

CANADA / JUDGMENT

Minhas v. Peltonen

2020 BCSC 1836

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Supreme Court of British Columbia

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2020 BCSC 1836 Minhas v. Peltonen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Minhas v. Peltonen,

2020 BCSC 1836

Date: 20201120

Docket: M199229

Registry: New Westminster

Between:

Harry Minhas

Plaintiff

And

Tyler Peltonen and Excelsior Building Maintenance Ltd.

Defendants

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment

Counsel for the Plaintiff:

J.A. Thomson

Counsel for the Defendants:

A.M. Pappin

Place and Dates of Trial:

New Westminster, B.C.

November 16-19, 2020

Place and Date of Judgment:

New Westminster, B.C.

November 20, 2020

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I. Introduction

[1] The plaintiff Mr. Minhas is a 43-year-old chartered professional accountant ("CPA"). He was injured in a motor vehicle accident that occurred July 6, 2017, in Vancouver. He was 40 years of age at the time. The defendants have admitted liability for the MVA. These reasons address the plaintiff's claims for injuries suffered in the motor vehicle accident.

II. Background

A. The MVA

- [2] On July 6, 2017 the plaintiff was driving from his place of work in downtown Vancouver to his home in Burnaby when the accident occurred. He had left work at his usual departure time of 5:00 PM. He was driving eastbound on Hastings Street in a 2010 Nissan 370Z Sport Coupe, when a vehicle driven by the defendant Peltonen, a 2007 Chevrolet classic C-1500 pick-up truck, made a left turn to proceed southbound on Skeena Street, in front of the plaintiff's vehicle, resulting in the collision. The plaintiff's Nissan struck the side of the defendant's pick-up truck. There was extensive damage to the plaintiff's vehicle. The vehicle damage estimate was for a repair cost of \$24,565.18. The vehicle was deemed a total loss. The damage to the defendant's pickup truck was assessed at \$7,202.16.
- [3] The accident scene and damage photographs show extensive damage to the front end of the plaintiff's Nissan.
- [4] Traffic was heavy at the time of the MVA. Mr. Minhas remained in the vehicle briefly, in a state of shock, then got out and spoke to the driver of the other vehicle, the defendant. The defendant was hostile. Mr. Minhas called 911. Police, ambulance and fire department personnel attended. His car was not drivable. He called his wife to come to the scene and take him home.
- [5] That evening Mr. Minhas noted a lot of pain and stiffness in his mid and upper back, neck, shoulders, and head. He also had a severe sharp pain in his left ring finger. He saw his general practitioner, Dr. Edward Lum, who had been his family physician for nine years, the following day, July 7, 2017. Dr. Lum advised Mr. Minhas to take time off of work, take pain medications, and see a physiotherapist.
- [6] Mr. Minhas was in a great deal of pain for the next several days. He took one week off of work. He returned to work, in pain, working reduced hours. Over time, he was able to increase his work hours to a level somewhat less than before. He currently works about 35 hours per week, or about one hour less per day than pre-accident. In addition, he maintains that he is unable to work extra hours, as he did in the past.

B. The Plaintiff

- [7] Mr. Minhas resides in Burnaby with his wife, two children aged 11 and eight, a boy and a girl, and his parents. He was married in 2006. His spouse is a lawyer.
- [8] Mr. Minhas grew up in Prince George. He obtained a Bachelor of Business Administration from Simon Fraser University in 2002, and obtained credentials as a chartered accountant (now chartered professional accountant, or CPA) in 2006.

- [9] As a child and youth Mr. Minhas worked steadily, in jobs such as farm labouring (berry picking), newspaper delivery, restaurant worker, saw mill worker and retail worker. In university he mainly worked in restaurants as a server. He also worked at Vancouver International Airport for two summers in shipping and receiving.
- [10] After obtaining credentials as an accountant, he worked for a small chartered accountancy firm for several years, during which he gained a lot of experience with start-up businesses.
- [11] In 2012, he was approached by an employment recruitment agency, and began work for a new business, Secret Location Ventures Ltd., owned and operated by Ms. Carey Melnichuk. His work at Secret Location Ventures Ltd. began in April 2012. Initially he was financial controller. His title is now chief financial officer (CFO). As comptroller and CFO, the plaintiff is responsible for the overall financial management and direction of the company.
- [12] For much of his life Mr. Minhas has been an avid soccer player, playing at elite levels.

C. Treatment of Injuries

- [13] As noted, Mr. Minhas saw his general practitioner, Dr. Lum, the day after the accident. He continued to see Dr. Lum periodically for treatment for MVA injuries thereafter. Dr. Lum recorded, and testified, that Mr. Minhas initially complained of headache, right neck pain, right shoulder pain, right arm pain, left thumb pain, and right leg and knee pain. The plaintiff also injured his left ring finger. Dr. Lum prescribed pain medications (Naproxen, Flexeril) and physiotherapy.
- [14] In early 2019, Dr. Lum referred Mr. Minhas to a specialist, Dr. Chawla, a physiatrist. Mr. Minhas saw Dr. Chawla approximately 20 months post accident, in March 2019, for evaluation of chronic neck pain and shoulder region pain and headache pain. There is no opinion evidence from Dr. Chawla, but Dr. Chawla's consultation report to Dr. Lum was available to the medical experts who testified at trial.
- [15] Dr. Chawla discussed treatment modalities with Mr. Minhas including trigger point injections and diagnostic medial branch blocks, which could lead to other interventions. After discussing these options with Dr. Lum, Mr. Minhas declined to proceed with this treatment.
- [16] Mr. Minhas took some chiropractic treatment from July through October 2017 (approximately six visits) but did not find it beneficial, and he did not feel comfortable with the adjustments.
- [17] Mr. Minhas undertook physiotherapy treatment on 40 occasions between July 15, 2017 and February 13, 2020. The treatment ended due to the Covid-19 pandemic. Mr. Minhas indicates that he will return to physiotherapy treatment in the future.

[18] Mr. Minhas has been seen by two doctors for independent medical examinations. On September 5, 2019 he saw a physiatrist, Dr. Gillian Simonett, who provided a report and testified at trial, as part of the plaintiff's case. At the request of the defence he saw Dr. M. Abdul-Wahab Khan, a physiatrist, on May 25, 2020. Dr. Kahn provided a report and testified at the trial.

D. Prognosis and Diagnosis

[19] The medical opinion evidence is found in the reports of Dr. Simonett and Dr. Khan, and their evidence at trial.

[20] Dr. Simonett diagnosed the following:

1. Upper neck injury, most consistent with mechanical neck pain and associated head pain.
2. Left shoulder - mechanical shoulder pain, warranting further investigations for more specific diagnosis.
3. Headaches, consistent with headaches attributed to whiplash mechanism.
4. Jaw pain - myofascial pain to the masseter region;
5. Mood changes, related to alteration of function and disruption to routines.
6. General sense of fatigue; reported loss of drive at work; mood dysfunction.
7. Deterioration in quality of sleep.

[21] At trial, the plaintiff's major ongoing complaints are of headache, neck pain, and left shoulder pain, as well as mood changes including irritability, impatience, and reduced sociability. He testified that overall his condition plateaued approximately two years ago and has not improved much since then. Physiotherapy treatment, including massage, provides temporary relief.

[22] Dr. Simonett noted that Mr. Minhas had no known medical conditions relevant to his injuries. This is consistent with the evidence of Dr. Lum as well.

[23] Dr. Simonett's prognosis is generally unspecific, but negative, overall. She suggests there are some possible therapeutic avenues. She states as follows:

Ms. Minhas continues to have mechanical neck pain and headaches for over two years despite regular and appropriate treatments. Such chronic pain is a poor prognostic factor for a full recovery. He demonstrates poor posture, which is likely contributing to his ongoing pain symptoms. Therefore, he may have potential for some improvement of his symptoms with optimization of his posture, although it is too early to determine if this will fully resolve his symptoms. Focused core and postural exercises can be continued with his physiotherapy but also may be addressed in community-based programs such as Pilates/yoga style classes. Based on his presentation of having progressively poor posture while sitting, I recommend that he have a trial of a sit-to-stand desk at work as he reports his posture has improved with this. If Mr. Minhas does

not have resolution of his pain symptoms despite these changes, the prognosis for a full recovery is reduced.

He does report that he has ongoing intolerance to perform a full day of work every day and does take work home. There is some potential this may improve with optimizing his physical workspace as well as focusing on mental health if this is a contributing factor. He continues to have limitations with yard work, particularly when having to have neck extension, and I anticipate this will continue to be problematic for him at least over the next few years.

[24] In relation to future treatment, Dr. Simonett suggests:

1. MRI/MRA of the left shoulder
2. Physiotherapy - although progress has plateaued, ongoing treatment may help maintain his current level of symptoms;
3. Ergonomic assessment of his workspace, including consideration of a sit to stand desk;
4. Reduction of use of Advil to reduce risk of associated side effects from chronic use;
5. Targeted interventional spinal pain procedures (to the neck) if the investigation provides more information as to the specific facet level involved; and
6. Assessment by a treating headache physician for ongoing management of headache.

[25] As noted, Dr. Kahn examined Mr. Minhas quite recently, on May 25, 2020. He reported presenting complaints as follows:

1. neck pain - constant, aggravated by sustained head postures such as while working on a computer, sustained cervical extension (that is, looking upwards), physical activity, and crouching. He reported 70% improvement to date.
2. bilateral shoulder pain - Dr. Kahn reports this as being "constantly present" but at trial the plaintiff testified that this complaint is no longer constant. The problem is aggravated by sustained head postures, such as working on a computer, heavy lifting, and range of motion. According to Dr. Kahn, Mr. Minhas reported approximately 70% improvement to date.
3. constant frontal headaches, with no identifiable aggravating factors. The plaintiff reported approximately 20% improvement in his headaches to date.
4. sleep difficulties, due to ongoing symptoms as well as the headaches.
5. mood - anxiety, sound sensitivity, frustration, irritability; and
6. intermittent jaw pain.

[26] Like Dr. Simonett, Dr. Kahn noted no non-organic findings on examination. In other words, there were no symptoms that were inconsistent with what would be expected anatomically.

[27] Dr. Kahn diagnosed:

1. cervical spine sprain/strain;
 2. bilateral trapezius/posterior shoulder girdle sprain/strain;
 3. thoracic spine sprain/strain - unclear if related to the subject accident.
- [28] In relation to prognosis, Dr. Kahn stated that given the passage of time, prognosis for complete resolution is "guarded". In other words, as he explained in his evidence at trial, his symptoms are likely to continue.
- [29] Vocationally, Dr. Kahn noted that Mr. Minhas may have difficulty completing some functions and activities, and he may require pacing and partitioning of tasks. He may need more breaks, and may miss days from work. However, Dr. Kahn said that the "impact of his symptoms is likely to be manageable, and minimized through ergonomic modifications, appropriate medical therapy, and an active exercise program that focuses on neck, shoulders and core strengthening exercises."
- [30] As I interpret Dr. Kahn's evidence, he recommends that Mr. Minhas carry on with his full work duties, but with such modifications as is required in order to manage his symptoms.
- [31] Dr. Kahn suggests certain treatment for his ongoing pain, including pharmacological optimization, referral to a pain clinic or to the physiatrist he previously consulted with, Dr. Chawla, for consideration of trigger point injections (injection of anesthetic to the muscles), or diagnostic medial branch blocks to assess possible facetogenic pain, with possible radiofrequency neurotomy thereafter. In Dr. Khan's report, he referred to this treatment as radiofrequency ablation.

III. Analysis

- [32] The defence argues that the plaintiff's complaints are substantially subjective, and urges me to conclude that his description of injuries should be rejected.
- [33] However, pain is a subjective determination, as Dr. Simonett noted. This does not mean it is not real. As is common, in this case much depends on the plaintiff's own credibility.
- [34] I consider the plaintiff to be generally a reliable and credible witness. Moreover, his complaints of injury are well supported by the medical evidence. The medical reports of the two specialists, Dr. Simonett and Dr. Khan, are not fundamentally dissimilar as to their findings. The other medical evidence including the evidence of Dr. Lum is consistent with the injuries described by the plaintiff, as is the collateral lay evidence.
- [35] The plaintiff's description of the effects of the accident injuries on the other aspects of his life is also credible.
- [36] As noted, Mr. Minhas' ongoing complaints are of headache, neck pain, and left shoulder pain. Of these complaints, by far the most significant is his complaint of headache. I accept his evidence that he has a constant dull headache at all times. He sometimes has severe

headaches, which he describes as intermittent, but extreme. He says this occurs approximately twice per month. Various factors or activities can trigger severe headache. As Dr. Simonett notes, the headaches have migrainous features, in that he has increased sensitivity to noise, and can get overwhelmed in noisy social settings.

- [37] He continues to have neck pain. This is a constant dull pain which worsens with certain neck movements, notably neck extension (looking upwards), but also flexion (looking down).
- [38] His left shoulder pain is no longer a major problem. It is intermittent. He feels pain when he undertakes certain activities such as lifting weights or other physical activity involving the left shoulder. It seems that his shoulder condition does not warrant further investigation, in his view, as he has not pursued this. Dr. Simonett notes that imaging of the shoulder could be undertaken, which could lead to an opinion about possible surgery. I infer that the plaintiff does not wish to pursue this avenue.
- [39] Mr. Minhas was very healthy prior to the accident. The injuries he complains of are caused by the motor vehicle accident.
- [40] The defence argues that the plaintiff has produced few pre-accident clinical records. However, the evidence is consistent that was very healthy and active prior to the MVA, playing elite level soccer and exercising regularly. There is no evidence of any relevant pre-existing condition, or of any cause for his complaints other than the MVA. There is no reason to infer that the plaintiff has failed to produce relevant records.
- [41] As noted, the medical opinions as to prognosis of Doctors Simonett and Khan are similar, and are non-specific. As I interpret their opinions, both indicate that his chronic pain and related symptoms may persist indefinitely, or even permanently, at least to some extent.
- [42] Although Mr. Minhas is of the view that he has exhausted all treatment options, the medical opinions indicate that there are some treatment options which remain. Dr. Kahn mentions pharmacological optimization, or referral to Dr. Chawla for the treatment options he described. Dr. Simonett says the same. Mr. Minhas was reluctant to proceed with these therapies as he understood them to involve surgery. It seems to me that he may have misunderstood the nature of this treatment and the medical risks involved. Mr. Minhas may choose to reconsider whether these therapies could be worthwhile.
- [43] Dr. Simonett suggests that he should have an assessment by a treating headache physician for ongoing management options.
- [44] In addition to the physical injuries, Mr. Minhas suffers from a significant alteration in mood and personality. I accept his evidence that he is now easily frustrated, more irritable, and less sociable than he was previously. I will discuss this further in the context of his non-pecuniary loss claim.
- [45] In addition, Mr. Minhas suffered from other injuries which have more or less resolved.

- [46] He had an injury to his right shoulder and arm, and his right leg and knee, to his finger, and to his thumb. He sometimes has jaw pain.
- [47] Mr. Minhas been diligent about returning to work, and has largely done so, successfully, although his work hours are somewhat limited, due primarily to his headache and neck concerns.
- [48] He has been diligent about exercise and physiotherapy treatment. He is encouraged to continue to be active physically. He finds some relief from physiotherapy, and Dr. Simonett supports ongoing physiotherapy treatment, despite the fact that the benefits of physiotherapy treatment have plateaued.
- [49] The plaintiff's collateral witnesses were his employer, Ms. Melnichuk; a long-time co-worker, Ms. Cuglietta; his brother Allen Minhas, and his spouse, Parveen Minhas. The evidence of these witnesses credibly supports the plaintiff's own description of the effects of his injuries upon his work and personal life, and upon his mood and personality.

IV. Assessment

A. Non-Pecuniary Damages and Loss of Housekeeping Capacity

- [50] I adopt my comments concerning the legal principles for assessment of non-pecuniary loss as set out in *Gillam v. Wiebe*, 2013 BCSC 565 at paras. 68-71. There, I referred to the leading decision of the British Columbia Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34, at paras. 45 to 46, which I need not repeat here.
- [51] I accept the plaintiff's evidence that his injuries have had a very negative effect upon his enjoyment and quality of life. In addition, he has sustained a significant amount of pain and suffering over the past three-and-a-half years since the accident. He will continue to suffer some pain and disability indefinitely.
- [52] As he explained, playing soccer has always been a big part of his life. His enjoyment of soccer and related activities has been substantially impacted. Prior to the accident he played at the elite "premier" league, the highest league available for players over the age of 35. Training sessions (practices) were two times a week, with one game per week, typically. He was a central defender. He enjoyed playing the game and took pride in his ability.
- [53] Since the accident, he has dropped down two levels to recreational soccer. He is no longer able to play as a central defender. He plays right back, which as he explained is a less physical position, often played by the weakest player on the team. He is no longer able to head the ball. He unsuccessfully attempted a return to premier league soccer in 2019.
- [54] Formerly, he enjoyed coaching his children's soccer. Since the accident, he has discontinued coaching, although he still runs substitutions for the teams. He is too impatient and irritable to coach children's sports.

- [55] The plaintiff is less capable as a professional. He has had to reduce his work hours, and has a limited ability for extra work.
- [56] The plaintiff is less able to participate and contribute to domestic and household activities. Formerly, he and his wife, both busy professionals, shared domestic duties equally. The plaintiff did more of the outside work including maintenance of their large residential property and pool. He did the laundry, and other interior tasks as well. He is no longer able to do the yard work to the extent he did before, or pool maintenance. He hires others to prune the trees. He relies on other family members to do much of the yardwork.
- [57] The most significant aspect of his non-pecuniary loss probably relates to changes in mood and personality. He explains that he has a constant dull headache all the time. He has been rendered cranky and impatient, and less sociable. The evidence is consistent that prior to the accident he was very sociable, and was a pleasant and easy going person. He is now much more withdrawn. He avoids social activities, including large family gatherings, which are a feature of his culture.
- [58] However, in overall terms, his injuries have not been debilitating. He continues to work, with limitations, and with pain. He continues to play soccer, but at a lower level, and enjoys it less than he did before. He continues to be active physically including workouts, which are less strenuous than previously.
- [59] The plaintiff relied on the following authorities:
- Lu v. Huang, 2016 BCSC 1146 [Lu] - \$90,000;
 - Tang v. Duong, [2020] B.C.J. No. 158 [Tang] - \$80,000;
 - Chai v. Greenwood, 2020 BCSC 1294 [Chai] - \$120,000; and
 - Bucholtz v. Zhang, [2020] B.C.J. No. 625 [Bucholtz] - \$85,000.
- [60] These decisions offer useful guidance. The most similar decision is Lu. In that case the plaintiff was described as being in her 40s. The accident occurred approximately four years before the trial. She suffered from constant cervical and lumbar pain, constant or near constant headaches, and problems with mood, including depression, irritability and shortness of temper. The prognosis was generally very negative. Her injuries had limited her career as an accountant.
- [61] Tang and Bucholtz are similar, but the consequences to the plaintiffs in those cases was somewhat less severe than in the case before me. Chai was somewhat more severe. The assessment included a factor for loss of housekeeping capacity.
- [62] In this case, as well, loss of housekeeping capacity is a feature of the loss. I am not satisfied that a separate pecuniary award is merited, with the exception of an award for tree pruning. The only identified expense has been yearly pruning of the trees.

[63] The defence relied on the following authorities:

- Job v. Van Blankers, 2009 BCSC 230 - \$25,000;
- Napoleone v. Sharma, 2008 BCSC 1539 - \$35,000;
- Deneault v. Fleming, 2006 BCSC 1219 - \$26,000; and
- Damani v. Yehia, 1996 CanLII 1887 (B.C.S.C.) - \$20,000.

[64] Given my findings, the authorities relied upon by the defence do not offer useful guidance. Having regard to the evidence and the authorities, in my view a reasonable assessment of the plaintiff's non-pecuniary loss is \$95,000.

[65] In relation to the claim for loss of housekeeping capacity, I adopt my comments regarding the legal principles applicable as set out in Roemer, at paras 130-31:

[130] As I noted in Firman v. Asadi, 2019 BCSC 270, at para. 235, the court has discretion whether to address a claim for loss of housekeeping capacity as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In Riley v. Ritsco, 2018 BCCA 366, at para. 100, Groberman J.A. added:

[101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non pecuniary damages.

[102] I acknowledge what was said in Kroeker about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

[131] Likewise, in Kim v. Lin, 2018 BCCA 77, Bauman C.J.B.C. held as follows:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu, "it lies in the trial judge's

discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

- [66] In addition to the general damages for non-pecuniary loss, I allow a pecuniary award of \$5,000 for the cost tree pruning of \$1,000 per annum, as pecuniary loss of housekeeping capacity, past and future.

B. Legal Principles - Loss of Earning Capacity

- [67] I repeat my summary of the legal principles for assessing loss of earning capacity as set out in *Roemer v. Shafi*, 2020 BCSC 1 [Roemer], at paras. 81 to 82, as follows:

- [81] I adopt the summary of the applicable legal principles I set out in *Sendher v. Wong*, 2014 BCSC 140 [Sendher], at paras. 158-163 (pre-trial loss) and 171-177 (future loss):

- [158] The award for past loss of earning capacity is based on the value of the work that the plaintiff would have performed but for her accident injuries. The award is properly characterized as a loss of earning capacity: *Bradley v. Bath*, 2010 BCCA 10 (CanLII) at paras. 31-32; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 (CanLII), at para. 153; *X. v. Y.*, 2011 BCSC 944 (CanLII), at para. 185.

- [159] The plaintiff need not establish the actual loss of earnings on a balance of probabilities. What would have happened prior to the trial but for the accident injuries is hypothetical, just the same as what may happen in the future, after the trial.

- [160] In *Smith v. Knudsen*, 2004 BCCA 613 (CanLII), at para. 29, Rowles J.A. stated:

What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

- [161] However the plaintiff must establish on a balance of probabilities that there is a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient: *Smith v. Knudsen* para. 36; *Athey*, at para. 27; *Perren v. Lalari*, 2010 BCCA 140 (CanLII), at para. 32; *Falati v. Smith*, 2010 BCSC 465 (CanLII), at para. 41, *aff'd* 2011 BCCA 45 (CanLII).

- [162] Just as in the case of the assessment of future loss of earning capacity, in the case of past loss of earning capacity, if the plaintiff establishes a real and substantial likelihood of the pecuniary loss asserted, the assessment of damages to be awarded as compensation depends upon an assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss.

[163] In cases where it is appropriate to proceed with an assessment of the value of the loss, s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, stipulates that a person who suffers loss of income is only entitled to recover the net income amount as damages: *X. v. Y.*, at para. 187; *Lines*, at paras. 152-186.

...

[171] The Court's essential task is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory*, at para. 32. Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines*, at para. 185.

[Emphasis added.]

[172] The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353; *Pallos v. Insurance Corp. of British Columbia* (1995), 1995 CanLII 2871 (BC CA), 100 B.C.L.R. (2d) 260; *Pett v. Pett*, 2009 BCCA 232 (CanLII).

[173] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 (CanLII), at para. 18.

[174] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos* and the "capital asset approach" in *Brown*. Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: *Perren v. Lalari*, 2010 BCCA 140 (CanLII), at para. 12.

[175] The earnings approach involves a form of math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert*, [[2011] B.C.J. No. 1931] at para. 233.

[176] The capital asset approach involves considering factors such as whether the plaintiff (i) has been rendered less capable overall of earning income from all types of employment; (ii) is less marketable or attractive as a potential employee; (iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown*; *Gilbert*, at para. 233.

[177] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 (CanLII), at para. 101:

[101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, 1996 CanLII

183 (SCC), [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, supra, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 (CanLII) at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 1995 CanLII 1971 (BC CA), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, supra, at 79. ...

[Emphasis added.]

[82] In *Bhatti (Litigation Guardian of) v. Ethier*, 2018 BCSC 1779 [Bhatti], I added:

[54] The use of economic and statistical evidence does not turn the assessment into a calculation, but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Grewal v. Naumann*, 2017 BCCA 158 at para. 49, citing *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[55] As I will explain, in this case the capital asset approach is applicable. The following comments of Savage J.A. in *Villing v. Husseni*, 2016 BCCA 422 are relevant:

18 Using the capital asset approach does not mean the assessment is unstructured. I agree with Garson J.A.'s observations in *Morgan v. Galbraith*, 2013 BCCA 305:

[56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in *Brown* in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award: *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 24, 75 B.C.A.C. 263; *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43, 63 B.C.A.C. 145.

[Emphasis added.]

19 In every case where the capital asset approach is adopted, the four questions in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), form the basis of the assessment. The questions are 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.

20 The considerations in *Brown* are not intended to be exhaustive: *Sinnott v. Boggs*, 2007 BCCA 267 at para. 9, per Mackenzie J.A.

C. Past Loss of Earning Capacity

- [68] As noted, Mr. Minhas began working for Secret Location Ventures Ltd. in August 2012. At the time, it was a start-up business. When the plaintiff was hired, the company had seven employees. The company's business is focused on retail sales. It has a store in Gastown. The company's offices are located nearby. The company previously operated a restaurant and an outlet centre at Vancouver airport as well. As noted, Mr. Minhas is now chief financial officer for the Company. In addition to his work for Secret Location Ventures Ltd., he does accounting and administrative work for other businesses or charitable entities in which Ms. Melnichuk or her family are involved.
- [69] His starting salary in 2012 was \$85,000. In 2015 he received an increase to \$90,000, and in late 2017, his salary was increased \$105,000.
- [70] During the early years, Mr. Minhas often worked 60 hours a week or more. By the time of the accident, the work was generally 40 hours per week, but with frequent after-hours work as well.
- [71] Following the accident, Mr. Minhas lost one week of work. He attempted to return to work but had difficulty. He was forced to reduce his hours. He attempted to increase his hours to full-time in 2019 but was unable to continue. Currently, he works one hour less per week than full time, that is, 35 hours per week instead of 40. He has delegated some of the tasks that he used to do to other staff members. He no longer participates in the after-hours work that he used to do.
- [72] The defence position is that past loss of earnings of \$1,384 should be recognized on the basis of one week's work.

[73] His employer initially reduced his pay to reflect his reduced working hours. Although his nominal pay for 2018 was \$105,000, in effect as if January 1, 2018, his actual pay for 2018 was reduced, to account for hours not worked in 2017, and 2018. The total reduction in pay is \$17,443.75. The plaintiff submits that this loss can be assessed at \$14,000, after a reduction of about 20% for taxes. I accept that this loss is established, in this amount.

D. Future Loss of Earning Capacity

[74] For 2019, the plaintiff received his full pay of \$105,000. There was no reduction for diminished hours of work. However, his employer's position is that he is not likely to receive increases in his salary unless he is able to return to full time hours.

[75] I accept the plaintiff's evidence that his ongoing symptoms somewhat affect his ability to work full-time as a professional accountant. An unusual feature of this case is that I have direct evidence from his employer that his inability to work full-time has depressed his salary, and that this is likely to continue. I have this testimony from Ms. Melnichuk.

[76] The Covid-19 pandemic has affected the employer's business. In particular, the loss of cruise ship guests has affected retail sales. The company is attempting to transition more of its business to on line, e-commerce. Ms. Melnichuk remains optimistic about the company's viability.

[77] In the circumstances it is easy to conclude that there is a real and substantial possibility of a future event that leads to a loss of income. I accept the evidence that Mr. Minhas' injuries have already depressed his income somewhat, and that this situation is likely to continue. As noted, this is the express evidence of his employer. The earnings approach is not applicable, given the uncertainties. The loss must be assessed from the point of view of loss of capital asset. In relation to factors enunciated in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, the plaintiff has been rendered less capable overall from earning income. It is easy to infer, even without an economist's report, that the plaintiff is less marketable to potential employers, should he be required to seek alternative employment. He has also lost the ability to take advantage of all job opportunities which might otherwise be open to him, in that his capacity for full-time or longer hours is limited.

[78] The plaintiff submits that but for the accident injuries, he would be earning \$120,000 presently, rather than \$105,000. The loss will extend into the future and is indefinite. The plaintiff submits that future loss of income should be assessed at an amount of approximately one year's salary, or \$100,000.

[79] The position of the defence is that there should be no award for future loss of earning capacity.

[80] The defence relies upon the opinion of Dr. Kahn, who states that Mr. Minhas is capable of working full time. However, Dr. Kahn notes that Mr. Minhas may have difficulty in completing functions, and require pacing and partitioning of tasks. He may miss work and

may need to take frequent breaks. In my view, these limitations affect his work capacity. Dr. Simonett expected his work and domestic limitations to continue. For example, with respect to yard work, she said that he would continue to have limitations and that she would expect this to "continue to be problematic for him at least over the next few years". She offered no time horizon with respect to work activity, but as noted, the prognosis was negative. In summary, the evidence supports that the plaintiff's work limitations will continue indefinitely, and I accept that this has some negative impact upon his likely income.

[81] So, for example if the plaintiff loses \$15,000-\$20,000 per annum for five years, his loss would be roughly \$87,500. There are both negative and positive contingencies, which could balance out. The loss may extend longer, and be larger than this amount. On the other hand, his condition could improve, or he could obtain other employment that is more remunerative. There is some evidence that his pay is below market given his credentials, experience and responsibilities.

[82] In my view the sum of \$90,000 is reasonable for this loss, in all of the circumstances.

E. Costs of Future Care

[83] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Gao v. Dietrich*, 2018 BCCA 372, at para. 69. The plaintiff submits that an award of \$7,500 should be made, for the costs of physiotherapy treatment, over-the-counter medication (Ibuprofen) and for gardening services, in particular, annual pruning of the trees at the plaintiff's residence.

[84] The defence submits that no award is justified.

[85] The plaintiff has attended physiotherapy regularly for several years. He attended for 40 treatments between July 15, 2017 and February 13, 2020, but the treatments had to stop due to the Covid-19 pandemic. As noted, he indicates that he will resume treatments when it is safe to do so. The opinion of Dr. Simonett supports the continued value of physiotherapy treatments. She notes that ongoing treatments help maintain his current level of symptoms. She recommends that physiotherapy treatment progress to postural strengthening specifically, including core exercises.

[86] The plaintiff's receipts show that he was paying \$40 per treatment until February 2019, when ICBC began paying for the treatments. The plaintiff will be required to pay for these treatments in future. In my view another 40-50 treatments is reasonable, and the cost is modest in comparison with the benefit. Costs may escalate. I allow \$2,500 for future cost of physiotherapy treatment.

[87] The plaintiff purchases Ibuprofen (Advil) in volume at Costco. He has not kept receipts. Dr. Simonett advises that he reduce his usage of Advil over time. Dr. Kahn suggests optimization of pharmacological treatment. I infer this would likely be via prescription medications. Nevertheless, some continued and long term usage of over-the-counter pain medications is likely. I allow \$2,000 for this claim.

[88] I have already dealt with the tree trimming item under loss of all homemaking capacity.

F. Special Damages

[89] The parties agree on the plaintiff's special damages claim, in the amount of \$1,936.70, consisting of user fees for physiotherapy and related mileage claims. He does not claim for the Advil purchases, for which he did not keep receipts. The claim is allowed at the agreed amount.

V. Conclusion

[90] The plaintiff's claims are allowed in accordance with the foregoing decision.

Head of Damage

Award

Non-pecuniary damages

\$95,000

Loss of Housekeeping Capacity

\$5,000

Past Loss of Earning Capacity

\$14,000

Loss of Future Earning Capacity

\$90,000

Costs of Future Care

\$4,500

Special Damages

\$1,936.70

TOTAL

\$210,436.70

VI. Costs

[91] Subject to the consequences of offers to settle, the plaintiff is entitled to costs of the proceedings.

"Verhoeven J."

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