an intersection, he or she must yield the right of way to oncoming traffic unless it is not an immediate hazard. Describing a driver as dominant means no more than that driver has the right of way, whereas the servient driver has the obligation to yield the right of way. The obligation imposed by s. 174 on the left turning vehicle is that it "must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard". A left turn must not be commenced unless it is clearly safe to do so. If there are no vehicles in the intersection or sufficiently close to be an imminent hazard, the driver may turn left and approaching traffic must yield the right of way. In other words, if a left turning driver complies with his or her obligation only to start the left turn when no other vehicles are in the intersection or constitute an immediate hazard, then the left turning driver assumes the relationship of being the dominant vehicle and approaching vehicles become servient and must yield the right of way.
- [53] The key requirement is that a left-turning driver must yield to oncoming traffic that is in the intersection or so close as to constitute an immediate hazard. An approaching vehicle is an immediate hazard if it is so close to the intersection that its driver must take some sudden or violent action to avoid the threat of a collision. A left-turning driver must assess whether the oncoming driver is an immediate hazard at the moment before the left-turning driver actually starts to make the turn: *Raie v. Thorpe* (1963), 43 W.W.R. 405 (C.A.)
- [54] As set out in *Nerval v. Khehra* a two-stage analysis is required in determining liability pursuant to s. 174 of the Motor Vehicle Act.
- [55] In the first stage the court must determine whether an immediate hazard was present when the left-turning driver commenced the turn. If it is determined that no immediate hazard was present, a left-turning driver becomes the driver with the right-of-way and the oncoming driver is required to yield.
- [56] The burden of proving the absence of an immediate hazard falls on the left-turning driver.

- [57] At the second stage of the analysis, even if the oncoming driver is found to have had the right-of-way, the court must determine whether this driver was nonetheless negligent and at fault for causing or contributing to the accident.
- [36] Both parties accuse the other of driving without due care and attention, contrary to s. 144(1)(a). Mr. McCullagh alleges that he was entitled to the right of way pursuant to s. 175(1)(a) but that Ms. Rozinbaum failed to yield to him, as an "immediate hazard," as the statute required. Ms. Rozinbaum contends that Mr. McCullagh was speeding when he entered the intersection, contrary to s. 144(1)(c).
- [37] It is apparent that 6th Street is a "through highway" relative to 12th Avenue, which is controlled by a stop sign. Mr. McCullagh, in driving through it, was therefore the "dominant" and Ms. Rozinbaum, in making her left turn, the "servient" driver.
- [38] The evidence supports Mr. McCullagh's contention that he was an "immediate hazard" and that Ms. Rozinbaum should have seen him and yielded the right of way. The fact that Ms. Rozinbaum's front bumper struck the rear corner of Mr. McCullagh's vehicle with a force sufficient to turn it 90 degrees suggests that she should have seen his car coming before beginning her turn. I find that the accident occurred because Ms. Rozinbaum went ahead with her turn without properly checking for oncoming traffic to the left, having been distracted by the bus driver to her right.
- [39] There is no evidence to support the defence contention that Mr. McCullagh was speeding at the time. That allegation was based essentially on Ms. Rozinbaum's post facto reconstruction of the accident based on her analysis of the location of the damage on her car, rather than from her memory. I find that Mr. McCullagh could not have been speeding because he had come to a complete stop before entering the intersection. He did so, I find, in order to let the other vehicles that were already in the intersection complete their turns, as he testified.
- [40] In summary, I find Ms. Rozinbaum to be 100% at fault for the accident.

IV. Damages

A. Non-Pecuniary Damages

- [41] Non-pecuniary damages are intended to compensate a plaintiff for pain and suffering and the loss of enjoyment of life and its amenities. The factors to be considered in assessing damages under this head were set out by Kirkpatrick J.A., writing for the Court, in *Stapley v. Hejslet*, 2006 BCCA 34, as follows:
- (a) the age of the plaintiff;
 - (b) the nature of the injury;
 - (c) the severity and duration of pain;
 - (d) the extent of any disability;

- (e) the extent of the plaintiff's emotional suffering;
- (f) the plaintiff's loss or impairment of life;
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities; and
- (i) loss of lifestyle.

[42] Mr. McCullagh seeks an award of \$200,000 under this head. He relies on the following authorities as indicative of the appropriate range: *Felix v. Hearne*, 2011 BCSC 1236 [Felix]; *Gill v. Apeldoorn* [Gill], 2019 BCSC 798; *Kallstrom v. Yip* [Kallstrom], 2016 BCSC 829 and *Sebaa v. Ricci*, 2015 BCSC 1492. Mr. McCullagh also submits that the award should also reflect his loss of housekeeping capacity, given that he has elected not to pursue a standalone claim for damages under that head.

[43] The defendants submit that the appropriate non-pecuniary award in this case should fall within the \$100,000 to \$125,000 range, citing the following authorities: *Djukic v. Hahn*, 2006 BCSC 154 [Djukic]; *Kosugi v. Kruger*, 2007 BCSC 278 [Kosugi]; *Lane v. Ou*, 2019 BCSC 928 [Lane] and *Tabet v. Hatzis*, 2013 BCSC 1167 [Tabet].

[44] Mr. McCullagh was 37 at the time of the accident. He suffered a herniated disc and associated nerve damage and other soft tissue injuries. I accept that he has experienced considerable and ongoing pain, particularly in his back, neck, shoulders and legs. His injuries have led to depression and anxiety and damaged his sense of self-worth. He is unable to do yard work and home maintenance as before. He has been unable to continue in his chosen career due to the heavy physical demands associated with it. He lives in a basement suite due to his inability to earn a living as before. His relationships with family and friends, and particularly his children, have suffered. For example, he was unable to enjoy a recent family vacation in Disneyland due to his pain symptoms.

[45] I agree with Mr. McCullagh that the impacts on him resemble those described in *Felix*, although one factor that weighed in favour of the higher award in that case was the traumatic nature of the collision itself, which involved a rolled over vehicle - a factor not present here. I also find *Gill* and *Kallstrom* to be helpful, although in those cases the psychological impacts appear to have been even more severe because they appear to have led to attempts at suicide. Another distinguishing factor here is the prospect of improvement in his symptoms that Mr. McCullagh appears likely to see following his surgery.

[46] *Djukic* is an older authority which may explain the relatively smaller award for what appear to be similar injuries, although I note that in that case and *Lane*, the plaintiff, unlike Mr. McCullagh, had already undergone surgical treatment and had seen some improvement from it, if not a full recovery. In *Lane*, the award was reduced to reflect the plaintiff's lack of credibility and failure to mitigate his losses, factors not present here. The award in *Kosugi*

was reduced to account for other causes of the plaintiff's depression, another factor not present here. In Tabet, the plaintiff was, unlike Mr. McCullagh, able to return to his chosen employment on a full-time basis.

[47] In light of these considerations, I award Mr. McCullagh \$175,000 under this head.

B. Past Loss of Earning Capacity

[48] In Noori v. Hughes, 2018 BCSC 965, I summarized the principles to be applied in assessing damages under this head as follows:

[104] The object of an award of damages for past loss of earning capacity is to compensate the plaintiff for what he would have (not "could have") earned but for the injury: Rowe v. Bobell Express Ltd., 2005 BCCA 141 at para. 30.

[105] In Kallstrom v. Yip, 2016 BCSC 829, Kent J. set out a two-step process that should be followed in determining a plaintiff's entitlement to such damages:

[393] There is a discrete, two-step process that is required with respect to these past and future loss of earning capacity claims:

1. the court must first determine whether, as a result of the injuries sustained in the accident(s), the plaintiff's past or future earning capacity has been or will likely be impaired, such that there has been an actual loss of income in the past and/or a real and substantial possibility of a loss of income in the future; and
2. if so, then the court must then determine the amount of past loss that has been incurred to the date of trial and, on a present value basis, assess the amount to be awarded for any possible future financial loss.

[49] In Rowe v. Bobell Express Ltd., 2005 BCCA 141, Smith J.A., writing for the majority, emphasized that a claim for past wage loss is more properly referred to as a past loss of capacity:

[30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury. [Emphasis added.]

[50] Section 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 restricts the damages recoverable to net, rather than gross, earnings.

[51] Mr. McCullagh claims that, but for the accident, he would have continued working for the remainder of 2016 at Summit Tools, or in an equivalent position. While there, he was earning a gross annual salary of \$48,576, or \$4,048 per month. He claims that in 2017 he would have returned to his former position at the BMT and earned a gross salary of \$40,000 for that entire year. From January 2018 on, he says, he would have moved to the DMF and earned an annual gross salary of \$60,000 in each year.

[52] On that basis, he calculates his past loss of earning capacity as follows:

2016: $\$4,048 \times 4 = \$16,192$

2017: \$40,000

2018: \$60,000 less actual earnings of \$2,500 = \$57,500

2019: \$60,000 less actual earnings of \$4,524.83 = \$55,475

January 2020: \$5,000 ($\$60,000/12$) less actual earnings of \$214.50 = \$4,786

Total: \$173,953 (gross)

[53] The defendants argue that Mr. McCullagh would have continued to work at Summit Tools until his position there was eliminated in November 2016. Thereafter and until the present, they say, he would have earned nothing more than he actually did. On that basis, they calculate Mr. McCullagh's net loss of earning capacity as follows: net pay for two weeks ($\$1,463.27$) $\times 6$ (September to November) = \$8,779.62.

[54] Neither of the parties' calculations quantifies Mr. McCullagh's past loss of earning capacity reasonably, in my view.

[55] It appears likely that Mr. McCullagh would have continued working at Summit Tools at least until his position there was eliminated in November 2016. Although it is possible that he would have lost his job at that point, I am prepared to assume that he would have continued to be employed at Summit Tools or its successor in his former capacity at least until the end of 2016, yielding a loss of income for the rest of 2016 that can be calculated as follows: $\$4,048 \times 4 = \$16,192$.

[56] I am not persuaded by the defendants' submission that no position would have been available to him at Summit Tools or its successor thereafter, or that he would have earned nothing more than he actually did in the following three years. On the other hand, although it is possible that Mr. McCullagh would have seen a rise in his income as posited in his calculation, that scenario depends on very optimistic assumptions.

[57] A more realistic assessment of his earning capacity should also reflect his actual historic earnings prior to the accident, which were as follows:

2013

\$10,424.00

2014

\$28,089.00

2015

\$36,647.32

2016 (annualized)

\$48,000

[58] His average annual income in those years was \$30,790.08, but the trend shows a steady increase in each year. It is unlikely that Mr. McCullagh would have returned to his position at Seaspan in 2017, as he assumes. He testified that he left that position to go to Summit Tools because he was not prepared to continue with the commute to North Vancouver. Presumably, the same impediment would have continued to discourage him from returning there.

[59] The most likely scenario would see Mr. McCullagh continuing to earn to earn at his historical average of \$30,790.08 in 2017. From 2018 on, he may have continued to earn at his historical level, as the defendants argue, or he may have found a position at the DMF earning \$60,000, as he argues. Assigning an equal probability to each, the average of those scenarios is \$45,395.04.

[60] On that basis, I am awarding damages under this head as follows:

2016: \$16,192

2017: \$30,790.08

2018: \$45,395.04, less actual earnings \$2,500 = \$42,895.04

2019: \$45,495.04, less actual earnings \$4,524.83 = \$40,970.21

January 2020: \$45,495.04/12 = \$3,791.25, less actual earnings \$214.50 = \$3,576.75

Total: \$134,424.08 (gross)

C. Future Loss of Earning Capacity

[61] In *Parker v. Lemmon*, 2012 BCSC 27, Savage J. (as he then was) summarized the approach to be taken in assessing damages under this head as follows, at para. 42:

- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
- (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;

- (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
 - (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
 - (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
 - (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
 - (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
 - (8) An earnings approach will be more useful when the loss is more easily measurable;
 - (9) The capital asset approach will be more useful when the loss is not easily measurable in a pecuniary way.
- [62] Both parties presented damages calculations using variations of the "earnings" approach.
- [63] Mr. McCullagh seeks an award "closer to the top end" of a range that he posits as lying between \$400,000 and \$800,000. He arrives at that range by comparing his potential earnings both with and without the accident, assuming various possible scenarios. The "with accident" scenarios depend primarily on his recovery prospects following surgery and the related issue of his ability to retrain and reintegrate into the workforce, given his injuries. He argues that the fairest scenario to apply should reflect the fact that his disabilities are significant and permanent. He argues that his prospects for successful reintegration into the workforce, and the range of career options realistically available to him, are limited. The "without accident" scenarios depend on whether he would, but for the accident, have remained on his pre-accident earning trajectory for the rest of his working life or whether, as he suggests, he would have advanced into a much more lucrative career in welding or as a deckhand with Seaspan, through which he would have earned, he says, between \$80,000 and \$100,000 annually. His postulated annual income is then multiplied by an economic multiplier of 14.996, as calculated by an economist, Mr. Benning, to yield the net present value of the income stream over the remainder of his working life, to age 67.
- [64] The defendants do not dispute that Mr. McCullagh has established a real possibility of a future loss of income earning capacity. But they calculate his damages much more modestly. They submit that he should be expected to return to work at full capacity after he recovers from the anticipated surgery. On that basis, they urge the Court to measure his loss at three years of lost earnings, calculated using the average of his annual earnings in the three years prior to the accident. They say the appropriate award, so calculated, lies somewhere between \$50,000 and \$75,000.

[65] The medical evidence generally supports Mr. McCullagh's contention that his injuries are likely to be permanent, at least to some degree, regardless of the outcome of the surgery. The surgery, even if successful, will only alleviate the pain associated with the herniated disc injury itself. It will not resolve the nerve and other soft tissue injuries or the psychiatric symptoms, which are independent of the disc injury and unlikely to resolve completely, even on the most optimistic surgical scenario. It is appropriate, moreover, to consider the possibility that the surgery will be less than completely successful, in which case the impact on his earning capacity will be that much greater.

[66] On the other hand, turning to Mr. McCullagh's hypothetical "without injury" career path, I agree with the defendants that any projection of his posited lifetime earnings should begin with his actual historical earnings prior to the accident. I have concluded that the appropriate baseline income to use for this purpose is the same one that I have used to calculate the value of his past loss of earning capacity, which is \$45,495.04. I prefer to deal with the prospect of a long-term move into a more lucrative career with Seaspan as a contingency to be added in reaching a net award.

[67] Given his current level of capacity pending the surgery and recovery period, Mr. McCullagh can be expected to earn the same from 2020 to 2022 as he did in 2019, which was \$4,500. For those first three years after trial, his income loss can be calculated on that basis using the economic multiplier in Mr. Benning's Table 1 as follows:

$$\$45,495.04 - \$4,500 = \$40,995.04 / 1,000 \times 2,388 = \$97,896.16$$

[68] For the remainder of his career to age 67, I have calculated the damages assuming he has lost 40% of his pre-accident functional capacity on a permanent basis, notwithstanding the surgery. The resulting loss may be calculated using the economic multipliers in Mr. Benning's Table 1 as follows:

$$\$45,495.04 \times 40\% = \$18,198.016 / 1000 \times (14,996 - 2,338 = 12,658) = \$230,350.49$$

[69] Adding the two figures yields a gross award of \$328,246.65. In order to account for the contingencies associated with the possibility that the surgery will be less than entirely successful, the possibility that Mr. McCullough may have found more lucrative work at Seaspan and his possible need to retrain, my net award will be \$350,000.

D. Cost of Future Care

i. Introduction

[70] The principles to be applied in assessing damages for the cost of future care were set out by McLachlin J. (as she then was) in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) as follows:

- [187] The "additional expense" approach is preferable where the plaintiff will continue to lead basically the same life as she would have led had she not been injured, with the aid of additional assistance and physical facilities. In such a case, the simplest way of calculating the loss caused by the accident is by totalling the cost of the extra assistance facilities which the plaintiff will require.
- [198] The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.
- [199] These authorities establish that (1) there must be a medical justification for claims of cost of future care; and (2) that the claims must be reasonable.
- [71] More recently, in *Campbell v. Swetland*, 2012 BCSC 423, Wong J. summarised the applicable principles as follows, at para. 198:

There must be a medical justification for claims for cost of future care. ... The expense should not be a squandering of money. In considering any particular item of future care, the test is whether a reasonably minded person of ample means would incur the expense.

The weight to be given to an opinion on future care will depend on the extent to which recommendations for things like psychological counseling and physiotherapy are supported by the evidence of experts within the relevant field of expertise.

Awards for cost of future care must be reasonable, both in the sense of being medically required and in the sense of being costs that, on the evidence, the plaintiff will be likely to incur.

- [72] Mr. McCullagh seeks a total of \$338,968 in future care costs. To substantiate his anticipated needs in this regard, he relies on the report of Dr. Witty, an occupational therapist and life care planner. Her report sets out the individual items comprising Mr. McCullagh's future care needs, along with their projected cost and the medical and other recommendations supporting them. Mr. Benning has calculated the multipliers that can be used to generate a net present value for each item.
- [73] The defendants argue that only \$14,893.08 of those costs are justified. I address the controversial items below.

ii. Medications

- [74] Mr. McCullagh seeks to be compensated for the cost of purchasing the following medications: trazadone, pregabalin, baclofen, mirtazapine and escitalopram.
- [75] The defendants argue that the cost of pregabalin, a pain medication, should not be awarded because it was recommended solely by Dr. Krassioukov, a physical medicine and rehabilitation specialist. The defendants argue that because Dr. Krassioukov testified that he would defer to an orthopedic specialist in the management of Mr. McCullagh's lower back pain, he is not qualified to make that recommendation. I am satisfied that this item is justified. As a physical medicine and rehabilitation specialist, Dr. Krassioukov is qualified to

recommend medications such as this. The fact that he would defer to other specialists does not undermine the validity of his recommendations, in the absence of any conflicting opinions from them.

- [76] With respect to mirtazapine, a mood stabilising medication, the situation is more complicated. Dr. Witty stated in her report that this medication too was recommended by Dr. Krassioukov, but in fact no such recommendation appears in his report. In cross-examination, Dr. Witty acknowledged the error and suggested that her recommendation was based instead on the fact that Mr. McCullagh was presently taking it. Mr. McCullagh testified that he was indeed taking mirtazapine as an anti-depressant and to help him sleep. He said that he stopped taking it temporarily because he could not afford the prescription. When he did so, his mood spiralled downward and he did not want to see people. He says he has resumed taking it because it helps him sleep and now he cannot do without it. I am satisfied that the need for this medication is adequately established by that evidence.
- [77] The defendants also argue that the claim for the cost of trazodone is unjustified. The basis for this recommendation is the suggestion in Dr. Babbage's report that, "Mr. McCullagh try trazodone 50-100 mg at bedtime as a hypnotic agent to help deal with his insomnia". I agree with the defendants that Mr. McCullagh does not appear to be taking this medication but rather managing his insomnia by other means. There is no evidence that he is taking escitalopram either, although it too was recommended by Dr. Babbage. I have no evidence as to the cost of that medication. I am therefore refusing the claims for the cost of trazodone and escitalopram for want of an adequate evidentiary foundation to support them.
- [78] The total for the medications I have allowed is \$17,428.

iii. Ergonomic Supplies

- [79] Mr. McCullagh advances two claims in this category: ergonomic mats (\$4,212) and hand-held shower heads (\$235). The defendants submit that these claims should be allowed as one-off items only, at a total cost of \$639.
- [80] Dr. Witty recommends the purchase of two mats annually and replacing the shower heads every seven years. These are not unreasonable recommendations. I am therefore awarding those amounts as claimed.

iv. Vocational Assessment

- [81] Mr. McCullagh seeks to be compensated for the cost of vocational counseling in the first three years (\$10,980) and for 30 hours during years 4-19, as well as associated travel costs. The defendants object to these items for want of any recommendation other than that of Dr. Witty herself.

[82] I note that Mr. McCullough has already been receiving vocational counseling. He argues that he may require continued counseling on an ongoing basis given the seasonal nature of his work. Because the potential need for this service is speculative, I am allowing it in part, and without the associated travel costs claimed, for a total of \$8,000.

v. Pain Management Programme

[83] Mr. McCullagh seeks to be compensated for the cost of attending a private pain management programme, in the amount of \$29,184. The defendants object to this item, noting that all of the programmes recommended by Dr. Krassioukov are publicly funded. Mr. McCullough acknowledges this but argues that he ought not to have to wait his turn given the long waitlists. I agree with the defendants that this item has not been shown to be necessary or reasonable and, for that reason, I refuse to award it.

vi. Psychological Counseling

[84] Mr. McCullagh seeks the cost of an initial consultation (\$1,810) followed by ongoing therapy sessions for the rest of his life (\$96,119). The defendants do not oppose an award to compensate him for the cost of six sessions over three years, until he has had his surgery, at a cost of \$3,600.

[85] While I agree with the defendants that Mr. McCullagh is likely to see an improvement in his psychiatric and other symptoms if the surgery is successful, his pain is unlikely to be eliminated completely. In addition, Dr. Babbage testified that the psychiatric symptoms may persist even if the surgery is successful. To account for this contingency, I am awarding the cost of the initial consultation (\$1,810) and 40% of the ongoing psychological counseling cost claimed, or \$38,447.60, for a total of \$40,257.60.

vii. Occupational Therapy

[86] Mr. McCullagh seeks to recover the cost of two to three years of occupational therapy at 48 hours per year, for a total of \$9,865. The defendants oppose this, arguing that there is little evidentiary support for this need or the number of hours claimed.

[87] Dr. Krassioukov recommended that Mr. McCullagh continue to receive occupational therapy. Dr. Witty, who is herself an occupational therapist, recommended the number of sessions claimed. On that basis, I am allowing this item as claimed, in the full amount of \$9,865.

viii. Household Aids

[88] Mr. McCullagh claims the cost of purchasing a counter/portable dishwasher and robotic vacuum, at a cost of \$545 and \$339, respectively. The defendants do not oppose this claim. I am therefore awarding those amounts as claimed.

ix. Home Support

- [89] Mr. McCullagh seeks to be compensated for home care costs in several categories, including homemaking (\$44,088), grocery delivery (\$782), gardening to age 80 (a total of \$34,258) and home maintenance to age 80 (a total of \$22,838).
- [90] The defendants argue that with the household aids that he has claimed, he will not require homemaking services. They also argue that the other services sought are not necessary: grocery deliveries are available at no charge with a minimum purchase and the gardening work is ordinarily the responsibility of the landlord, not the tenant.
- [91] Mr. McCullagh testified about the cleanliness standards he kept prior to the accident to maintain his home. The dishwasher and robotic vacuum will make it easier for him to do only some of the housework that he was able to do formerly. I therefore agree that some homemaking costs should be awarded. On the other hand, I agree with the defendants that the gardening and maintenance tasks may be performed, in whole or in part, by the landlord. Moreover, it is likely that Mr. McCullagh would not have continued to do household chores such as gardening so late in life, even without his injuries.
- [92] Taking those factors into account, I am awarding \$60,000 for home support costs.

x. Driving Rehabilitation

- [93] Mr. McCullagh claims the costs of a driver rehabilitation course (\$1,766). The defendants argue that this item is unnecessary because Mr. McCullagh testified that he has driven company vehicles since the accident but no longer does so because he is unable to afford it.
- [94] I am satisfied that this item is justified, based on the testimony of Mr. McCullagh as to the ongoing impact on him of driving anxiety and the supportive recommendation of Dr. Babbage.

xi. Parenting Course

- [95] Mr. McCullagh claims the cost of attending a parenting course to improve his relationship with his children (\$92). The defendants argue that the item was not the subject of any physician's recommendation. I agree with Mr. McCullagh that the recommendation of Dr. Witty, who is an occupational therapist and life care planner, suffices to justify this item. On that basis, I am making the award.

xii. Kinesiology

- [96] Mr. McCullagh claims the cost of kinesiology sessions over a period of several years, totalling \$40,438. Although the defendants accept that kinesiology is justified, they argue that the award should be limited to the cost of 96 sessions in the first year and six sessions per year for two years after that, for a total of \$10,654.08. The defendants have adduced no expert opinion evidence to call into question the expert evidence adduced by Mr. McCullagh as to the number of kinesiology sessions that will be needed. When asked in cross-examination about this, Dr. Witty explained that Mr. McCullagh is currently attending two kinesiology sessions per week and that Dr. Babbage and Dr. Krassioukov have recommended

that he continue doing so. On that basis, I am awarding the amount claimed.

xiii. Gym/Pool Pass

[97] Mr. McCullagh claims the cost of a pass to attend a gym and pool on an ongoing basis, at a total cost of \$12,073. The defendants argue that this item is not supported by any medical recommendation. Mr. McCullagh testified that while he did not purchase a gym membership prior to the accident but has been doing so lately in order to facilitate his rehabilitation efforts. On that basis, I am awarding the amount claimed.

xiv. Conclusion on Cost of Future Care

[98] The amounts I have awarded total \$195,250.60. In order to account for the contingency that Mr. McCullagh's symptoms will improve considerably following the surgery (a possibility has been factored into some but not all of these claims, and sometimes only inadequately), I am reducing the award to \$160,000.

E. "In Trust" Claim

[99] Mr. McCullagh seeks an award of \$20,000 in trust to compensate his mother for the housekeeping services that she was called upon to provide as a result of the accident. He says that such an award is justified in this case because his mother's services were provided in lieu of housekeeping expenses that he would otherwise have incurred. The defendants argue that no such award is justified because Ms. McCullagh did not provide services beyond what would reasonably have been expected of a family member in the circumstances.

[100] In *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124, D. Smith J. (as she then was) summarized the relevant principles to be applied in assessing such claims as follows, at para. 180:

[180] From a review of these authorities one can construct a summary of the factors to be considered in the assessment of "in trust" claims:

- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
- (c) the maximum value of such services is the cost of obtaining the services outside the family;
- (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;

- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
- (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[101] I am satisfied that Ms. McCullagh provided housekeeping services to her adult child that she would not have provided but for the injuries he sustained in the accident. Accordingly, I agree that it would be appropriate to compensate her for those services. Assuming that while she was living in his home she performed one hour of housework per day at \$34 per hour (the average rate set out in Dr. Witty's report), the total cost of the services comes to \$12,410.

[102] Although Mr. McCullagh seeks additional compensation to account for the fact that Ms. McCullagh refused a promotion in Calgary in order to remain with Mr. McCullagh while he recovered, she was able to take an equivalent position in Kelowna after moving out at the end of the year.

[103] On that basis, I am awarding \$12,410 for the "in trust" claim.

F. Special Damages

[104] The parties have agreed that special damages of \$5,413.49 are properly payable. I am therefore making that award.

V. Summary and Conclusion

[105] I have found the defendants 100% liable for the accident.

[106] I am awarding Mr. McCullagh damages as follows:

- (a) non-pecuniary: \$175,000;
- (b) past loss of earning capacity: \$134,424.08 (gross);
- (c) future loss of earning capacity: \$350,000 (gross);
- (d) cost of future care: \$160,000;
- (e) in trust: \$12,410; and
- (f) special: \$5,413.49.

[107] The parties have leave to speak to costs if they are unable to agree on the appropriate order in light of my judgment.

"Milman J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/04/2020BCSC0429.htm>

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

Prepared on 25 October 2026 · Esheria