

CANADA / JUDGMENT

Pupo v. Hua

2020 BCSC 1682

COURT

Supreme Court of British Columbia

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2020 BCSC 1682 Pupo v. Hua

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pupo v. Hua,

2020 BCSC 1682

Date: 20201106

Docket: M179391

Registry: Vancouver

Between:

Frank Pupo

Plaintiff

And

Hua Hua, Toyota Credit Canada Inc.,

Mario Nicoletti, Travelers Leasing Ltd.,

Cinda Elizabeth Graham, Theodore Melvin Graham

Defendants

- and -

Docket: M1811590

Registry: Vancouver

Between:

Frank Pupo

Plaintiff

And

Lindsay Lisa McGuire,

Trevis Michael McGuire,

Andrey Pachshenko

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

August 4-7, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 6, 2020

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- [1] Frank Pupo, the plaintiff, was in two motor vehicle accidents: the first in January 2016, and the second in July 2018. The defendants admit liability for both accidents, which were rear-end collisions.
- [2] Mr. Pupo seeks damages for pain and suffering, cost of future care and out of pocket expenses. He is not seeking damages for loss of earning capacity.
- [3] The defendants admit Mr. Pupo was injured in the first accident. They also admit that some of those injuries were aggravated by the second one. However, they dispute the extent of his injuries and the impact he says the injuries have had on his life.

I. FACTS

- [4] Mr. Pupo was 54 years old at trial. He has been a realtor since 1992. Since 1998, he has worked continuously at RE/MAX specializing in commercial real estate.
- [5] He owns the home where he lives with his daughters, every other week. They live with their mother (his ex-spouse) alternate weeks.
- [6] He did all housework and outside maintenance himself. His home is just over 2,000 square feet on a 66 x 100 foot lot. It is a corner lot so he also has responsibility for mowing the boulevard. He had no difficulties doing all these activities himself.
- [7] He described a typical day before the accident as starting very early; he would go to the gym shortly after it opened at 5:00 a.m., typically spending about two hours working out. He went to the gym five or six days a week. If it was a week that his daughters lived with him, he would return home after the gym in order to drop them off at school, before heading into work. On alternate weeks, he would leave the gym and go straight to work.

- [8] He has enjoyed the company of one or two friends at the gym for many years. Phil Moore testified that he has been working out with Mr. Pupo for just over 20 years. His testimony was consistent with Mr. Pupo's as to the frequency, consistency and intensity of their typical work-outs, both before and after the accidents.
- [9] In addition, in good weather Mr. Pupo enjoyed going on hikes. He estimated he would go most weekends.

A. The Accidents

- [10] The first accident occurred on Lougheed Highway. He was stopped at a red light when he was hit from behind. The collision forced his car forward, causing it to hit the car in front of him. He was still able to drive his car. He gave a ride home to one of the other drivers involved in the accident, whose car was not drivable.
- [11] He testified that the day after the accident he felt pain in his neck, upper and lower back, groin and right leg. In the period between the two accidents, he says his groin and leg pain did improve. His neck and shoulder pain improved a bit, but he felt he achieved no improvement in his back pain.
- [12] The second accident occurred during rush hour on July 30, 2018. He was rear-ended just before the intersection of Kingsway and Griffiths Avenue. The collision knocked off the spare tire of his vehicle, which was attached below the back hitch. He was told he could not drive his vehicle. He was heading to a meeting with clients, who decided to pick him up and drive him home.
- [13] He testified the second accident aggravated the injuries to his neck, shoulder and lower back. He confirmed it did not cause any new injuries.

B. After the Accidents

- [14] Mr. Pupo's position is that his condition is chronic, and he suffers daily discomfort in his neck and back. He described his lower back pain as the worst injury. On his bad days, he described his back as feeling tight; the pain is aggravated by sitting too long. He feels tension in his neck almost every day. On good days, he is still in discomfort, but the pain is reduced. He testified that his shoulder, groin and right leg pain are more intermittent.
- [15] He described two flare-ups of his pain that he experienced after the second accident. The first was in December 2018. He got up from his desk at work and his back suddenly seized up. He was in excruciating pain. He managed to call a chiropractor whose office was in the same building. He was able to get an appointment immediately.

- [16] He felt unable to walk on his own, and called a colleague for assistance. He leaned heavily on his colleague in order to walk. By the time they reached the elevators, Mr. Pupo collapsed and could go no further because of the amount of pain he was in. He lay down in the hallway and never made it to the chiropractor's office that day.
- [17] The colleague who assisted him, Bill Andrews, testified at trial. Mr. Andrews has known and worked in the same office as the plaintiff for about 15 years. Typically (before the COVID-19 pandemic) he would see him about once a week. His testimony about this incident was consistent with Mr. Pupo's description.
- [18] Mr. Andrews testified that he called 911 because he was uncomfortable trying to assist Mr. Pupo to move further. He worried about the possibility of further injury. Also, it was clear to him that Mr. Pupo was in no condition to drive.
- [19] Mr. Pupo was taken to Burnaby Hospital, where he spent the entire day. He was given pain medication early on, so by the time he saw the doctor, he was experiencing some relief. Upon discharge, he was told to see his family doctor, which he did shortly thereafter.
- [20] Another intense flare-up of pain was in January 2020. He experienced an unexplained and sudden flare-up of his lower back pain that lasted about six weeks. He says there was no trauma to the area and he felt like the flare-up came out of the blue. To address that pain, he received more frequent chiropractic treatments and made changes to his office set-up to avoid prolonged sitting.
- [21] He also described a recent exacerbation of his right shoulder pain in March or April 2020. He could not identify any particular incident that he believed led to that exacerbation. Again, he was able to address that pain through temporarily increased chiropractic treatment. He also described a flare-up of his right leg pain in the weeks before trial after a two-hour walk around Burnaby Lake Park.
- [22] Mr. Pupo also testified that he has experienced numbness in his leg, arms and hands. He agreed that these symptoms were not mentioned at his examination for discovery held in November 2018. He testified they must have appeared shortly thereafter. Thus far, the numbness has not caused significant problems or interfered with his daily functioning, but he testified that he worries the numbness intimates problems for the future.
- [23] Except for a period of time after the December 2018 flare-up, he still goes to the gym with the same frequency he did before the accidents. However, he testified that he had to modify parts of his workout, and has to be very cautious with his activity and movements in the gym. He also testified that he does not have the same strength as before.
- [24] Mr. Moore estimated that Mr. Pupo's weight lifting capacity is about 50% of what it was before the accidents. However, Mr. Moore confirmed that Mr. Pupo still enjoys going to the gym and does so with the same frequency. Mr. Moore also had the impression that the workouts seem to bring Mr. Pupo some peace.

- [25] Mr. Moore also agreed that Mr. Pupo could no longer tolerate hikes that include significant inclines, but he can tolerate hikes, or long walks along a level surface. Mr. Moore continues to do more challenging hikes, but Mr. Pupo no longer participates in those. Mr. Pupo testified he does miss spending time with his friends, and being able to engage in more challenging hikes,
- [26] Mr. Pupo testified that he can no longer keep the same standard of tidiness and cleanliness in his home because he has some limited endurance for housework. He also testified that he often cannot finish mowing his lawn in one day, and spreads the task over two days.
- [27] He testified that after the second accident he began having problems with sleep. However, at his examination for discovery held November 2018, he said he had no sleep problems attributable to the second accident. At trial, he explained that discrepancy by saying the sleep problems developed after that examination for discovery. He also admitted he was a poor sleeper before the accident.
- [28] He testified that the pain he experiences does lead to frustration and causes him to lose patience more easily, resulting in him being curt with people. He believes this may have affected his work in that he finds communication more challenging on days his pain is worse. He tends to avoid calling certain people on those days. Mr. Andrews admitted that he sometimes found Mr. Pupo would be less communicative than he was before the accidents and confirmed that occasionally, he found Mr. Pupo was short with people.
- [29] The primary treatment Mr. Pupo has received regarding his injuries is chiropractic treatments, which began in December 2018. He said during periods of intense pain, or if he suffers a relapse, he sees his chiropractor as often as two or three times a week, tapering off to bi-weekly visits when his pain is more manageable. He testified that the chiropractic treatments have helped with his neck and back pain, although he still experiences fluctuation of pain in those areas.
- [30] Mr. Pupo claimed that his right leg injury was aggravated by the second accident, but only a little bit. He also said his groin injury was aggravated, but he found it hard to describe how. He simply said some days it bothers him and other days it does not bother him at all.
- [31] Just before trial, it was discovered he had a hernia that needed further exploration. I did not understand he related that complication to the accident. Certainly there was no medical evidence to draw that conclusion.
- [32] After the first accident he did attend massage therapy a few times, but felt it was not addressing his primary complaint and therefore, he found it unhelpful. However, because he believes the chiropractic treatment has addressed the underlying pain, he would like to try massage therapy again and is hopeful it will assist him with his pain.

- [33] He avoids taking any medication, if he can. He has not received any prescribed medications for his pain. He will take extra strength Advil for intense pain. On days when he feels the pain may get worse, he will take regular strength Advil. He never takes Advil for more than three days in a row because of his concern that it may cause stomach issues. He estimates he has intense episodes requiring extra strength Advil two or three times a month.

C. Expert Evidence

- [34] The plaintiff adduced an expert report from his family physician, Dr. Luigi Salvino, which was dated May 3, 2018, and from Dr. David Flaschner, a physiatrist, whose report was dated November 17, 2019. The defendants adduced an expert report from another physiatrist, Dr. Jonathan Hawkeswood. His report is dated May 27, 2020.
- [35] Dr. Flaschner's and Dr. Hawkeswood's opinions did not differ on many points. Both agreed that Mr. Pupo's back and neck pain were caused by the first accident, and that the second accident aggravated those injuries.
- [36] They also agreed that prior to the accident, Mr. Pupo most likely had degenerative changes in his spine. However, because he was asymptomatic before the first accident, that degeneration was not responsible for his injuries. They also agreed that it is unlikely he was experiencing any neurological symptoms or neurological injury.
- [37] Both doctors recommended an active rehabilitation program. Dr. Flaschner recommended a six to eight week program of two to three sessions per week.
- [38] Dr. Hawkeswood also recommended the purchase of an upright magnet-based exercise bike because it allows for different postures while doing cardiovascular exercise. He also recommended some basic gym equipment Mr. Pupo could use at home (a mat, Bosu ball, resistance bands, step box, foam roller, and yoga cork balls).
- [39] Both agreed that passive therapies are unlikely to improve the injuries, but they could provide relief during periods of intense pain.
- [40] While Dr. Flaschner recommended some medication, Dr. Hawkeswood did not. Both suggested that topical analgesics could assist with some of the shoulder pain, or more generally to provide relief from possible increased pain or soreness if Mr. Pupo were to ramp up any aspect of his gym routine.
- [41] In addition, Dr. Hawkeswood suggested pain education and a follow-up with his family doctor regarding his mood. Specifically, he opined that Mr. Pupo may have some type of pain disorder causing him to report pain symptomology not commensurate with his injuries and the impact they had on his functioning.
- [42] Dr. Salvino has been Mr. Pupo's family doctor for about 30 years. His report was written just before the second accident. At that point, Dr. Salvino did note that Mr. Pupo's symptoms had not resolved completely. He also wrote that Mr. Pupo's injuries were "frustrating, but not

disabling" and he expected a full resolution in the coming months. However, at trial, he clarified that while he expected Mr. Pupo to fully recover at the time he wrote the report, he was no longer of that view. He testified that the second accident did exacerbate Mr. Pupo's previous injuries.

- [43] In terms of frequency of visits, Dr. Salvino testified he typically saw Mr. Pupo only about once or twice a year before the first accident. He also noted he had only seen him (regarding injuries from the motor vehicle accidents) four times since the second accident.

D. Other Evidence

- [44] Dr. Deny Cortese is Mr. Pupo's treating chiropractor. He testified about treatments and observations, but was not presented as an expert witness. Dr. Cortese's testimony confirmed Mr. Pupo's estimate of how often he sought treatment, and was consistent with Mr. Pupo's description of the progress of his symptoms.
- [45] Dr. Cortese began treating Mr. Pupo in December 2018 and confirmed that the first visit was prompted by flare-up of back pain described earlier in this judgment. In the first six months following that, Dr. Cortese treated Mr. Pupo about 24 times, whereas in the subsequent six months, he provided 12 treatments. There were 24 treatments in the following six months which is consistent with Mr. Pupo's testimony about the second flare-up of back pain.
- [46] Dr. Cortese testified that his treatment, and Mr. Pupo's initial complaints, centred on Mr. Pupo's low back pain. After about a year of treatment, Dr. Cortese also began focussing on Mr. Pupo's neck and upper back pain. Dr. Cortese testified that Mr. Pupo did report improvements in his pain since beginning treatment, but also that Mr. Pupo's report of pain does fluctuate somewhat.
- [47] Mr. Pupo did report numbness to Dr. Cortese. However, Dr. Cortese's records indicated that Mr. Pupo reported that the numbness was almost completely gone by April 2019. Mr. Pupo testified he did not recall making that statement, but I had no evidence to support an inference that Dr. Cortese's records would be inaccurate on that point.
- [48] Dr. Cortese did recommend to Mr. Pupo's family doctor that an MRI be done. Dr. Cortese wondered whether his back pain might be related to problems with his discs.
- [49] Mr. Pupo described that Dr. Cortese gave him direction on exercises done at the gym, including letting him know what exercises to avoid because they would be more likely to irritate his injuries or cause re-injury. Dr. Cortese's testimony confirmed Mr. Pupo's evidence. Dr. Cortese stated that Mr. Pupo was very compliant with his directions and well motivated to improve his condition.
- [50] Although the medical documentation and pleadings refer to headaches, Mr. Pupo's testimony was that the accidents did not cause him to suffer headaches on a consistent basis.

II. CAUSATION

[51] There is no dispute about the applicable test for causation. The plaintiff bears the burden to prove on a balance of probabilities that the defendants caused or contributed to the injuries suffered: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-14. The issue to determine is, but for the accident, would the plaintiff have suffered the injuries: *Horsley v. MacLaren*, [1972] S.C.R. 441. However, it is important to remember that causation need not be determined to the standard of scientific precision, but is a practical question of fact that is approached by taking into account ordinary common sense: *Snell* at para. 328.

[52] Consistent with the consensus in the medical evidence, the defendants did not dispute that the accidents caused soft-tissue injuries to Mr. Pupo's neck, upper and lower back. The evidence was also clear that it is unlikely that pain will ever completely resolve.

[53] However, the parties disagree about what other injuries were caused by the accidents. The defendants emphasized that just because an injury occurs after the accident is not sufficient to conclude there is a causal relationship. In *Deo v. Wong*, 2008 BCCA 110, the Court of Appeal stated the following (para. 19):

Snell, however, does not stand for the proposition that the plaintiff need only prove a sequence of events to prove causation. Nor does it relieve the plaintiff of the need to provide medical opinion evidence on the issue when, as here, such an opinion is clearly needed to establish possible causes of the injury in question.

[54] In that case, the Court noted that the accident in April 1999 was not followed by a complaint of a knee injury until more than two months later. The Court also noted that there was no knee pain complaint during numerous visits to the doctor after that one report. It concluded that there had not been sufficient causal link proven.

[55] In *White v. Stonestreet*, 2006 BCSC 801 at paras. 74 to 75, the court cautioned against making an inference of causation based merely on temporal sequence (see also *Andrews v. Mainster*, 2014 BCSC 541 at para. 189). The court commented that one needs to look at other things which were happening at the same time that could prove an alternate or more accurate explanation of what caused the event.

[56] I turn to consider the injuries and symptoms that the parties disagree were caused by the accidents.

A. Shoulder Pain

[57] The defendants submit Mr. Pupo's recent complaints of shoulder pain are unrelated to the accidents. The plaintiff submitted his March 2020 shoulder pain was without an obvious trigger, and therefore, it should be seen as an aggravation of original injuries attributed to the accidents.

- [58] Dr. Hawkeswood's opinion was the shoulder pain was not caused by the accidents. In his view, its occurrence was too far removed in time from the accidents to be caused by them. Dr. Hawkeswood also opined that, over time he expected improvement in the shoulder and upper body.
- [59] Dr. Flaschner confirmed Mr. Pupo did not complain of shoulder pain when he was examined. In his report, under the heading "Musculoskeletal Testing", he noted that the shoulder range of motion was full. He found mild "dynamic scapular winging", but stated that other tests performed "did not suggest intrinsic shoulder pathology".
- [60] At trial, he explained that "dynamic scapular winging" is a description of a particular biomechanical movement of the shoulder muscles. While he noted that it can be a secondary symptom of a shoulder injury, which can sometimes lead to impingement, it can also improve with muscular retraining. However, these comments were general in nature and did not appear to represent an opinion rendered specifically with regard to Mr. Pupo's condition. Notably, in the portion of his report titled "Causation", he did not identify any issue with the shoulder, nor did he comment on its prognosis.
- [61] In Dr. Hawkeswood's view, it was significant that there was no report of shoulder pain in the medical records in the early period after the accidents. In his report, Dr. Hawkeswood's observations of Mr. Pupo's shoulder biomechanics were not necessarily inconsistent with Dr. Flaschner's, but he did not find it significant enough to make a notation of scapular winging. Specifically, he testified that the biomechanics he observed, as a predictor of possible impingement, is very common in the population as people age. He said it could be caused by trauma, or just a normal result of aging. He was unable to conclude that Mr. Pupo would be more susceptible to shoulder injuries in the future.
- [62] I agree with the defendants that the evidence adduced at trial was insufficient to establish on a balance of probabilities that Mr. Pupo's most recent complaints of shoulder pain were caused by the accident.

B. Groin Injury

- [63] I am not satisfied that the plaintiff has proven a groin injury apart from initial soreness immediately after the first motor vehicle accident.
- [64] Mr. Pupo described an incident occurring within a week before trial where he had to go to the emergency room. He testified that the medical personnel told him they suspected he had a hernia. There was no medical evidence that would connect the hernia to the motor vehicle accident.
- [65] The defendants point to Mr. Pupo's testimony that prior to the complication described in the preceding paragraph, the last time he mentioned soreness in his groin to his family doctor was in 2016. He agreed in cross-examination that the groin injury as described in those records seemed to pass or improve.

[66] Although Mr. Pupo did mention his groin was sore immediately after the first accident, that soreness must have resolved. The most recent description of issues with his groin is different in kind and too far removed to assume it is causally related to the accidents.

C. Numbness

[67] The defendants argue that Mr. Pupo's complaints of numbness in his leg, as well as the more recent complaints of numbness in his hands and forearms, were not caused by the accident. Their position is based on the following:

- a) Mr. Pupo did not mention experiencing numbness at his examination for discovery held November 2018.
- b) The first time that complaint appears in Dr. Salvino's records is February 2019, which is three years after the first accident and more than six months after the second accident.
- c) There is a reference in Dr. Cortese's records to a report of numbness in December 2018, but the defendants submit that was related not to the accident, but rather to Mr. Pupo's attempting a particular exercise (dead-lifts) at the gym for the first time in years.
- d) Dr. Cortese's records contain a notation that the numbness was almost gone by April 2019.

[68] Dr. Hawkeswood's report commented on Mr. Pupo's left leg numbness, finding it unlikely that it was related to the accident. During the physical assessment, he found no obvious signs of neural tension or limitations.

[69] The plaintiff relies on Dr. Hawkeswood's report where he found it "probable that the arm and calf numbness are indirect manifestations of his other pain issues. He also points out that during cross-examination, Dr. Hawkeswood stated that he thought without the accident, Mr. Pupo would still have experienced some numbness, but perhaps less.

[70] However, that comment was made in a larger context. Dr. Hawkeswood was clear that an analysis of Mr. Pupo's numbness was complex. In his view, Mr. Pupo's description of numbness reflected a more widespread disorder that could not be explained by any specific pathology, such as a disc or nerve irritation. Specifically, he pointed out Mr. Pupo's reporting of numbness in three limbs (as opposed to all four) was more consistent with a pain processing disorder. He opined in his report that he could not "exclude the possibility that a component of Mr. Pupo's current pains have a psychosomatic component due to his anxiety burden". More generally, he described Mr. Pupo as an anxious person, who was likely overly pain-focussed.

- [71] I am not satisfied that Dr. Hawkeswood's opinion provides sufficient proof on a balance of probabilities that any numbness experienced by Mr. Pupo was caused by the accidents. It is important for the court to consider carefully medical evidence that opines directly on causation. While obviously helpful, such evidence still must be subjected to legal analysis, even where the expert describes his or her opinion using terms also used in the legal analysis of causation.
- [72] Dr. Hawkeswood was the only medical expert to comment on the numbness issue in terms of causation. He wrote that it was "probable" that the arm and calf numbness were indirect manifestation of other pain issues. He further explained his findings during his testimony. He also related his view that the numbness be interconnected with the pain processing disorder which he opined Mr. Pupo may have. Combined with the objective evidence about the timing and nature of Mr. Pupo's reports of numbness, I am not satisfied on a balance of probabilities that Mr. Pupo's complaints of numbness were caused by the accidents.

D. Flares-up of Pain

- [73] The defendants question whether the incident in December 2018 when Mr. Pupo collapsed in the hallway can be connected to the injuries caused by the accident. They submit that Mr. Pupo admitted trying dead-lifts just prior to the incident of his collapsing from back pain, an exercise he had not attempted in years. They submit that flare-up and any associated injuries specific to it should not be seen as being caused by the motor vehicle accident.
- [74] Isolating the cause of the flare-up may be relevant to my assessment of how serious and chronic Mr. Pupo's back injuries are.
- [75] Although something he did at the gym may have been an immediate cause of his flare-up, the evidence was clear that the accidents made Mr. Pupo more vulnerable to back injuries. Mr. Pupo testified he has been a regular attendee at the gym doing weightlifting since he was about 16 years old. There was no evidence that prior to the accidents he experienced any kind of difficulties with any exercises at the gym.
- [76] Both Dr. Flaschner and Dr. Hawkeswood recommended that Mr. Pupo seek active rehabilitation. One of the main benefits of that treatment is giving specific advice on how to perform exercises so as to decrease the possibility of injury. Dr. Hawkeswood suggested Mr. Pupo should never attempt dead-lifts. However, there was no evidence that anyone had advised Mr. Pupo against that exercise prior to December 2018.
- [77] Overall, I accept that the accidents made Mr. Pupo more vulnerable to back injuries. Even if performing the dead-lifts was a major contributor to his flare-up of back pain, it is more probable than not he would not have suffered as much as he did from that, but for the accidents.

III. PAIN AND SUFFERING

[78] There was no dispute about the applicable legal principles as set out in, among others, *Andrews v. Grand & Toy Alberta Ltd*, [1978] 2 S.C.R. 229; *Stapley v. Hejslet*, 2006 BCCA 34. A helpful summary was set out by Justice Dickson in *Kuskis v. Hon Tin*, 2008 BCSC 862 at paras. 135 to 136:

Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair and reasonable to both parties: [cites omitted]

For purposes of assessing non-pecuniary damages, fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: [cites omitted]

[79] *Stapley* articulated a list of well-known factors to take into account, which include the following: the plaintiff's age, nature of the injury, severity and duration of the pain, the extent of any disability, the effect on family and social relationships, any impairment of mental and physical abilities and impact on lifestyle.

[80] The plaintiff identifies cases that he says establish the applicable range for non-pecuniary damages for his injuries is \$80,000-\$100,000. The defendants submit that the impact on the plaintiff has been minimal and the appropriate range is between \$40,000 and \$50,000. I review the cases they rely on in turn.

A. Cases Cited by the Parties

[81] A brief synopsis of the cases that the plaintiff relies on follows.

- a) *Bain and Goodridge*, 2019 BCSC 1450: The plaintiff was 47 at the time of the accident. She remained active after the accident and her injuries were not of the most severe type. She suffered from chronic pain in her back, and frequent headaches. Neither condition was likely to improve. The accident was found to exacerbate pre-existing depression. The court awarded \$100,000.
- b) *Lauriente v. Schoonhoven*, 2017 BCSC 2246: the plaintiff was 43 years old at trial. She suffered from daily neck pain and headaches. After the accidents, she completed her schooling and continued to work, although her pain limited the range of physical activities at work. The plaintiff suffered from mild depression and moderate anxiety. While she remained active she did curtail some of her recreational abilities. The court awarded \$100,000 in damages.
- c) *Blackman v. Dha*, 2015 BCSC 698: the plaintiff was 37 years old at trial. She had recurring neck pain and resulting headaches. The pain had been intermittent, and the court held she would likely experience periodic mild pain. She continued to work full time and engaged in recreational activities, while raising a family. She was awarded \$80,000.

- d) *Carlisle v. Vanthof*, 2015 BCSC 2427: the plaintiff was 34 at trial. She had chronic pain to her neck, upper back, shoulder muscles, low back, hip and S-1 joints. Her pain was chronic and flared up if she became more active. The accident negatively effected the frequency, duration and types of activities in which she engaged. The court awarded \$90,000.
- e) *Patterson v Gauthier*, 2019 BCSC 633: the plaintiff was 32 years old at trial. She suffered chronic pain and ongoing headaches. She had soft-tissue injuries to her neck, shoulders, lower back, left S1 joint and periodic sciatic pain. She was awarded \$80,000.
- f) *Kuras v. Repo*, 2014 BCSC 1634: the plaintiff was 31 years old when the accident occurred. She suffered neck and back pain and headaches. The court found she was restricted in her enjoyment of many aspects of daily life, and could no longer engage in some activities she did before. She also suffered from mood issues after the accident. The court awarded \$80,000.
- g) *Gunson v. Sekhon*, 2015 BCSC 2491: the plaintiff was 37 at trial. The plaintiff had chronic pain as a result of injury to his lower back. He was off work for 28 days after the accident but returned to full-time work. The accident caused an exacerbation of the plaintiff's pre-existing depression. He was awarded \$80,000.

[82] The defendants referred to the following cases.

- a) *Spence v. Yellow Cab Company Ltd.*, 2019 BCSC 1540: the plaintiff was 40 years old at the time of the accident. He suffered injuries to neck, shoulder, low back, but the court found they were not debilitating. He also suffered from headaches and sleeplessness related to flare-ups of his neck and back pain. The court found the pain was not debilitating and that it was intermittent. He was awarded \$50,000, before a reduction for the plaintiff's contributory negligence.
- b) *Zamora v. Lapointe*, 2019 BCSC 1053: the plaintiff was 56 years old at trial. He had ongoing discomfort in his neck and back and jaw pain. The accident caused him to give up activities he previously enjoyed and had negatively affected his sleep. He was awarded \$50,000.
- c) *Erwin v. Buhler*, 2017 BCSC 362: the plaintiff was 53 years old at trial. The plaintiff suffered ongoing injuries to his neck, back and shoulder, which the court held would continue to affect him in the near future. The injuries affected him on an intermittent basis. He had a pre-existing injury that complicated his situation. He missed work for about six weeks. He was awarded \$40,000.
- d) *Eng v. Titov*, 2012 BCSC 300: the plaintiff was 43 at trial. He had injuries to his shoulders and neck but also experienced headaches. The court accepted the injuries were chronic and ongoing, although fluctuating, but were likely to be permanent. He missed 41 days of work. He was awarded \$45,000.

B. Analysis

- [83] In terms of ongoing persistent pain caused by the accidents, I accept Mr. Pupo has a chronic pain condition in his lower back and neck that is unlikely to be resolved. However, I am not satisfied on a balance of probabilities that the evidence demonstrated that his shoulder pain, numbness, or more recent report of groin pain were caused by the accident.
- [84] I agree that the prognosis for his neck and lower back are poor and therefore these are permanent injuries. Specifically, while there are treatments recommended that will provide him with symptom relief, the medical evidence is that these injuries are unlikely to completely resolve.
- [85] The parties disagree about the impact these injuries have had on Mr. Pupo's life, which is relevant to the amount of damages to be awarded.
- [86] I accept that Mr. Pupo experiences discomfort daily, and sometimes that pain can be intense; he has good days and bad days. However, I find that pain has had only a mild affect on his functioning. I acknowledge however that his stoicism does not justify a lower amount of damages for pain and suffering.
- [87] He continues to attend the gym as frequently as he did before the accidents, going five or six days a week. With regard to his gym activity, I find the injuries have only had a mild limitation on his activity. The duration of his workouts has not decreased; he still spends about one hour in the gym followed about an hour of cardio. He has modified some of his exercises, but he still engages in weight lifting with his friends. He can no longer tolerate hikes with significant inclines.
- [88] I accept that he has to be more careful and cautious about the activities he does in the gym, but both Mr. Pupo and Mr. Moore described that he continues to lift significant amounts of weight, as much as 200 pounds doing squats. That is less than the amount of weight he could lift before the accidents. However, he did not relate the enjoyment he gets from the gym to any specific exercise goal. Rather, he enjoyed the company of his friends, staying fit and the routine it provided him. Mr. Moore testified that Mr. Pupo still enjoys going to the gym and looks forward to it.
- [89] While I accept that his inability to enjoy a more rigorous hike represents a decrease in his enjoyment of life, I am not persuaded that the impact on his enjoyment of attending the gym has been anything other than minimal. Attending the gym is his primary hobby and non-work activity.
- [90] Mr. Andrews and Mr. Moore both described that they had noticed some change in Mr. Pupo's personality since the accidents. They observed him to be in discomfort or pain on some days, which affects his demeanour and mood. However, it is notable that he has not taken any time off work. While he described that he avoids calling certain people on days when his pain is worse, there was no evidence to suggest that caused any discernable disruption to his ability to carry out his job. It certainly would be frustrating, commensurate with having to

cope with daily pain but I am not satisfied that it amounts to a psychological injury.

- [91] With regard to his ability to complete household tasks or maintenance, there was nothing that he could not do, but he said his endurance was affected. However, he admitted that he had fairly high standards, so rather than resulting in a lack of cleanliness, and at most he said that some days he could not keep the house as clean as he wanted to.
- [92] In light of all the evidence and preceding discussion, I find the injuries have had a negative impact on Mr. Pupo's life, but only to a mild degree. In my view, the appropriate range of damages, given Mr. Pupo's circumstances and the case law cited to me, is between \$40,000 and \$80,000.
- [93] The cases of the low end tended to be with people whose pain was not necessarily daily, but some of them had a wider range of injuries. Cases at the high end, as cited by the plaintiff, mostly involve plaintiffs who were quite a bit younger and had more injuries or injuries that were typically more serious than Mr. Pupo's.
- [94] The plaintiff submits because he is not submitting a claim for loss of earning capacity that ought to be taken into account in adjusting his damages to the high end. I do not agree. He chose not to advance a claim for loss of earning capacity. I was not referred to any case law that suggested the lack of advancing a claim for lost earning capacity is a significant factor in assessing the quantum of damages for pain and suffering.
- [95] Mr. Pupo was about 50 years old at the time of the accident, and therefore a bit older than most of the plaintiffs who received damages in the high end. He suffered soft-tissue injuries which are at the mild end of the spectrum. However, I accept that his injuries are chronic and his neck and back pain are unlikely to resolve. Overall, however, I found the negative impact on his life to be minimal.
- [96] Taking into account all of the considerations, I conclude the appropriate amount of damages is \$50,000.

IV. COST OF FUTURE CARE

- [97] The plaintiff seeks an award of \$10,000 for damages for cost of future care. The defendants were reluctant to identify a quantum of the award they said was appropriate, but eventually submitted a moderate sum in the range of \$3,000 - \$5,000 would be appropriate.
- [98] As set out in this case, *Krangle (Guardian ad litem of) v. Brisco*, [2002] S.C.R. 205, courts have emphasized that assessing an award for cost of future care is inherently imprecise because it is a matter of prediction. Courts need to determine based on the evidence what care is likely to be in the injured person's best interests despite the fact that no one can predict the future (para. 21).

- [99] The plaintiff is required to prove their case in terms of the need and likely utility of items sought (*Lo v. Matsumoto*, 2015 BCCA 84 at para. 20), but the authorities also support awarding an amount that will provide a reasonable high standard of future care (*Sephar (Guardian ad litem of) v. Beazley*, 2002 BCSC 1104 at 55).
- [100] The test for awarding costs for future care are that there must be medical justification for those costs, and the claims must be reasonable: *Milina v. Bartch*, (1985), 49 B.C.L.R. (2nd) 33. Also, if the evidence is clear that the plaintiff will not access a particular service, then the award should not take that into account: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351.
- [101] The defendants also point out that an award should be adjusted to the extent that the care needs will change over time, and particularly should be reduced in the case of a prospect for improvement (*Harry v. Powar*, 2018 BCSC 845), or fluctuations in medication or treatment (*Morlan v. Barret* 2012, BCCA 66).
- [102] However, in this case the evidence was clear that Mr. Pupo's injuries are chronic and permanent; there was no evidence of likely improvement. I also find that Mr. Pupo's claim is sensible. He did not seek to include in his claim all items as recommended by both doctors, thereby demonstrating a reasonable and moderate approach to what is an appropriate amount for cost of future care.
- [103] The plaintiff accepted that it is unlikely he would continue to benefit or seek out chiropractic treatment to the same extent he does now, as he gets older, and that at some point he will discontinue treatment. This is simply a function of his age. Thus, he agreed the award should not be based on assuming a life-time attendance at a chiropractor.
- [104] However, he also submits the fact that he has already incurred almost \$5,000 in special expenses in the last five years supports his position. Primarily that amount has been for chiropractic care, which I agree has provided him with significant relief. I agree that is a significant factor to incorporate into my assessment. The medical evidence was not disputed that Mr. Pupo is likely to continue to experience flare-ups of his pain.
- [105] Mr. Pupo testified he wanted to attend massage therapy again. Dr. Flaschner confirmed even though a plaintiff may not have received benefit for one type of passive therapy early in the course of treatment, given the progression and nature of these types of injuries, that does not rule out the possibility it could be effective in future. The defendants submit the award should not take future massage therapy treatments into account because Mr. Pupo has taken no steps to attend massage therapy since Dr. Salvino's recommendation in August 2018.
- [106] I disagree. Mr. Pupo reasonably discontinued massage therapy during his initial recovery when it was not addressing his major complaint. Mr. Pupo hoped to resolve his pain and understood early on that massage therapy would not do so. I do not find it unreasonable that two years after the second accident, he was now willing to attend massage therapy

knowing it will only provide temporary, symptomatic relief. He is entitled to symptomatic relief because his pain is chronic and highly unlikely to disappear from his life. The medical evidence was uncontroverted on this point. Accordingly, it is consistent with the legal authorities that the award for future care take into account Mr. Pupo's attending massage therapy.

- [107] Mr. Pupo points out that the defendants' expert, Dr. Hawkeswood, recommended specific items that range in price from about \$4,300 - \$7,200, as partial support for the quantum he seeks. However, it was clear that the plaintiff enjoys going to the gym and still does so. This is a big part of his life and social interaction. It is not clear to me that he would necessarily use gym equipment at home as he has a very well entrenched regime of going to the gym every morning. I am not persuaded that the award should necessarily be based on an assumption he would buy that equipment.
- [108] Dr. Hawkeswood also recommended counselling sessions in order to assist Mr. Pupo with managing his pain, although there was no evidence associated with the cost of those. I did not understand Mr. Pupo to specifically agree that he would pursue that treatment.
- [109] Both Dr. Flaschner and Dr. Hawkeswood recommended activity-based rehabilitation. They did not discourage passive treatments, but agreed those would only be for symptom relief. Neither felt it would have any kind of curative effect. The defendants submitted I could find Mr. Pupo would not access those services because of his well-established history of attending the gym since a young age. I agree that factor has some relevance to the award.
- [110] Dr. Flaschner also recommended that Mr. Pupo could attempt Botox, although during Mr. Pupo's testimony he expressed reluctance to try that. Both doctors did recommend anti-inflammatory topical treatments would be helpful.
- [111] The defendants submitted that the award for future care should take into consideration "non-accident related factors which contribute to the plaintiff's current conditions, including the plaintiff's complaints of numbness and groin pain", and therefore "any award must be divided amongst the various causes".
- [112] Despite that, in their written submissions, the defendants did not place a dollar figure on what they felt was the appropriate amount to award, and only when pressed during oral submissions did counsel submit that an award in the range of \$3,000-\$5,000 would be acceptable.
- [113] Mr. Pupo is not seeking any award for treatment related to his complaints of groin pain or numbness. I did not understand Dr. Cortese's treatment to address either complaint, nor did I hear evidence that massage therapy would be sought because of those complaints. Instead, Mr. Pupo is seeking damages to address the costs he believes he is likely to incur to treat and cope with his chronic pain caused by the accidents.

[114] The defendants also submitted the award for future care should be moderated because the plaintiff has continued to work as a realtor with minimal treatment. With respect, to do so would be specifically punishing the plaintiff for his stoicism. Mr. Pupo has made no claim for loss of past or future earning capacity. However, his working through his pain and discomfort should not count against him, and no case was cited to me to support that proposition.

[115] Taking all the foregoing into account, I find an award of \$10,000 is justified and appropriate.

V. LOSS OF HOUSEKEEPING CAPACITY

[116] The plaintiff also advances an award for loss of housekeeping capacity. He seeks \$10,000 under this head of damage. The defendants submit the plaintiff is not entitled to an award under this head of damage.

[117] The plaintiff relies on *O'Connell (Litigation Guardian of) v. Yung*, 2012 BCCA 57. That case did not deal directly with an award for housekeeping capacity, but it did affirm the general principle that where an award is meant to reflect the loss of personal capacity, such as housekeeping, entitlement is not limited to cases where the plaintiff has proven those costs will be incurred in the future. On that basis, the plaintiff argued that it was not that relevant that he had not hired any housekeeping after the accidents, nor adduced evidence as to the cost to hire house cleaners.

[118] The defendants emphasize that a separate award is meant to reflect the value of work that the plaintiff is incapable of doing because of the injuries: *Westbroek v. Brizuela*, 2014 BCCA 48 at paras. 72 - 78. While it is not dependent upon whether replacement costs will be incurred, the Court did express some caution to ensure the award is commensurate with the loss.

[119] In *Harris v. Zabar*, 2010 BCSC 97 the court held that loss of housekeeping can also be reflected in an award for non-pecuniary damages (para. 122). This is particularly the case where evidence is lacking as to the cost and in light of the fact that homemaking losses are not easily quantified. The plaintiff relied on this principle in support of his alternate position, that loss of housekeeping capacity could be rolled into the award for non-pecuniary damages justifying an award at the higher end of the range. The defendants' alternate position is that the range they propose is adequate compensation for pain, suffering and loss of housekeeping capacity.

[120] I am not persuaded that the plaintiff has adduced sufficient evidence entitling him to an award under this head of damage, or that it should justify damages for non-pecuniary damages at the higher end of the range. Mr. Pupo testified that there was no task that he could not do in terms of cleaning his house. He admitted he was picky about tidiness and he was unable to keep the house as clean as he wanted to. However, he gave no details about what he meant by that. He did not identify tasks that were more difficult for him because they caused discomfort. He did not identify any tasks that were being done less

frequently or not done at all. He only commented vaguely about his decreased endurance. The only concrete example was that he could no longer mow his lawn in one day, which strictly speaking, relates to yard maintenance rather than housework. In any event, I find that to be a mildly negative impact on his capacity.

[121] In my respectful view, this evidence adduced by the plaintiff was insufficient to establish the loss of housekeeping capacity.

VI. SPECIAL DAMAGES

[122] The plaintiff seeks an award of special damages of \$4,737.94. The defendants submit \$3,958.94 is the appropriate amount.

[123] The parties entered an agreed statement of facts and schedules in relation to special damages. The disputed items are \$80 for an ambulance and an amount he paid for a private MRI.

[124] The ambulance cost was clearly reasonably justified as Mr. Pupo was described as being in excruciating pain and collapsed to the floor. Mr. Andrews concluded Mr. Pupo was in no condition to drive nor was he comfortable moving Mr. Pupo because of the possibility of aggravating his injury. It is not reasonable in those circumstances to suggest, as did the defendants, that Mr. Pupo should have taken a taxi or attempted to find someone else willing to drive him.

[125] I also find the private MRI to be justifiable and reasonable. The defendants refer to *Cooknell v. Quinn*, 2013 BCSC 1653 at para. 39 where the court stated that a publicly-funded scan was available and there was no evidence that such investigation was necessary or proper.

[126] Dr. Salvino sent the requisition for the MRI which was suggested by Dr. Cortese. That is clearly sufficient to establish the MRI was proper, and necessary. The defendants focused on lack of evidence of medical urgency to seek out a private MRI. With respect, that is not the only consideration. The MRI was helpful to both medical experts in diagnosing the injuries -- experts relied on by the defendants. Moreover, the evidence does not support a finding that Mr. Pupo could have received an MRI in time for those reports, or in a timely way at all.

[127] Moreover, the MRI was important to determine if there was an actual disc injury. Given how active Mr. Pupo is at the gym and the fact that he experienced a significant injury when doing a dead lift, I accept that both the swiftness and certainty of getting an MRI quickly was to his benefit. I find it was reasonable and necessary. Therefore, I allow the cost.

[128] For those reasons, I award the full amount claimed by the plaintiff for special damages.

VII. CONCLUSIONS AND COSTS

[129] In conclusion I award the following: non-pecuniary damages, \$50,000; damages for cost of future care, \$10,000; and special damages, \$4,737.94. I decline to make an order for loss of housekeeping capacity. The total award is \$64,737.94.

[130] The plaintiff is entitled to his costs. If there are circumstances of which I am unaware relevant to costs that may justify a different result, the parties may request a brief hearing before me to address costs, so long as that request is made no later than 30 days from the date of this judgment.

"Sharma J."

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