
CANADA / JUDGMENT

Miley v. Abulaban

2014 BCSC 1472

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1472 Miley v. Abulaban

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Miley v. Abulaban,

2014 BCSC 1472

Date: 20140805

Docket: 47093

Registry: Kamloops

Between:

Colin Miley

Plaintiff

And

Ashraf Abulaban and Hisham Al-Ahmad

Defendants

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

Counsel for the Plaintiff:

J.A. Zak

Counsel for the Defendants:

E.A. Harris

Place and Date of Hearing:

Kamloops, B.C.

December 9-13, 2013

and February 14, 2014

Place and Date of Judgment:

Kamloops, B.C.

August 5, 2014

INTRODUCTION

- [1] On Tuesday, May 18, 2010, the plaintiff, Colin Miley was driving his car. His car was stopped, waiting in a long line of vehicles (15 to 20) on the King George Highway in Surrey, British Columbia, when his vehicle was struck in the rear by a white minivan driven by the defendant, Ashraf Abulaban. Mr. Abulaban was driving the vehicle with the consent of the defendant and owner of the minivan, Hisham Al-Ahmad.
- [2] Mr. Miley testified that he saw the minivan in his rear-view mirror. He testified that in anticipation of his vehicle being hit, he locked his arms and braced his legs. His airbag did not deploy. He stated that his car jumped forward. He was wearing his seatbelt. The driver's seat of his car was equipped with a headrest. He testified that his neck snapped back. He does not recall hitting his head but he felt dazed. Mr. Miley got out of his car and he and Mr. Abulaban exchanged information.
- [3] Upon inspecting his vehicle, Mr. Miley noticed scuff marks on the left side of the car's rear bumper as well as some cracking on the rear bumper. The hood of the minivan was pushed in and crumpled.
- [4] After the accident, Mr. Miley called his wife and then went home. Within hours he felt nauseous and queasy.
- [5] As a result of the accident, Mr. Miley developed stiffness in his neck, which went away within two weeks. He developed pain on the left side of his back which became worse over time. He remained away from work for a few days and returned to work on the first day of work the following week.
- [6] Liability is not in issue. The issues are causation and damages. Mr. Miley seeks damages for the injuries that he suffered in the accident. The heads of damage are:
1. non-pecuniary;
 2. special damages;
 3. loss of earning capacity; and

4. loss of future care.

- [7] On March 2, 2011, Mr. Miley was on his way to a physiotherapy appointment when he was involved in a second motor vehicle accident. This accident occurred at an intersection when a vehicle owned and operated by Anita Horkoff struck the front passenger side of the Miley vehicle. Mr. Miley commenced an action against Ms. Horkoff. It was ordered that this action and the Horkoff action (Kamloops Registry No. 47333) be tried together. On the first day of trial, the Horkoff action was discontinued. Mr. Miley's evidence is that he was not injured in the Horkoff accident, except that he experienced a sore neck and general stiffness in his back for about two weeks, the latter settling back to its original condition as a result of the first accident.
- [8] Mr. Miley's position is that the injuries suffered in this accident are indivisible in accordance with the principles set out in *Bradley v. Groves*, 2010 BCCA 361, leave to appeal ref'd [2010] S.C.C.A. No. 337. The defendants argue that in accordance with the damage to Mr. Miley's car in the second accident, which was far more than the damage to his car in the first accident, Mr. Miley was injured in the second accident. The defendants argue that despite being described as an aggravation to his back, the extent of the aggravation must be factored in when making an award of damages.

ISSUE

- [9] The main issue for determination is the extent and duration of Mr. Miley's injuries that were caused by the motor vehicle accident that occurred on May 18, 2010.

POSITIONS

- [10] Mr. Miley argues that the back injury that he suffered in the first accident has impacted all aspects of his life and that the injury is permanent. He argues that his neck injury from the first accident healed quickly and is of little significance. He argues that in the second motor vehicle accident his neck was sore and was of no consequence as it only exacerbated his back, but did not injure it.
- [11] The defendants acknowledge that Mr. Miley suffered a low back injury in the accident but take issue with the impact that the plaintiff alleges the injury has taken on his day-to-day activities, on his employment and its prognosis.
- [12] The defendants argue that there was little damage to Mr. Miley's vehicle in the first accident, compared to writing off of his vehicle in the second accident, which suggests that his injuries in the first motor vehicle accident were not as severe as he alleges.
- [13] The defendants further argue that Mr. Miley did not follow medical advice, which was to lose weight and strengthen his core.

BACKGROUND

Mr. Miley

- [14] At the time of the accident, Mr. Miley was age 38 and at the beginning of trial he was age 41. Mr. Miley is married with two daughters, ages five and a year and a half. At the time of the accident his eldest daughter was a few months short of her second birthday; his second daughter had not been born. Mr. Miley has an 18 year old son from a previous relationship. His son has graduated from high school and he lives away from home.
- [15] At the time of the accident and at the time of trial, Mr. Miley resided in Surrey. In February of 2011, Mr. Miley and his spouse, Azadeh, left their rented duplex and they purchased a single family home. Their home is situated on one-third of an acre in a forested area. It is an older home with five bedrooms and three bathrooms. It meets their needs and is one block away from a school. The home requires some repairs; the grounds require ongoing maintenance.
- [16] At the time of this trial, Mr. Miley was employed by Coast Capital Savings Credit Union ("Coast Capital") in Surrey, as a corporate communications officer. He started his employment with Coast Capital on February 7, 2009. Mr. Miley lost his position with Coast Capital when his employer learned that he did not have a university degree though his resume stated that he did. This was revealed during the trial.
- [17] After completing high school, Mr. Miley attended the University of Victoria for a period of three years. From 2003 to 2005, he attended Douglas College where he received a diploma in professional writing and editing.
- [18] During the summers while going to high school and university, Mr. Miley worked as a landscaper.
- [19] He was employed by BC Hydro's Power Smart Program where he installed water and energy saving devices. This was a physical job. He was required to wrap hot water tanks and install weather-stripping which required the use of power tools. He was required to work nights. He had no difficulty performing these tasks.
- [20] He worked for Telus from 1988 to 2003 as a customer service representative.
- [21] After completing his diploma in professional writing and editing, he started his own business in which he did free-lance writing. He contracted to a number of companies, societies and other organizations for which he provided his services.
- [22] In 2007 and 2008, he worked as a communications officer for a homeowner protection office.

State of Mr. Miley's Health and Activities Before the Accident

- [23] Mr. Miley was a talented volleyball player. He attended his first year at the University of Victoria on a volleyball scholarship. The team was disbanded after the first year. Mr. Miley continued to play competitive men's volleyball. He played in a league and he belonged to a team that won the Canadian Club Championship for two years. At the time of the accident he was still playing in a league and he would also play pickup co-ed volleyball.
- [24] While in high school and playing rugby, he fractured his arm. He also fractured his ankle playing volleyball. In 2007, he was tested for congenital heart conditions and has had no further issues since. From 2005 to 2006, Mr. Miley suffered from drug addiction. He sought treatment and is free of that addiction. None of these medical conditions interfered with his work, his lifestyle or pursuit of his athletic endeavours. Mr. Miley viewed himself as being in excellent physical shape.
- [25] Mr. Miley's best friend, whom he has known since grade 8, sees Mr. Miley once or twice a week. He said that before the accident he and Mr. Miley watched sports together, took short trips together and participated in lots of social activities. He described Mr. Miley as very athletic emphasizing his pursuit in volleyball. He said that Mr. Miley was fun to be around.
- [26] Mr. Miley and his wife enjoyed walking trails and camping.
- [27] With the arrival of his first daughter, Mr. Miley spent considerable time with her, including bathing her as part of the nighttime routine. In addition, he cared for his elderly father.
- [28] I conclude that prior to the accident Mr. Miley was in good health. He was able to participate in all his sporting activities, particularly volleyball. He was able to participate in social activities and meet his family obligations. I also find that Mr. Miley intended, in the future, to continue to pursue all of his activities, including volleyball.

Medical Treatment

- [29] Initially, Mr. Miley was treated by Drs. Nolte and O'Brien at a walk-in clinic. He was prescribed medication and physiotherapy. Mr. Miley had spasms and pain in the lower left side of this back. He thought initially that his back problem was a short term, acute problem. He found that physiotherapy was not helping. On June 10, 2010, he saw his family doctor, Dr. Spangehl and thereafter remained in his care. Mr. Miley's complaints relating to his neck resolved within a couple of weeks. This is confirmed by the evidence as he made no complaints to Dr. Spangehl about his neck until the second accident, when he complained of neck and back pain. He said the lower back pain "intensified throughout the day".
- [30] Mr. Miley underwent a series of treatments with two different physiotherapists. From June 14 to 16, 2010, Mr. Miley had nine physiotherapy sessions with Salveen Lalli and a further 26 sessions with Julie Sopko. From the time of the second accident to the time of trial, he had a further 14 sessions with Ms. Sopko. He had some needling treatment (intramuscular stimulation), together with therapeutic exercise and a home exercise program. On the

recommendation of his physiotherapist, he wore a belt or brace intended to reduce the pain. Mr. Miley testified that this provided temporary relief. The needling was painful but it provided a few days of relief.

- [31] It was during the second round of physiotherapy that Mr. Miley was involved in the second motor vehicle accident on March 2, 2011.
- [32] At the request of Mr. Miley's lawyer, Dr. McKenzie provided opinions as to Mr. Miley's injuries. Dr. McKenzie concluded that the pain in Mr. Miley's lower back, groin and lower leg (not below the knee) is a result of an injury to the left L5/S1 facet joint of his spine. This opinion was confirmed by Dr. Vincent as a result of treatment that Dr. Vincent provided Mr. Miley. Dr. McKenzie pointed out that MRIs, although good at picking up discs and nerve root problems, do not pick up pain.
- [33] Dr. Vincent is an anesthetist with a special interest in pain management. He practices in Victoria. He first saw Mr. Miley on March 12, 2012. After examining Mr. Miley, he concluded that Mr. Miley would benefit from a diagnostic medial branch block of the L5/S1 facet joint to determine the source of his pain and discomfort. Included in the procedure was a corticosteroid for therapeutic purposes. Mr. Miley had three facet joint blocks. They occurred in the months of March, June and September of 2012. Mr. Miley described the effects of these blocks as if he was suffering from a "mini flu". The first and third blocks took away the stabbing pain. The second block was less effective. This provided relief from pain which wore off after about three weeks.
- [34] Dr. Vincent treated Mr. Miley's lower back with a medial branch radiofrequency neurotomy, called a cryoanalgesia, on December 13, 2012. This treatment does not cure the injury, but rather is a:

tool to assist in enhancing lower back function and reduction of pain. Neural regeneration which a natural process of healing can take place as early as 4 months and as late as 2 years post treatment (Dr. Vincent's report dated June 12, 2013).

- [35] The neurotomy provided significant improvement in that there was no pain in Mr. Miley's groin. He had "flare-ups" in his back which, in his words, "did not stop me in my tracks". The pain is described by Dr. Vincent as low grade and that Mr. Miley's pain had been reduced. This treatment can be repeated.

Prognosis

- [36] Dr. McKenzie provided written medical legal opinions in letters dated December 9, 2010, January 11, 2011, June 21, 2011 and October 23, 2012 concerning Mr. Miley's injured back. Dr. McKenzie did not treat Mr. Miley. Dr. McKenzie has seen and examined Mr. Miley on three different occasions - December 19, 2010, October 23, 2012 and September 5, 2013. He stated that his physical examination of Mr. Miley and its result "was not significantly changed."

- [37] Initially, Dr. McKenzie recommended that Mr. Miley lose the weight that he had gained since the accident. He also stated that Mr. Miley appeared deconditioned and needed to exercise his core "within the limits of his pain". He cautioned Mr. Miley about the use of Tylenol 3 due to his history of addiction. When Dr. McKenzie saw Mr. Miley on December 9, 2010, he was of the view at that time that Mr. Miley had not reached his maximum improvement and he will not reach that level until approximately two to two and a half years from the date of the accident.
- [38] When Dr. McKenzie saw Mr. Miley on October 23, 2012, Mr. Miley continued to have pain on the left side of his lower back with occasional right upper lumbar pain. The pain will go into the left buttock and left groin. Mr. Miley told Dr. McKenzie that the leg pain had decreased and he attributed this decrease of pain to the injections administered by Dr. Vincent.
- [39] At the time of seeing Dr. McKenzie on October 23, 2012, Mr. Miley told Dr. McKenzie that he has not missed work due to his back in the last six months. He stated that he is a more active participant in doing housework, but he has increased pain when loading the dishwasher, vacuuming and picking things up. He operates a lawnmower, but it is difficult and he must be vigilant as to his position. He cannot play volleyball. He is able to play with his children and his walking is better. He told Dr. McKenzie that his sleep has improved and he wakes up only once in the night so as to adjust himself. He told Dr. McKenzie that he does not feel that he has any problems with anxiety or depression.
- [40] On September 5, 2013, Mr. Miley told Dr. McKenzie that he had some physiotherapy and a "flare-up" in February or March, and two "flare-ups" between May and July of 2013. The one in February or March was quite significant and lasted three days. He described the results of the neurotomy as reducing his back pain to virtually no back pain for a period of about two to three months. He described to Dr. McKenzie some "low level pain starting to creep back up again". He described it as 1 out of 10, with 10 being the worst pain.
- [41] In his letter of September 5, 2013, Dr. McKenzie described Mr. Miley's pain on that date as follows:

He continues to have one ongoing problem which is some low grade lower back pain. That has been quite improved since I last saw him due to the radiofrequency ablation. His pain is now in the left lumbosacral area. He has had no groin pain of significance since the radiofrequency ablation and no buttock pain with the exception of 2 or 3 minor episodes which were short lived. His thigh pain has "subsided".

- [42] In comparing the results of his September 5, 2013 physical examination to past physical examinations, Dr. McKenzie states:

He had some mild tenderness at the left side of L4/5 and L5/S1. There were no other areas of tenderness. Comparing this to my previous examination, he has a smaller area of tenderness and it seems to be less significant.

Employment

- [43] Mr. Miley advised his employer of his accident. It made accommodations for him. He could take work home. He was permitted to work from home when his back pain was severe. At meetings, he was permitted to stand up or sit, alternating these positions during the meetings. His employer accommodated his attendance at medical and physical therapy appointments during working hours.
- [44] Ms. Halum, who is head of communications at Coast Capital, testified. She stated that the communications department that Mr. Miley was part of is fast-paced; work has deadlines and shifting priorities. Mr. Miley performed well in his job.
- [45] Ms. Halum observed Mr. Miley's discomfort. She noticed that he shifted from a sitting to a standing position during meetings and used an empty meeting room to lie down to relieve the pressure. She testified that positions such as Mr. Miley's are not secure as the communications department had been downsized; an employee with more seniority than Mr. Miley had been let go, thus the length of service provides no assurance of continued employment. This, of course, has become moot as Mr. Miley has lost his job for reasons that cannot be laid at the feet of the defendants.

Physical Assessment

- [46] Karen Winkler is an occupational therapist who provided a report consisting to two parts: the first dealt with Mr. Miley's "physical strengths and limitations regarding employability and is determined by conducting a Physical Capacity Evaluation." The second part of her report is an opinion as to the cost of future care.
- [47] Ms. Winkler evaluated Mr. Miley on October 15, 2012. The evaluation consumed eight hours, which included 35 minutes for breaks; one for five minutes, the other for 30 minutes.
- [48] Ms. Winkler's assessment was to assess Mr. Miley's physical capacity relating to:
- sitting, standing, walking, balancing, bending/stooping, crouching, kneeling, handling, reaching, upper extremity strength and endurance, climbing, lifting, carrying, pushing and pulling, and tolerance to activity.
- [49] Ms. Winkler concluded that Mr. Miley's range of motion and all major joints were within normal limits with the exception of his trunk, which she found flexion was moderately restricted. She found that he had normal muscle strength except flexion in the right hip. His grip strength was between below average and average strength. After observing and timing Mr. Miley in sitting, standing and walking positions and situations, Ms. Winkler concluded:

Mr. Miley qualifies for job titles requiring sitting on both an occasional and a frequent basis, provided that he is able to shift his weight in his chair and to stand and stretch for micro breaks, as tolerated. Mr. Miley does not qualify for job titles requiring sitting for prolonged periods (i.e., approximately greater than 41 minutes) without allowing for a change in body position.

Standing. Mr. Miley was observed while standing over a period of 2 hours and 18 minutes, with a maximum sustained duration of 1 hour and 15 minutes.

His standing tolerance is dependent upon the types of activities he performs. During dynamic standing tasks, where Mr. Miley was free to move about, there were no observed difficulties related to standing. He did not report an increase in symptoms related to dynamic standing.

[50] As to bending, Ms. Winkler stated follows:

During assessment of lifting, which required bending at the trunk to reach the lifting box on the floor, Mr. Miley was observed to hold his back upright. He reported an increase in low back pain with lifting from the floor.

Mr. Miley qualifies for job titles requiring crouching and kneeling on an occasional basis, intermittently and sustained for short durations. In keeping with his tolerance to bending at the trunk, if working at lower levels (below knee level), he would perform best in tasks that can be completed with one hand so that the opposite hand can provide positional support. He does not qualify for job titles requiring crouching and kneeling on a frequent basis.

[51] Ms. Winkler concluded that Mr. Miley had good balance. She concluded that he qualified for jobs that required climbing stairs on an occasional basis and walking on even terrain.

[52] Mr. Miley was able to reach, including interchangeably with both arms. He exceeded expectations. Any difficulties arose when he was required to twist his torso and when he was required to work below the waist, when at such times he was required to use his hands to support his upper body. He showed good tolerance as to neck flexion. Ms. Winkler states that Mr. Miley qualifies for job titles requiring reaching to all levels on both an occasional and frequent basis and he performs best at tasks in front of him. He was tested for handling and Ms. Winkler stated he had no difficulties in this area.

[53] As to his ability to lift, Mr. Miley was fit to lift 50 pounds from the floor to shoulder level and occasionally carry 40 pounds. Ms. Winkler states that Mr. Miley showed no obvious signs of fatigue, but his tolerance decreased in bending and crouching activities. He complained to her of low back pain in prolonged sitting and prolonged standing activities:

Mr. Miley is considered to be employable (i.e., with some physical restrictions) on both a part-time and a full-time basis, with the potential to work in limited strength occupations and he has the potential to handle loads with light and medium strength occupations. His physical restrictions are listed below and relate primarily to any work that requires prolonged sitting and standing, and tasks that require bending through the trunk (bending/stooping, crouching, and lifting).

[54] I also conclude that since the writing of Ms. Winkler's report, Mr. Miley's treatment from Dr. Vincent has reduced the pain Mr. Miley experienced. This, in some respects, tempers her report as to the pain he experiences and his ability to perform his job.

[55] In Ms. Winkler's report dated September 3, 2013, she refers to Dr. Vincent's neurotomy treatment. Ms. Winkler states at page 2:

Cost of Future Care Recommendations

I have reviewed my report dated November 1, 2012, and based on my review of this new medical information, I support my initial recommendations.

With respect to replacement times, my initial recommendation for ongoing physiotherapy treatments to manage symptoms is set at 4 sessions per year; given the guarded prognosis, this will likely be required for the foreseeable future.

With respect to housecleaning, home maintenance, and yard maintenance, the initial recommendations for services to assist Mr. Miley to perform these tasks was based on his needs at the time of the evaluation. Over time, and with participation in an exercise program, occupational therapy, and physiotherapy, it is anticipated that Mr. Miley's participation in these areas will improve. The extent to which Mr. Miley is able to increase his participation in these areas is difficult to predict as there is such an individual response to treatment. Given the guarded prognosis and the potential for re-activating the mechanical back pain, it is anticipated that Mr. Miley will continue to benefit from assistance with these roles for the foreseeable future. I defer to my original report for information regarding the impact of age, and other life changes, on replacement of these services.

[56] In addition, she changes some of her recommendations as to physiotherapy, occupational therapy and some equipment. These changes are acknowledged in these reasons.

NON-PECUNIARY DAMAGES

[57] Non-pecuniary damages compensate for a loss of the amenities, pain, suffering and loss of enjoyment of life. They are intended to compensate a person for those damages up to the date of trial and also for damages that the person will suffer in the future. The award must be fair and reasonable to both parties as set out *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. 100, where Madam Justice Kirkpatrick stated:

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

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

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[58] At the same time, in determining the amount of the award, it is not the seriousness of the injuries, but rather "the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation": *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 237 cited in *Stapley* at para. 45 [emphasis in *Stapley*].

[59] An award for non-pecuniary damages is not intended to make the exercise into a form of tariff, rather it is as stated by Mr. Justice Halfyard in *Turner v. Coblenz*, 2008 BCSC 1801 at para. 94:

[94] It is well accepted that previously-decided cases have limited value which usually consists in establishing a general range of damages within which the award in a particular case may fall. No two plaintiffs will ever be the same in age, previous state of strength and health, occupation and other activities. The injuries sustained by one plaintiff will never be the same as those received by another, in kind or severity. The reaction of any two persons to the pain of a similar injury, or to particular treatments, will be different. The length of time that has passed between the date of the injury and the date of trial will vary from case to case, and can be a significant distinguishing feature.

[60] The plaintiff seeks an award of \$60,000.00 to \$75,000.00 to satisfy his non-pecuniary damages.

[61] In support of his claim, Mr. Miley relies on *Prempeh v. Boisvert*, 2012 BCSC 304. In *Prempeh*, the female plaintiff's predominant injuries related to her low back and right wrist. She received a considerable amount of physiotherapy. She was away from her work as a care aide for about three months, returning to work on a graduated basis for about two months. The wrist injury did not completely recover and her wrist was subject to periods of aggravation. The plaintiff used a splint on her wrist at work. She continued to experience persistent and varying levels of pain, discomfort and episodic flare-ups of low back pain which were aggravated by lifting and prolonged sitting. Working as a care aide, she was required to wear a lumbar corset. Her back pain was described as chronic. Flare-ups to her back required her to take time away from work and on those days she used vacation time. The court found that the back pain would persist indefinitely and awarded non-pecuniary damages of \$60,000.00.

- [62] In *Devilliers v. McMurchy*, 2013 BCSC 730, Ms. Devilliers was a mother and wife. She suffered chronic, severe back pain arising from a rear-end motor vehicle collision. Her initial complaints were neck, back and shoulder pain. The neck and shoulder injuries were resolved for the most part within five months. Despite her substantial weight loss, the low back pain persisted. She took some treatments which provided some relief. However, her condition returned to its original state. The court observed:
- [44] While Ms. De Villiers has retained some considerable level of function, through the use of medication, the intensity of her pain when she is not medicated is a distinguishing feature of this case. The recent increase in her dosage is also a concern, as it points to the prospect of long-term loss of efficacy. If her pain cannot be effectively controlled, it appears possible that it may become disabling. I also take judicial notice of the fact that dependency is a risk with any opioid, though presumably she will continue to be closely monitored by her physician.
- [63] The court awarded Ms. Devilliers non-pecuniary damages in the amount of \$75,000.00.
- [64] The defendants rely on the following cases as to the amount of general damages to satisfy Mr. Miley's claim: *Lumley v. Balilo*, 2013 BCSC 1052 - \$25,000.00; *Rattenbury v. Samra*, 2009 BCSC 207 - \$30,000.00 and *Verhnjak v. Papa*, 2005 BCSC 1129 - \$40,000.00.
- [65] In *Lumley*, the plaintiff, Ms. Lumley was age 25 at the time of trial. Her injuries were to the neck and back, and she suffered headaches. The back injury resolved within two weeks of the accident. Her complaints were tightness and pain. She had good range of motion. Ms. Lumley was able to pursue significant physical activities and her injuries were largely resolved within a year of the accident.
- [66] In *Rattenbury*, the plaintiff was age 25 at the time of trial. At the time of the accident, he was playing soccer at a high level. The plaintiff alleged that he suffered a concussion exhibited by headaches which resolved in three days, neck and shoulder injuries that resolved in a few weeks, back strain and aggravation of a previous shoulder injury. The plaintiff continued to play soccer at the level he was playing prior to the accident and resumed playing golf. The court concluded:
- [90] I do conclude, however, this chronic back pain is only mild in nature, in the nature of a nagging back pain that does not disable the plaintiff from pursuing his soccer at the highest level or his golf or any other sports that he used to enjoy, and does not prevent him from working full time at the business in a more supervisory role.
- [67] In *Verhnjak*, the plaintiff was 55 years old when she was broadsided in a motor vehicle accident. She suffered soft tissue injury to her neck, shoulder and lower back. She was involved with the care of her husband until his death and she was so tired after work that she was unable to do many activities. Her pain was diagnosed as chronic. She was restricted in her movements by 25 percent. Her prognosis was uncertain and it was not expected that she would fully recover.

Discussion

- [68] The defendants argue that the impact in the first accident is insignificant when compared to the impact in the second accident, suggesting that any injuries suffered in the second accident by Mr. Miley were more than transitory. This has been addressed by the court many times. I do not accept this argument. The defendants provided no evidence, expert or otherwise, which compared the speeds of the vehicles and the impact forces upon Mr. Miley. An inference cannot be drawn that if there is insignificant motor vehicle damage that amounts to little personal injury: *Christoffersen v. Howarth*, 2013 BCSC 144 at paras. 53-60.
- [69] Mr. Miley's back injury is permanent. The most difficult part of the injury is the pain which he suffered which has been significantly alleviated as a result of the treatments provided by Dr. Vincent.
- [70] Mr. Miley's back pain has been reduced, though he had flare-ups three times in 2013, none of which exceeded four days.
- [71] It is anticipated that any reoccurrence of pain will not be as severe. He will continue to have some difficulties with his recreation, work and house and yard activities. He will have to be careful not to aggravate his back. In order to minimize his pain, he will be required to exercise, which includes "stretching, physiotherapy and low impact aerobics" (Dr. Vincent's report dated May 26, 2013). The defendants argue that Dr. Vincent changed his prognosis from his report of May 26, 2013 to his report on June 12, 2013. Dr. Vincent's opinion does not change. Mr. Miley has permanent back injury. Improvement for Mr. Miley is the degree of pain he will experience.
- [72] The defendants argue that Dr. Spangehl filled in an ICBC CL19 form which "noted that Mr. Miley's low back was stiff and had slightly decreased range of motion and flexion and extension but that his neck and shoulders were fine." That is a form intended to be a summary and not intended to be Dr. Spangehl's last word on Mr. Miley's low back injury.
- [73] The case that is most helpful in assessing Mr. Miley's non-pecuniary damages is *Prempeh*. In that case, there were two injuries. The plaintiff had to cope with mechanical low back pain and a wrist injury, both of which affected her work. The plaintiff had flare-ups like Mr. Miley. Mr. Miley's other injury was to his neck, which was insignificant. Ms. Prempeh's wrist injury was not insignificant and it was subject to episodic flare-ups.
- [74] I find that considering Mr. Miley's circumstances and the effect his injury had on him, a fair and reasonable award for non-pecuniary damages is \$52,500.00.

CREDIBILITY

[75] Mr. Miley acknowledged that he was not truthful in his resume when he applied to Coast Capital for employment. Despite this, Mr. Miley was accurate and truthful in his evidence. Much of his evidence is supported by medical evidence, as well as those witnesses such as his wife, his best friend and his employer.

DIVISIBLE AND INDIVISIBLE INJURIES

[76] Mr. Miley discontinued his action against Ms. Horkoff. As a result, it will not be known who is responsible for the injuries. The defendants argue that they are not responsible for "any aggravation however long that aggravation lasted." The defendants argue that despite it being short-lived, aggravation should be factored into the award that I make.

[77] Mr. Miley stated that he had neck pain after the first accident. His doctors did not treat him for a neck injury. He had neck pain after the second accident for which he did not receive medical treatment either. Mr. Miley's evidence is that his back pain was aggravated in the second accident.

[78] In *B.P.B. v. M.M.B.*, 2009 BCCA 365, leave to appeal ref'd [2010] S.C.C.A. No. 90, Mr. Justice Chaisson identified divisible and indivisible injuries at para. 33:

[33] In a case such as this where there are multiple causes of a plaintiff's injury, the core question is whether the injury is divisible. If it is, a plaintiff can recover from a defendant only the damages attributable to the injury caused by that defendant. If the injury is indivisible, subject to considerations I shall discuss, a plaintiff can recover 100% from the defendant of the damages attributable to the injury which is caused or contributed to by the defendant regardless of the contribution to the injury by others (*Athey*, paras. 17-20).

[79] His doctors did not treat Mr. Miley for a neck injury which lasted as little as two days to two weeks, after the first accident. It is even less significant after the second accident. His neck injuries placed no limitations on him and did not factor into his activities and recreation, his work or his activities at home. Dr. McKenzie states:

It remains my opinion that with this accident this man will have no ongoing problems in his neck. He also had some neck pain with an accident in March 2011. In my opinion neither of those accidents will give him any long term neck pain.

[80] Given the insignificance of the neck injuries, I do not find it necessary to state that the injury is divisible. The second accident aggravated the first injury, which, according to Mr. Miley, lasted about one to two weeks. The medical evidence does not support a divisible injury.

MITIGATION

- [81] The defendants argue that Mr. Miley failed to mitigate his damages by allowing himself to become deconditioned and gain weight after the accident. Mr. Miley was not participating in volleyball as he was unable to due to his injuries.
- [82] On December 9, 2010, Dr. McKenzie recommended that Mr. Miley should be "very careful with his weight" and that he "looks quite deconditioned". He recommended that Mr. Miley lose weight and continue to exercise his core "within the limits of his pain".
- [83] Mr. Miley is 6' 2 ½". At the time of the accident, he weighed 185 pounds. He weighed as much as 205 pounds when he saw Dr. McKenzie on October 23, 2012. At the time of trial, he weighed 189 pounds.
- [84] Dr. McKenzie stated that some people had difficulty following the advice to exercise as pain prevents them from pursuing exercise. He stated that there has to be some control over the pain before a person can successfully exercise.
- [85] The defence has not produced any evidence to suggest that Mr. Miley's pain would be less severe had he lost weight and exercised.
- [86] The onus is on the defendants to prove that Mr. Miley would have been better off had he followed all recommendations as to the exercise and weight loss program. In order to be successful for failure to mitigate, the defendants must prove two things: first, that the plaintiff acted unreasonably by not following the recommended treatment and, second, the extent, if any, that Mr. Miley's damages would have been reduced had he acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.
- [87] In fact, Mr. Miley now has control over his pain. He has lost weight. He is engaged in a home exercise program. He has taken over 32 physiotherapy treatments.
- [88] The defence have failed to prove that Mr. Miley failed to mitigate his damages.

SPECIAL DAMAGES

- [89] Mr. Miley has proven his special damages in the amount of \$7,517.36. I award special damages to Mr. Miley in that amount.

LOSS OF EARNING CAPACITY

- [90] Mr. Miley seeks damages for loss of earning capacity. He seeks the equivalent of one year's earnings: \$65,000.00. This amount is based on an average of Mr. Miley's earnings before bonuses and employment benefits. I have concluded that this calculation must be based on his earnings with Coast Capital in 2010, 2011 and 2012. Mr. Miley's earnings prior to his employment with Coast Capital were significantly less.

- [91] The defendants argue that there is no real or substantial possibility that Mr. Miley will suffer a loss of future income.
- [92] The defendants argue that Mr. Miley, since the accident, completed the necessary training to become a certified business communicator. Further, since the accident, he missed very few days of work and has not suffered any loss of income. He performed his job well and worked hard. His back injury will not interfere with his ability to do his job.
- [93] In seeking damages for loss of earning capacity, the test is not whether the person is still earning income or able to earn income: *Jurczak v. Mauro*, 2013 BCCA 507 at para. 24:
- damages for loss of future earning capacity does not compensate projected future earnings, but the capacity to earn. In other words, it compensates for the loss or impairment of a capital asset: *Rosvold v. Dunlop*, 2001 BCCA 1.
- [94] The legal burden that is imposed on Mr. Miley is that there is a real and substantial possibility that he will suffer a future loss of income as a result of the injuries that he suffered in the motor vehicle accident. The proof is based on a possibility, not on a balance of probabilities. The court conducts an assessment based on either the earnings approach or the capital asset approach.
- [95] The court in *Perren v. Lelari*, 2010 BCCA 140 stated:
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss. [Emphasis in original]
- [96] After the accident, Mr. Miley continued his employment as a corporate communication officer with Coast Capital with very little time missed from work. He relied upon his training and experience as a professional writer and editor, which he obtained prior to the accident and his employment with Coast Capital.
- [97] Mr. Miley continued his work and received bonuses and pay raises after the accident. As well, he was able to qualify as a certified business communicator.

- [98] Despite this, Mr. Miley has a permanent injury to his back which causes him pain. Even though he remained employed by the same employer pre-accident, that is not a reason to foreclose a claim for loss of earning capacity: *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 24, 53 and *Pallos v. Insurance Corp. of British Columbia*, [1995] B.C.J. No. 2 at paras. 37-44 (C.A.).
- [99] The medical evidence confirms Mr. Miley's back injury. Dr. Vincent and Dr. McKenzie both agree; despite Dr. Vincent's successful treatments to reduce pain, the treatment does not cure the injury. They agree that Mr. Miley will have some degree of low back pain which will affect his work and other activities. It is anticipated that he will likely have reoccurring pain. He cannot participate in activities that would aggravate his back. He will be required to maintain his weight and keep himself conditioned. Mr. Miley is likely to require further neurotomy treatments.
- [100] At the time of trial, Mr. Miley's back pain had reduced, however, he will always be subject to flare-ups. He had several of them in 2013. These "flare-ups" could cause him to miss work or prevent him from functioning as he should in the event of a flare-up. This would interfere with his work if he were self-employed versus employed with an institution such as Coast Capital. Mr. Miley is "employable" with some restrictions. Ms. Winkler, the occupational therapist, states:

...In other words, Mr. Miley would not have the physical capacity to be able to access, in an open labour market, any jobs that have requirements for those restrictions as given below, despite being qualified in other ways (for example, by education, training, interests and aptitudes). He may require modified job duties or other environmental/ergonomic intervention related to the restrictions listed below, and this may limit the number of job titles that he is able to obtain or maintain.

The restrictions which place Mr. Miley within the category of employable are as follows:

1. Sitting. He is restricted from job titles requiring sitting for prolonged periods (i.e., greater than 45 minutes) without allowing for a change in body position.
2. Standing. He is restricted from job titles requiring static standing on a frequent basis, or static standing for period of more than 24 minutes before allowing for a change in position.
3. Bending. Mr. Miley is restricted from job titles requiring bending on a frequent basis, or sustained bending without the ability to use support from his arms.
4. Crouching. He is restricted from job titles requiring crouching and kneeling on a frequent basis, or sustained crouching without the ability to use support from his arms.
5. Strength. Mr. Miley is restricted from job titles requiring lifting loads weighing more than 50 pounds on an occasional basis, and carrying loads weighing more than 40 pounds on an occasional basis. He is restricted from material handling on a frequent basis.

With respect to Mr. Miley's current occupation as a writer/editor for Coast Capital Savings, this position is considered a sedentary job title, defined by the NOC as requiring handling loads weighing up to 11 pounds. Mr. Miley meets the strength requirements of this position.

His job position requires sitting on a constant basis, that is sitting is the primary positional requirement. Mr. Miley has assessed limitations to sitting. He requires regular micro breaks to stand for short durations so that he can manage his symptoms, and therefore, he is considered employable versus competitively employable in this position. Mr. Miley is in part able to continue to work in his current position that requires constant sitting because:

1. He is currently able to manage his symptoms by shifting his weight in his chair, and standing up from his work station; and
2. His work flow allows for him to take such breaks.

However, should Mr. Miley's current strategies of regularly changing his posture and position no longer be effective for him, he would have difficulty meeting the job demands of this position.

[101] The definition that Ms. Winkler uses as "employable" is as follows:

The individual meets most of the requirements of work within given strength categories but has limitations that restrict access to the full range of occupations for which he is otherwise qualified. He may require a sympathetic employer, modified work hours or environmental/ergonomic intervention.

[102] There is no evidence before me that Mr. Miley intends on changing his occupation as a professional writer. In fact, the evidence is that he intends to continue with that occupation or something similar to it.

[103] At the same time, in considering Mr. Miley's loss of earning capacity, it is not realistic that Mr. Miley would pursue labour jobs or jobs not from his chosen field and for which he has not been educated.

[104] The best method in assessing Mr. Miley's loss of earning capacity is to consider those factors in *Brown v. Golaiy*, [1985] B.C.J. No. 51 (S.C.):

[8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[105] Mr. Miley is less capable in jobs where he is required to sit, stand or crouch. This means any physical activity which requires his trunk to have flexion. These difficulties make him less marketable. It cannot be said that Mr. Miley can take advantage of job opportunities where flexibility in his trunk is required.

[106] Mr. Miley is less valuable to himself in that if he were self-employed he may not be able to take advantage of all potential earning contracts if his injury caused fatigue or a flare-up.

[107] Mr. Miley did not say when it was that he would retire. Whether Mr. Miley will retire early due to his injuries, at age 63 as suggested by his counsel, is unknown. Whether his injuries will affect his earning capacity over the course of the next 24 years is also unknown. Further, there are negative contingencies such as unemployment, and other health problems not related to his injuries as a result of the motor vehicle accident.

[108] In all of the circumstances which include Mr. Miley's past earnings, his limitations which did not exist prior to the motor vehicle accident and the vagaries of life that are not predictable, I award Mr. Miley \$52,000.00 for damages for loss of earning capacity. In coming to this amount, I have used a salary of \$50,000.00 per year and have used the multipliers based on Mr. Carson, the economist's income loss multipliers.

FUTURE COST OF CARE

[109] Ms. Winkler has prepared a future cost of care analysis. She states:

The purpose is to address the effects of Mr. Miley's injuries on his ability to perform activities of daily living and to provide recommendations for services, equipment and supplies to enable him to function at a level that is as close [as] possible to his pre-injury status.

[110] She bases her opinions on the physical capacity testing which she did and her interviews with Mr. Miley on October 15 and 18, 2012. In coming to her opinions, Ms. Winkler relied on Dr. McKenzie and Dr. Vincent's medical reports, reports from physiotherapists, clinical records, an MRI report and an x-ray report. In giving her opinion as to cost of future care, she assumed that Mr. Miley's role in the home relating to homemaking and housekeeping had been impacted by the motor vehicle accident and that Mr. Miley and his wife share household duties.

The Law

[111] The purpose of an award of cost of future care is to restore the injured person to his or her position as if the accident had not occurred. The courts must award cost of future care so as to ensure the injured person has adequate future care: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78-79 (S.C.), *aff'd* [1987] B.C.J. No. 1833 (C.A.).

- [112] The injured person must establish medical justification for each expense and each expense must be reasonable: *Aberdeen v. Langley (Township)*, 2007 BCSC 993 at para. 198, varied an issue of contributory negligence; 2008 BCCA 420.
- [113] Medical justification is not limited to doctors' opinions, but such evidence may come from qualified health practitioners: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 39:
- [39] I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Aberdeen* at paras. 43, 63.
- [114] In *Meghji v. Lee*, 2011 BCSC 1108 at para. 306, varied 2014 BCCA 105, Johnston J. states:
- [306] Milina makes it clear that every effort must be made to avoid duplication between awards for cost of future care and awards for loss of future income. To the extent that items recommended as part of a future care claim are items that might ordinarily have been purchased in any event out of the plaintiff's earnings, a court must be careful to avoid duplication. Duplication can be avoided by awarding only the increase in costs beyond those that would ordinarily have been incurred by a plaintiff if an accident had not occurred, and by awarding as close to full indemnity for future earnings loss as is reasonable. Duplication can also be avoided by awarding reasonably full indemnity for the future care expenses and then reducing the future earnings loss claim to reflect that portion of future income that would ordinarily have been spent on items that have been awarded as part of the future care claim.
- [115] The test for an appropriate award of future care costs is objective based on medical evidence.
- [116] Dr. McKenzie was familiar with Ms. Winkler's report. He recommends that Mr. Miley have a home-based exercise program and, once he is familiar with it, the requirements of physiotherapy will not be needed. Dr. McKenzie recommends physiotherapy when Mr. Miley has "flare-ups". Dr. McKenzie recommends that Mr. Miley have the services of a kinesiologist in his exercise program. He agrees with Ms. Winkler's recommendation of a gym pass.
- [117] He further recommends that Mr. Miley have the services of an occupational therapist for ergonomic assessment of his office station. Dr. McKenzie agrees that Mr. Miley should have some assistance with the heavier aspects of housework and yard work as these acts will likely cause "flare-ups" to his back. Dr. McKenzie does not see the need for an electric height adjustable desk, but rather suggests a higher desk and stool.

- [118] The defendants criticize Mr. Miley for the purchase of his home which he knew, due to its age, would require some work and, further, the size of the lot requires a lot of yard maintenance. The home Mr. Miley and his wife purchased is not unreasonable. Mr. Miley is not the only person in the family. The home was purchased to meet his needs and the family's needs, which have to be considered. Mr. Miley's wife is capable of doing housekeeping and yard maintenance. It is Mr. Miley's limitations that the court must address as it relates to his home.
- [119] Ms. Winkler, in making her recommendations, was clear that she was dealing only with Mr. Miley's role in housecleaning.
- [120] The defendants argue that neither Drs. McKenzie nor Vincent merely endorse Ms. Winkler's report without independent thought or testing.
- [121] Dr. McKenzie has followed Mr. Miley's back injury for approximately four years. Dr. Vincent has treated Mr. Miley for about two years. Dr. McKenzie's diagnosis of facet joint injury was confirmed by Dr. Vincent as a result of tests and treatment.
- [122] These are independent assessments of Mr. Miley. Drs. Vincent and McKenzie are not occupational therapists. I find that Ms. Winkler's tests on Mr. Miley support the findings of Dr. Vincent and Dr. McKenzie.
- [123] The defendants argue that Mr. Miley does not need to travel to Victoria for treatment with Dr. Vincent and that other doctors can provide the care that he needs. I accept Mr. Miley's argument that he has confidence in Dr. Vincent based on Dr. Vincent's previous successes. As with the choice of counsel, Mr. Miley is entitled to a choice of his doctor so long as it is reasonable. I find it reasonable that Mr. Miley travel to Victoria for the treatments from Dr. Vincent.
- [124] The future care cost sought by Mr. Miley and as compiled by Ms. Winkler and translated into present value calculations, are set out in Mr. Miley's counsel's written submissions based on Mr. Carson's cost of care multipliers.
- [125] I accept the need for a one-time consultation with a kinesiologist in the amount of \$1,827.00, a gym pass to age 70 of \$7,515.00 and a one-time consultation with an occupational therapist of \$1,398.00, together with travel costs of \$96.00, non-prescription drugs of \$601.00, cost of a height adjustable desk of \$950.00, together with delivery and set-up of \$90.00 and a sit and stand stool of \$349.50.
- [126] The recommendation of physiotherapy is not in keeping with Dr. McKenzie's comments, nor for that matter, Dr. Vincent's. The need for physiotherapy should be limited to times when Mr. Miley has "flare-ups". In 2013, Mr. Miley had three "flare-ups". Using the measure of three times a year at \$55.00 per session equals \$165.00 per year until age 70. I see no need for an assessment by a physiotherapist as Mr. Miley's conditions and back problems are well known and documented. I find that physiotherapy costs based on \$55.00 per session at its present day value is \$2,835.53.

[127] The evidence before me is not that Mr. Miley cannot do certain housecleaning activities, but rather he is limited in some aspects of housekeeping. Those tasks, as identified by Ms. Winkler, are:

Such tasks include cleaning the bathrooms and floors as well as vacuuming: they are tasks that involve standing combined with bending and crouching, for which Mr. Miley has assessed limitations.

[128] I would exclude vacuuming from that list. As a result, I will use the lowest figure of \$1,700.00 per year that Ms. Winkler used, rather than an average of the highest and lowest figures. As a result, up to age 70, the present value calculations for housekeeping, including GST, is \$30,675.23.

[129] Mr. Miley seeks present value calculations of \$37,981.00 for home maintenance. This amount is based on skilled and unskilled labour balanced equally. The assumption is that Mr. Miley will own this home or another home with similar requirements up to age 70. This, of course, is unknown. For purposes of such contingencies, I have discounted the amount sought by 25 percent. I award Mr. Miley \$28,485.75 for home maintenance.

[130] Mr. Miley seeks a present day value for yard maintenance of \$25,395.00 up to Mr. Miley reaching age 70. I reduce this amount by 25 percent for the same reason I reduced home maintenance. In addition, I would reduce the amount keeping in mind that the home is also owned by Mr. Miley's wife, who is capable of performing some yard maintenance. She maintains a flower bed that she enjoys working on, including its weeding. I heard no evidence to suggest that she would not be able to mow the lawn.

[131] In *Pierce v. Pandhi*, 2002 BCSC 791, Mr. Justice Rogers made this comment:

[14] Mrs. Pierce also claims for the cost of having a gardener repair and maintain her rock gardens. While looking after one's house is a necessity and so, in the proper circumstances, might bottom an award to pay someone else to do the work, keeping a decorative garden is an exercise in aesthetics. Mrs. Pierce may not now derive as much enjoyment as she used to when she looks out the window of her house, and for that loss she is entitled to compensation in non-pecuniary damage. It is not an item of future care as contemplated by *McLaughlin J* (as she then was) when she said in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.):

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. These authorities establish, (1) that there must be a medical justification for claims of cost of future care and, (2) that the claims must be reasonable.

and:

It follows that I must reject the plaintiff's submission that damages for cost of future care should take into account amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time it must be recognized that happiness and health are often intertwined.

[132] I would expect Mr. Miley and his wife would require someone annually to do the heavier work. Mr. Miley by all accounts, prior to the accident, was capable of doing this work and after the accident was not. Taking into consideration all the factors to which I have referred, using the least amount in the annual range of yard maintenance used by Ms. Winkler; that is, \$740.75, dividing it in half to reflect Mrs. Miley's share, I allow the sum of \$6,681.79 as present day value, which includes GST.

SUMMARY

[133] The damages award are:

1)

Special damages:

\$7,517.36

2)

Non-pecuniary damages:

\$52,500.00

3)

Loss of earning capacity:

\$52,000.00

4)

Cost of future care:

\$81,504.80

TOTAL:

\$193,522.16

COSTS

[134] Unless the parties address me on the matter of costs within 30 days of receiving these reasons, I order that the plaintiff will have his costs and reasonable disbursements pursuant to Appendix B, Scale B of the Supreme Court Civil Rules, B.C. Reg. 168/2009.

"H.C. Hyslop J."

HYSLOP J.

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