
CANADA / JUDGMENT

Miller v. Marsden

2014 BCSC 2331

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 2331 Miller v. Marsden

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Miller v. Marsden,

2014 BCSC 2331

Date: 20141210

Docket: M102884

Registry: Vancouver

Between:

Matthew Roy Miller

Plaintiff

And

Kathryn Marsden, Frederick Marsden

and Richart Dyck

Defendants

Before: The Honourable Madam Justice Fenlon

Reasons for Judgment

Counsel for the Plaintiff:

P.D. Granger

Counsel for the Defendants:

K.J. Learn

Place and Date of Trial:

Vancouver, B.C.

May 26-30, 2014

June 2, 2014

July 3-4, 2014

Place and Date of Judgment:

Vancouver, B.C.

December 10, 2014

I. INTRODUCTION

- [1] This case arises out of a motor vehicle accident that occurred nine years ago when the plaintiff Matthew Miller was 16 years old. The defendants Kathryn Marsden and Frederick Marsden admit liability for the accident but dispute the severity and impact of Mr. Miller's injuries.

II. THE ACCIDENT

- [2] The accident occurred on December 3, 2005, at a T-intersection. Mr. Miller was in the right back passenger seat of a car being driven by Richard Dyck, the father of Mr. Miller's friend David Dyck. Mr. Dyck was travelling along at full speed when a car pulled out from a side road in front of them, causing the two vehicles to collide. Both cars were written off.
- [3] At the moment of impact Mr. Miller had his feet tucked under the seat in front of him with his torso twisted to the left and his head turned down and to the right, talking to his friend in the front passenger seat. He was unable to catch his breath after the impact and remained in the vehicle lying on his left side while the others got out. He thought that he might die and had to be assisted out of the car by his friend.

III. WHAT INJURIES WERE CAUSED BY THE ACCIDENT

- [4] It is common ground between the parties that Mr. Miller suffers from neck and back injuries and temporomandibular disorder ("TMD"), with headaches secondary to those injuries. The parties also agree that Mr. Miller has ongoing psychological problems arising from the accident. They do not agree on the severity of his injuries generally, and the extent to which they interfere with his life and work.

- [5] Another disagreement relates to Mr. Miller's tinnitus. The parties agree that he suffers from tinnitus, but the defendants' position is that the tinnitus was not caused by the accident. The defendants also dispute Mr. Miller's claim that he was entirely healthy before the collision. It is convenient to address these two latter disputes before turning to the nature and severity of the remaining problems.
1. Did Mr. Miller have pre-existing neck and back symptoms?
- [6] Mr. Miller was in Grade 10 when the accident occurred. He says he was a healthy 16-year-old before the collision. The defendants do not agree. They point to a history of intermittent neck adjustments with a chiropractor, Dr. Alan Irving, in the three years before the accident; Mr. Miller had been to Dr. Irving three times in the twelve months preceding the collision. The defendants argue these visits establish that Mr. Miller was having neck and back problems at a very young age.
- [7] I conclude that the plaintiff's visits to Dr. Irving were for "maintenance" of good spinal health. All of the attendances were at his mother's urging and immediately following her own appointments with the chiropractor. Mr. Miller's mother testified that she is of the view that regular chiropractic attendances maintain good overall health. It was evident from her testimony, and from the plaintiff's attendance at the chiropractor following the accident, that the plaintiff's family regards a chiropractor as a primary care provider.
- [8] Mr. Miller was only 13 when he had his first chiropractic adjustment. I find that his attendances at the chiropractor were due to his mother's concern to keep him healthy, rather than due to acute problems with his neck or back.
2. Was the tinnitus caused by the accident?
- [9] The defendants submit that the plaintiff's tinnitus was not caused by the accident because Mr. Miller did not report it to Dr. Sachit Shah until December 17, 2008, three years after the accident. Mr. Miller saw Dr. Shah on December 5 and 19, 2005, and on January 17, 2006, but Dr. Shah's notes do not refer to a complaint of ringing in the ears. In cross-examination the plaintiff's otolaryngologist, Dr. Neil Longridge, opined that onset of tinnitus would be expected within six months of a motor vehicle accident; onset three years post-accident would make a causative link between the two events unlikely.
- [10] I find the plaintiff has proved that the tinnitus was caused by the accident for the following reasons. First, the evidence establishes that the plaintiff experienced tinnitus in the weeks immediately following the accident. The plaintiff's mother described using white noise from an untuned radio days after the accident to mask the noise so that her son could fall asleep. Mr. Miller's father recalls him complaining of ringing in his ears within weeks of the accident. David Dyck, Mr. Miller's friend, recalled an incident when they were in Grade 11, when the topic of tinnitus incidentally came up. David Dyck had an episode of tinnitus and referred to it. Mr. Miller then told David Dyck that he too had this problem "but it was always there".

- [11] Second, Dr. Shah's notes were extremely sparse and he could not be certain the plaintiff did not mention tinnitus on an earlier appointment. He acknowledged that Mr. Miller and his mother sought treatment for tinnitus in December 2008 because Dr. Shah made referrals to a number of specialists to address that problem. While Dr. Shaw recorded "problems with hearing" in his notes, he did not specifically refer to tinnitus.
- [12] Third, Dr. Longridge, the plaintiff's otolaryngologist, held the opinion that the tinnitus was caused by the accident.

IV. SEVERITY OF THE INJURIES

1. The Musculoskeletal injuries of the cervical, thoracic and lumbar spine

- [13] The defendants submit that the soft tissue injuries Mr. Miller experienced are mild and do not interfere with his daily living and ability to work at physical tasks. The defendants rely on the evidence of Dr. Roy O'Shaughnessy, a forensic psychiatrist called by the plaintiff, who stated: "Overall, I was impressed that there were no major limitations in his physical functioning from pain although he certainly is describing ongoing irritations."
- [14] The defendants also rely on Dr. Caillier's opinion that as long as Mr. Miller's vocational activities were "lighter based activities" he would not be limited or restricted in any sphere of activity. Further, the defendants point out that Mr. Miller's pain complaints have not stopped him from working at heavier jobs such as metal recycling, carpentry, and waste water/septic tank treatment. Finally, the defendants rely on Mr. Miller's self-reports to his chiropractor over three visits in August 2009. Mr. Miller is quoted as saying that his "neck feels good" and on a later visit "feels awesome - no complaints and no headaches and further treatment until February 23, 2011".
- [15] Taken in the context of the evidence as a whole, these references do not persuade me that Mr. Miller has mild inconsequential soft tissue injuries as the defendants assert.
- [16] Neither Mr. Miller nor occupational therapist Mr. Min Trevor Kyi, nor any of the other specialists, say that the plaintiff cannot do physical work. His soft tissue injuries do not physically prevent him from lifting heavy weights or shovelling dirt. Rather, the specialists say that such work is not sustainable in the long term due to the pain Mr. Miller experiences doing it and its impact on the avocational aspects of his life. The functional capacity evaluation conducted by Mr. Kyi demonstrated objective decreases in range of motion and work productivity towards the end of an eight-hour work day.
- [17] Dr. John Fuller, an orthopedic specialist called by the plaintiff, noted that the accident occurred when Mr. Miller was "in a very unfortunate position." In his opinion, the fact that Mr. Miller was twisted to the left meant that movement in the thoracolumbar spine was "compromised, leaving less flexibility to absorb overload in flexion/forward bending." Dr. Fuller said similar considerations apply to Mr. Miller's neck because he was looking down and to his right at the point of impact.

- [18] Dr. Fuller holds the opinion that Mr. Miller's thoracolumbar junction is "structurally compromised" and that there is a "significant possibility of his developing a degree of degenerative change at this level in the back on a long-term basis" which could occur when Mr. Miller is aged 33 to 43. He described the prognosis for improvement as "very poor" given the passage of time and concluded that "this patient has long since reached maximal medical recovery."
- [19] Dr. Lisa Caillier, a specialist in physical medicine and rehabilitation, assessed Mr. Miller in August 2013. She found Mr. Miller had "chronic pain which is soft tissue in nature involving the neck, upper back, posterior shoulder girdle, and mid-back regions." Dr. Caillier, like Dr. Fuller, holds the opinion that "the likelihood of Mr. Miller becoming pain-free is poor and he is likely to have ongoing intermittent pain now and into the future." Although she states that she believes "there is still the opportunity to better manage his complaints." Dr. Caillier also noted that Mr. Miller has an "increased susceptibility and vulnerability to worsening of his pain should he sustain future trauma to the neck through to mid-back regions."
- [20] In summary, I accept the opinions of Dr. Fuller and Dr. Caillier as to the severity of the soft tissue injuries and their prognosis.

2. Headaches

- [21] The evidence from the experts for both parties suggests that Mr. Miller's headaches are due to two sources: his neck and upper back injuries (occipital headaches) and his jaw injury (temporal and frontal headaches).
- [22] Relying on a headache diary Mr. Miller kept in April and May 2009, the defendants submit that the plaintiff's headaches were mild and infrequent. However, I do not find the notations during this two-month period to be determinative. First, Mr. Miller was not employed at that time and therefore did not have his usual soft tissue injury symptoms. Second, Mr. Miller explained that he always had a low grade headache and only recorded headaches that were "really severe". While that was not in compliance with the instructions in the headache diary, I accept that is how Mr. Miller interpreted his task. I also accept the evidence of Dr. Gurdeep Parhar, a general practitioner, that Mr. Miller has sustained musculoligamentous injuries to his cervical, thoracic, and lumbar spine and that he experiences muscle tension headaches that are likely chronic.

3. Temporomandibular Disorder

- [23] The oral medicine specialists called by both parties, Dr. Bruce Blasberg for the plaintiff and Dr. Joel Epstein for the defendants, agree that Mr. Miller has TMD of the joint tissues resulting in clicking, crepitation, joint tenderness and muscle tenderness. Both agreed that treatment for the TMD is warranted to address the myalgia of the masticatory muscles because this is causing headaches. The doctors disagree on whether treatment should take the form of two modalities or one, a dispute to which I will return when addressing cost of future care.

4. Psychological Problems

- [24] As noted above, the plaintiff's psychiatrist Dr. O'Shaughnessy and the defendants' psychologist Dr. William Koch agree that Mr. Miller suffers from psychological problems as a result of the motor vehicle accident. Dr. O'Shaughnessy describes this as "a driving phobia and adjustment disorder with anxiety", while Dr. Koch concludes Mr. Miller has "driving fear/anxiety". It does not particularly matter for the purposes of this assessment what labels are applied to Mr. Miller's psychological difficulties following the accident. Both experts agree that he requires therapy to address his problems.
- [25] Dr. Koch assessed Mr. Miller in February 2014. He found Mr. Miller to be cooperative, forthcoming and reliable. Dr. Koch opined that Mr. Miller has a vulnerable personality and that he is less resilient than an average person in the face of stressful events. He also concludes that Mr. Miller's age at the time of the accident made him increasingly vulnerable to psychological injuries because he did not have the mechanism an adult would have to deal with stressful events such as the accident. Dr. Koch diagnosed Mr. Miller with subsyndromal post-traumatic stress disorder and a cerviogenic headache disorder that were both still active at the time of assessment, eight years after the accident. The subsyndromal post-traumatic stress disorder was manifested by vehicle travel anxiety, problems with concentration, sleeplessness and intrusive recollections of the accident.
- [26] Dr. Koch recommends cognitive behavioural therapy as something that "could potentially benefit" Mr. Miller. He identifies a number of positive and negative prognostic indicators including the chronicity of Mr. Miller's condition and its comorbidity with his headache disorder and tinnitus, which complicates treatment. Dr. Koch is of the view that Mr. Miller's prospects for recovery will be made more difficult by the prospect of not finding rewarding employment given his weak school performance and difficulty in retraining.
- [27] Dr. O'Shaughnessy is also of the opinion that Mr. Miller would benefit from psychologically-based treatment. He recommended a combination of cognitive-behavioural interventions and desensitization treatment.

5. Balance Problems

- [28] Mr. Miller reports having poor balance and walking into people when he is walking beside them. Dr. Longridge provided the only medical evidence in support of this claim. He conducted seven balance tests and found one slight abnormality on one task. Mr. Kyi tested the plaintiff for balance and found nothing unusual. I conclude that the plaintiff has not established that he suffers from a balance problem. If, in fact, there is a difference in his balance, I find that it is de minimis and has no impact on his functioning.
- [29] In summary, the medical experts largely agree that Mr. Miller's condition is likely chronic although there is potential for better management of his soft tissue injuries, TMD and psychological condition.

V. NON-PECUNIARY DAMAGES

[30] An award of non-pecuniary damages compensates the plaintiff for loss of amenities, for pain, suffering and loss of enjoyment of life.

[31] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal outlined the factors that a trial judge should consider when assessing such damages:

[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).

[32] The difficulty in the present case is that Mr. Miller was sixteen years old when the accident occurred. It is hard to know what his life as an adult would have looked like without the accident. Would he have become more involved in his community, in school, in sports, overcoming his tendency in Grade 10 to be shy and somewhat withdrawn?

[33] Mr. Miller is now 25. I accept the plaintiff's submission that the accident and the resulting injuries interrupted his development to a significant degree. Mr. Miller was about to get his learner's licence, but that was put on hold for four years. In addition to delaying learning to drive, Mr. Miller avoided social engagements that required taking a ride with a friend because of his fear of being in a vehicle. As David Dyck put it, Mr. Miller was "never the most outgoing guy", but after the car accident he did not want to go anywhere because of his trepidation about getting into a car.

- [34] Mr. Miller was never a good student at school, but he was even more reluctant to attend school after the accident. His mother described him ruminating about the accident, and having trouble sleeping. She recalled he did not want to do anything and was always at home in his bedroom. She described him as someone who used to be curious and interested in things but after the accident became withdrawn.
- [35] In terms of recreational activities, Mr. Miller has never been an athlete or a joiner. His recreational activities consisted of spending time with small groups of friends and playing video games. He is not now prevented from carrying out those recreational and social activities due to his injuries, but that is not to say that the injuries have had no impact on his life. Their biggest impact is psychological. Mr. Miller is not as cheerful as he was before. He is prone to depression, is anxious and more socially isolated. These symptoms are made worse by periods of unemployment.
- [36] Mr. Miller was described by both of his parents before the accident as quiet and willing to help with tasks around the house. After the accident they described him as quick to anger, irritable, less engaged and less inclined to help.
- [37] In short, before the collision Matthew Miller had a small group of good friends, played video games and went to school. That rather narrow range of experience remains largely the same but is qualitatively less enjoyable because Mr. Miller experiences chronic pain, discomfort, anxiety and an ongoing fear of being in a vehicle.
- [38] Mr. Miller's ability to find a career path has also been affected by his injuries. The experts noted a link between Mr. Miller's depressive symptoms and his lack of employment.
- [39] The tinnitus has had a serious impact on Mr. Miller's enjoyment of life. It is constant and intrusive enough that it takes Mr. Miller 30-40 minutes to fall asleep every night. The high-pitched noise also makes it difficult for him to work in a quiet environment, including listening to lectures. This is, for Mr. Miller, a daily frustration. His lack of sleep also affects his mood and resilience.
- [40] Mr. Miller accepts his condition as his "new normal" and gets on with his life. He is not a complainer, and he does not focus on his injuries. As noted in *Stapley v. Hejslet*, however, a plaintiff is not to be penalized in the assessment of non-pecuniary damages due to his stoicism. I accept that Mr. Miller suffers as a result of his injuries, despite not "making a big deal" about them.
- [41] The defendants assert that an award of \$40,000 to \$50,000 is appropriate, relying on the following cases:
- *Sharpe v. Tidey*, 2009 BCSC 948
 - *Sandher v. Hogg*, 2010 BCSC 1152
 - *Rattenbury v. Samra*, 2009 BCSC 207

- Romanchych v. Vallianatos, 2009 BCSC 669, aff'd 2010 BCCA 20
- White v. Nuraney, 2000 BCCA 536

[42] The plaintiff argues that \$120,000 in non-pecuniary damages is appropriate given that Mr. Miller's pain and suffering and loss of enjoyment started at the age of 16 and will continue for the rest of his life with perhaps some improvement following treatment. The plaintiff relies on the following cases:

- Andrusko v. Alexander, 2013 BCSC 985
- Paller v. Regan, 2013 BCSC 1672
- Hollows v. Wood, 2013 BCSC 1991
- Parhar v. Dawe, 2014 BCSC 580

[43] Other cases provide a useful starting point, but each case must be decided on its particular facts. In this case, I conclude that non-pecuniary damages of \$105,000 are appropriate.

VI. PAST INCOME LOSS

[44] I find that Mr. Miller's physical and psychological injuries have affected his ability to perform work. Mr. Miller's first job after he finished high school was as a general labourer with West Coast Metal Recycling. He was in daily pain and used analgesics several times a week. Mr. Miller also had to ask others to cut down metal pieces to smaller sizes and relied on his co-workers to help him with larger items that he should have been able to lift unassisted. He also had to regularly recuperate after work.

[45] Mr. Miller next worked at Precision Stair Systems Ltd., which was even more physically demanding than the recycling job. He was regularly absent from work, required assistance with tasks he should have been able to do independently, suffered daily pain on the job and afterwards, and relied on medication during work hours and in the evening to relieve pain.

[46] I have already alluded to Mr. Kyi's evidence that based on the functional capacity evaluation a full-time physically intensive position such as the two jobs Mr. Miller worked at before trial are neither sustainable nor appropriate for Mr. Miller. In addition, Dr. Fuller stated at paragraph 53 of his report:

his choice of career has therefore been compromised in that realistically he is incapable of this type of occupation with particular reference to any activity requiring flexion/forward bending, lifting, repetitive lifting, rapid motion, or working in an awkward or confined space.

[47] Dr. Caillier recommended lighter-based vocational activities, noting that heavy labour or heavy lifting type positions would provoke pain.

- [48] A claim for damages for past income loss is really for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. Because this head of damages involves a hypothetical, i.e. what Mr. Miller would have earned but for the accident, the standard of proof is the same as for loss of future earning capacity. It is assessed on the standard of real and substantial possibility of loss rather than on a balance of probabilities: *Hoy v. Williams*, 2014 BCSC 234 at para. 141; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27.
- [49] The defendants argue that Mr. Miller has not suffered any past income loss. They submit that Mr. Miller's history of work and his reasons for leaving the various jobs he had after high school were consistent with a young person finding his way in life. The defendants note that none of his past employers were called to give evidence, nor were any of his co-workers. Based on his full-time work at the recycling facility and Precision Stair, the defendants argue that if the plaintiff was not working prior to trial, it was due to his choice and his decision to leave these jobs for reasons unrelated to his injuries.
- [50] Mr. Miller argues he has suffered damages of \$160,000 for past income loss. That figure is based on Mr. Miller earning \$46,550 a year at an hourly rate of \$22.38. The latter figure is an average of labour rates of pay provided by Mr. Trevor Lesmeister, a vocational rehabilitation consultant, based on the following occupations: construction trade labourer, bus driver, painter, carpet installer, logger, bricklayer, iron worker, and landscaper.
- [51] I find the real measure of Mr. Miller's loss lies somewhere between the positions of the parties for the following reasons. First, I do not accept plaintiff's counsel's submission that Mr. Miller would have been earning \$22.38/hour from the moment he left high school until the date of trial. While Mr. Miller was restricted in the location of the jobs he chose because he did not want to have to drive to work, there is no evidence that he could have found something more lucrative immediately if he had been able to drive.
- [52] Mr. Miller started at the recycling plant in August 2007, loading pieces of metal for \$9/hour. When he left in May 2008 he was earning \$12/hour and working five days a week.
- [53] He earned \$10/hour as a dishwasher working three days a week for two months after he left the recycling job. He then tried going to Kwantlen College full-time during the 2009-2010 school year but failed statistics and did poorly in his other courses, resulting in the college putting him on an academic warning in both terms.
- [54] On June 1, 2010, Mr. Miller started working full-time at Precision Stair Systems earning \$14/hour to start and moving to \$16.50 when he left in 2010.
- [55] I find it probable that but for the accident Mr. Miller would have started at much the same kind of work right out of high school as he did. He was well suited by temperament and interest to the job at Precision Stair, a position he obtained through his mother who is the bookkeeper for that company.

- [56] Accordingly, I find that a better measure of the earnings he would likely have earned but for the accident is \$15/hour rather than \$22.38/hour.
- [57] Full-time earnings at \$15/hour for a 40-hour work week with time off for vacation give an annual income of \$31,200. Income from August 2007 to trial in July 2014 would be roughly seven times that, or \$218,400. Mr. Miller actually earned \$77,500 during that period, leaving a difference of \$140,900.
- [58] That, however, is not the measure of past income loss because Mr. Miller was a young man finding his way. There is a significant possibility that he would have returned to college or training as he did to test his hand at computer courses given his interest in computers and his friend's decision to study in that area.
- [59] There is, further, a real and substantial possibility that Mr. Miller would have had periods of unemployment. He left West Coast Recycling because he felt it was unsafe after a piece of heavy metal came close to falling on him, in fact striking his knee. He left Precision Stair to try his hand at septic waste management. While I accept that his decision to leave both jobs was motivated in part by the difficulties he was experiencing doing physical work because of his injuries, it was also in part a search for something better. In other words, Mr. Miller was a young man trying to find his way and exploring his options. He seemed even before the accident to be a somewhat passive person who could not be described as driven or particularly hard working.
- [60] Taking all of this into account, I set past wage loss at \$50,000.

VII. FUTURE LOSS OF INCOME EARNING CAPACITY

- [61] I find there is a real and substantial possibility that Mr. Miller will earn less in future than he otherwise would have without the injuries. In light of his aversion to school, I also find it highly likely he would have worked as a labourer in a position that did not require formal vocational training.
- [62] In comparing what would have happened in Mr. Miller's work life with what will happen now, I find Mr. Miller is less capable of doing physical work. He is also psychologically more fragile and more prone to depression. Based on the evidence of the plaintiff's experts, it is likely that as he ages he will have more problems with his back and increased absenteeism. All of these factors make Mr. Miller less attractive to an employer and less likely to hold and maintain the kind of employment he was most suited to before the accident. I find this will translate into a real out-of-pocket loss.
- [63] The plaintiff led considerable evidence from Mr. Lesmeister about vocational options for Mr. Miller that accommodate his physical limitations. The three most suitable were found to be graphic designer, dental lab technician and animal health technician. While these jobs would suit Mr. Miller in terms of his physical limitations, and while Mr. Lesmeister opined that Mr. Miller had the intellectual capacity to do the work required to complete the training

for those jobs, I find it improbable that Mr. Miller has the drive, discipline and interest necessary to complete the training necessary to do any of these occupations. Nor would he have had such drive prior to the accident.

- [64] In summary, Mr. Miller is someone who, but for the accident, would have worked at a physical labouring job that did not require vocational training. The job at Precision Stair suited him. He did it well, enjoyed it, and was appreciated and accommodated by his employer. Indeed, it is remarkable that the only time Mr. Miller showed any animation while testifying was when he described his work at Precision Stair. He said with genuine enthusiasm, "I loved that job."
- [65] There is a real and substantial possibility that Mr. Miller is going to end up working in light, unskilled labour work that pays entry level wages at or just above minimum wage. Mr. Lesmeister identified work in this area as light assembly worker, storage facility rental clerk, or sales clerk.
- [66] But for the accident I find Mr. Miller would have been earning about \$22/hour by the age of 25 and that he will now be earning about \$12/hour. As set out in *Perren v. Lalari*, 2010 BCCA 140 at para. 32:
- [T]he 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*.
- [67] The defendants urge a capital asset approach based on one year's income at Mr. Miller's best income to date of approximately \$33,000. The plaintiff urges an earnings approach using the differential between what he would have earned per hour and what he will now earn per hour. Based on the differential between \$22.38/hour and \$12.07/hour, that difference comes to \$21,445 annually or \$429,872 adjusted for present value over a working lifetime. This adjustment takes into account a contingency for premature death as well as labour market contingencies including non-participation in the labour force, unemployment, part-time work and part-year work.
- [68] The \$429,872 figure would have to be adjusted for additional negative and positive contingencies. On the negative side there is the potential for worsening back health which could happen as early as his late 30s and which could prevent him from working at even light work. On the positive side, treatment that Mr. Miller has not yet undertaken could improve his symptoms or at least enable him to manage them better. It is also possible that he could achieve higher earnings than \$12/hour through obtaining a low level management position, or become more skilled on the job resulting in a higher hourly wage.
- [69] There is no pre-accident work history from which to assess Mr. Miller's commitment and work ethic when he was healthy. More than in most cases, assessing loss of future earning capacity for a young person is an exercise in crystal ball gazing.

[70] It is appropriate in this case to assess loss of future earning capacity using the differential between heavy unskilled labour and light unskilled labour as the starting point. However, the assessment is not a precise mathematical exercise. As Huddart J.A. noted in *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18, "The assessment of damages is a matter of judgment, not calculation."

[71] I conclude that damages for loss of future earning capacity should be set at \$250,000.

VIII. SPECIAL EXPENSES

[72] The plaintiff claims special expenses of \$1,350. The defendants take issue with the claim for chiropractic treatment. I accept the defendants' submission that the \$595 claimed for those treatments should be reduced to \$424 in recognition of the fact that the plaintiff would have received some chiropractic treatments even if he had not been injured.

[73] The defendants do not oppose the remaining special costs sought. I conclude they are appropriate and award \$1,180.

IX. COST OF FUTURE CARE

[74] The plaintiff seeks costs of future care of \$132,247. Those costs reflect the present value of treatment and devices recommended by the many experts called in this case.

[75] An award for cost of future care will be made if the claims are medically justified and reasonable: *Milina v. Batsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 84, *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.). The test is an objective one based on medical advice: *Milina* at 84. However, the Court should exercise common sense and consider whether the plaintiff is likely to make use of the treatment and items claimed: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at paras. 12-14. In this case, some of the recommendations are not treatments or steps that the plaintiff is likely to take. For example, the plaintiff seeks a gym membership for life when it is clear that he is a non-athletic person who does not use a gym. In a similar vein the plaintiff seeks a pool membership when the plaintiff does not like swimming. I conclude it is also very unlikely that the plaintiff will use Pilates and yoga training.

[76] As for homemaking and yard assistance, Dr. Caillier indicated the plaintiff can do this work although he will have to pace himself.

[77] Dr. Blasberg and Dr. Epstein both recommend treatment for TMD. They agree that oral appliance therapy and physiotherapy should be pursued. In addition, Dr. Blasberg recommends jaw self-management instructions, four appointments to manage initial therapy, and needling therapy for jaw muscles. Dr. Blasberg estimates the total cost for the initial therapy to be between \$3,950 and \$4,700.

[78] Dr. Blasberg and Dr. Epstein differ on the need for future care beyond the initial therapy sessions. Dr. Blasberg suggests Mr. Miller should be re-examined after the initial therapy to "determine the need for additional or alternative therapy." Dr. Epstein does not speak to additional treatment beyond the initial treatment. He anticipates that the recommended treatment will result in improvement of Mr. Miller's symptoms, although he notes that they may not fully resolve. Based on this evidence, I am satisfied that it is appropriate to award Mr. Miller \$4,325 for the initial TMD treatment. I am not satisfied that the need for further TMD treatment has been established.

[79] I am also satisfied that an award should be made to cover the cost of a kinesiologist, chiropractic treatments for symptom flare ups, tinnitus retraining and masking, medications, and cognitive therapy for Mr. Miller's driving anxiety and phobia.

[80] In summary, I find the following to be medically justifiable and reasonable expenditures that Mr. Miller is likely to use based on all of the evidence:

Assessment and work with a kinesiologist on a one-time basis:

\$1,650

Chiropractic treatments for flare-ups:

\$2,500

Cognitive behavioural therapy for anxiety and driving phobia:

\$2,300

Tinnitus retraining:

\$1,440

Tinnitus masking device:

\$2,000

TMD treatment:

\$4,325

Prescription and non-prescription medications:

\$2,000

TOTAL:

\$16,215

X. DUTY TO MITIGATE

- [81] The defendants argue that Mr. Miller failed to mitigate his damages because he did not seek out regular medical care following the accident. For example, the defendants point to Mr. Miller's absence from Dr. Shah's care from January 17, 2006, to December 17, 2008 despite being advised to return if his symptoms did not improve.
- [82] The defendants bear the burden of proving that Mr. Miller failed to mitigate. In accordance with *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, the defendants must establish:
- (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.
- [83] The test is a subjective/objective one that considers "whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment": *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.
- [84] I conclude that the defendants have not met this burden. Mr. Miller saw several physicians after the accident and followed up on referrals to specialists to explore treatments for his symptoms. While he did not visit Dr. Shah regularly, he did attend for chiropractic treatment. Mr. Miller was sixteen at the time of the accident. To a large extent he depended on his parents to arrange and pay for appointments that were not covered by the Medical Services Plan. His parents did not have the means to assist financially and did the best they could in the circumstances. Further, the defendants have not shown that Mr. Miller's damages would have been reduced had he met with physicians more regularly or sought out additional medical treatment.

XI. SUMMARY OF DAMAGES

- [85] In summary, I award the plaintiff the following:

Non-pecuniary damages:

\$105,000

Past Wage Loss:

\$50,000

Loss of Future Earning Capacity:

\$250,000

Special Expenses:

\$1,180

Cost of Future Care:

\$16,215

\$422,395

XII. COSTS

[86] In the usual course the plaintiff would be entitled to his costs at Scale B. If the parties are unable to agree on costs they may set the matter for hearing before me within three months of the date of these reasons for judgment.

The Honourable Madam Justice L.A. Fenlon

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