
CANADA / JUDGMENT

Rahemtulla v. Sutton

2019 BCSC 1105

COURT

Supreme Court of British Columbia

DECIDED

8 July 2019

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

2019 BCSC 1105 Rahemtulla v. Sutton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rahemtulla v. Sutton,

2019 BCSC 1105

Date: 20190708

Docket: 171948

Registry: New Westminster

Between:

Mohamed Mujhahid Rahemtulla

Plaintiff

And:

Carter Sutton and Ben Sutton

Defendants

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Counsel for Plaintiff:

N. Mulholland

E. Atkinson

Counsel for Defendant:

L. Hibbert

M. Bruneau

Place and Date of Trial:

New Westminster, B.C.

January 14-18, 21-23, 2019

Place and Date of Judgment:

Vancouver, B.C.

July 8, 2019

I. Introduction

- [1] These Reasons deal with a personal injury claim of Mr. Rahemtulla arising from a motor vehicle accident that occurred on September 22, 2013 at the intersection of 168th Street and 56th Avenue in Surrey, B.C. The plaintiff was driving northbound on 168th and the defendant driver turned left across the path of the plaintiff. I will refer to this as the Accident. Liability is not in issue.
- [2] The key aspect of Mr. Rahemtulla's claim is the assertion that he has been left with chronic pain and a permanent partial disability, with a resulting permanent reduction in his earning capacity.
- [3] On October 20, 2015, the plaintiff was involved in a second motor vehicle accident. It took place on the Oak Street Bridge. The plaintiff was rear-ended by a car driven by the third party, Mr. Pasha. That accident is the subject of a separate action and is not joined with the case before me. There appeared to be a question as to whether the injuries Mr. Rahemtulla claims from the second accident are indivisible with the injuries suffered in the first.
- [4] On the fifth day of trial, the defendants sought leave to withdraw their third party claim. Leave was granted.
- [5] Witnesses at trial were:
- (a) Mr. Rahemtulla, the plaintiff;
 - (b) Dr. Heran, neurosurgeon who performed surgery on Mr. Rahemtulla's lower back;
 - (c) Krystal Shipley, the plaintiff's spouse;
 - (d) Michael Riefvelt, a neighbour and friend of the plaintiff;
 - (e) Sergiy Pivnenko, labour economist who prepared a report on the loss of income, past and future, relating to the plaintiff;
 - (f) Dean McBurney, uncle of Ms. Shipley, and co-worker of the plaintiff;

- (g) Cheryl Black, occupational therapist, who prepared a functional capacity evaluation report;
 - (h) Dr. Zeeshan Waseem, physiatrist, who prepared an expert report;
 - (i) Lorne Hutt, elevator mechanic to whom the plaintiff is helper;
 - (j) Robert Swing, Regional Health and Safety manager for thyssenkrupp, the plaintiff's employer;
 - (k) Dr. Donald Cameron, neurologist, who provided an expert medical/legal report;
 - (l) Dr. Dean Powers, vocational rehabilitation specialist, who provided a vocational assessment report.
- [6] In addition medical reports and other documents were tendered at trial.
- [7] The defendants accept that the plaintiff suffered a variety of soft-tissue injuries and an injury to the lower back that required surgery.
- [8] The defendants also accept that the plaintiff may experience some pain with respect to his position as an elevator apprentice, but maintain that the plaintiff remains capable of performing his duties on a full-time basis with no functional difficulties.

II. ISSUES

- [9] The key issues to be decided are:
- (a) What are the nature, extent and duration of the injuries suffered by the plaintiff as a result of the Accident?
 - (b) What is the appropriate award for general damages?
 - (c) What is the past loss of income?
 - (d) What is the future loss of income earning capacity?
 - (e) What is the cost of future care?
 - (f) What amount, if any, should be awarded for financial services?
- [10] The parties have agreed on special damages of \$8,799.85.

III. Background

- [11] The plaintiff is currently 36 years old. He was born in Kenya in 1982, came to Canada in 1989 and grew up in Calgary. He attended and graduated from high school there. For the majority of time prior to the Accident the plaintiff worked as a labourer. His work was physically demanding.

- [12] Mr. Rahemtulla met his spouse Ms. Shipley in the Lower Mainland in 2011. She had three children from a previous relationship; a daughter and two sons. She candidly described Mr. Rahemtulla at the time she first met him as a "bum" living in Chilliwack. However, she spent some time with him and discovered that he had qualities she liked such as his openness and caring interest in children, particularly her sick son Isaac. Within a short time, he and Ms. Shipley began to cohabitate in her home in 100 Mile House, B.C. She lived next door to her parents who assisted her in caring for her children. Ms. Shipley helped Mr. Rahemtulla find work working on the oil rigs in Alberta through family contacts she has in Alberta. He would travel for work to northern Alberta from 100 Mile House, usually two weeks on and one week off. They moved to Surrey in the Lower Mainland in the spring of 2012 to be closer to Children's Hospital as her son Isaac required regular medical attention because of, mitochondrial disease, a terminal genetic disease. Mr. Rahemtulla took on parenting duties and considered the children as his own. In 2013, Mr. Rahemtulla decided to seek work in the Lower Mainland in order to be present for his son Isaac. Ms. Shipley was during this time studying to become a nurse and obtained her LPN designation in the summer of 2014.
- [13] A central feature of Mr. Rahemtulla and Ms. Shipley's life was the care that Isaac required because of his condition. He needed 24-hour care. Isaac was unable to walk and had to be lifted and carried. Isaac could not speak and was severely deaf. He had to be fed and bathed. His vitals and secretions had to be monitored. He had to be provided his medications and given physiotherapy. Fortunately, the parents were allotted from the health authority substantial nursing care for Isaac to perform these duties. They had in essence full day and night nursing care for Isaac through two shifts each day.
- [14] The nursing coverage did not alleviate the parties' care of Isaac entirely. There was a two or three hour gap between the first shift and the second shift during which the parents would take responsibility for the care requirements for Isaac. As well, the parent would have to transport Isaac to Children's Hospital when emergencies arose or for medical appointments. They would also have to provide care when the nurses were unable to attend. All of these duties were in addition to the parenting duties for the other two children in the family.
- [15] In terms of the Accident, the defendant Carter Sutton was driving Nissan Sentra southbound on 168th Street attempted to make a left turn onto 57A Avenue in front of the plaintiff who was driving northbound on 168th Street. Ms. Shipley and Isaac were in the car with Mr. Rahemtulla. The vehicles collided. The air bags in the car Mr. Rahemtulla was driving (a loaner from his car dealership) deployed and hit Mr. Rahemtulla on the chest and head. Firefighters and ambulance attended the scene. Liability has been admitted by the defendants.
- [16] At the time of the Accident the plaintiff was 31 years old and working as a labourer for a contracting firm laying water mains. As a result of the Accident, he was off work for two weeks. He was prescribed Advil and Naproxyn.

- [17] At around this time, Ms. Shipley's uncle, Mr. McBurney, an elevator mechanic, suggested to Mr. Rahemtulla that he consider applying for work as an elevator mechanic. Mr. Rahemtulla followed up on this suggestion, got into the elevator union and started work in early December 2013 as an apprentice with Richmond Elevator. The apprenticeship program takes an average of five years. He was laid off a few times due to seniority. An apprentice does not receive credit for the time laid off. The layoffs were unrelated to his injuries from the Accident.
- [18] In about early 2014, Isaac's health seriously declined and almost died. The summer of that year was a hopeful one as Isaac became stronger. However, he began to deteriorate in about September and passed away on October 14, 2014. Though expected, Isaac's passing was very painful to all in the family. It was a difficult time. Ms. Shipley was also pregnant.
- [19] In July 2014 Mr. Rahemtulla moved to another elevator firm, thyssenkrupp and worked there as an apprentice until March 2015.
- [20] In January 2015, Mr. Rahemtulla's and Ms. Shipley's son Rias was born.
- [21] The parties had many arguments. Mr. Rahemtulla says he was unable to do much around the home due to his injuries. He turned to his former bad habits. The evidence is that Mr. Rahemtulla was partying hard; binging on cocaine and alcohol and was unfaithful to Ms. Shipley. There was tension in the relationship between Mr. Rahemtulla and Ms. Shipley. It is fair to say that the health issues with their son Isaac, the parenting of their other children, the loss of Isaac, and injuries from the Accident were contributors to the tension between the two.
- [22] In October 2015, Mr. Rahemtulla was involved in another motor vehicle accident. That is the subject of a separate action.
- [23] In March 2016, Mr. Rahemtulla moved from thyssenkrupp to another elevator company FujiTec. He was laid off and joined Hayes Elevator in June 2016 and worked there until October 2016. He was then rehired by thyssenkrupp.
- [24] On April 7, 2017, Mr. Rahemtulla underwent a spinal decompression at L4-5 and instrumented fusion at L5-S1. The surgery was performed by Dr. Heran. The intent of the surgery addressed the plaintiff's low right back and sciatic symptoms that Mr. Rahemtulla had experienced since the Accident. MRI scans had identified an asymptomatic congenital anomaly which had been rendered active and symptomatic as a result of the Accident and resulted in nerve root compression at L4-5. Mr. Rahemtulla required about 13 months off work to recover from the surgery.
- [25] During his recuperation period he continued to attend the required classroom work for his apprenticeship which was once a week for four hours.

- [26] Mr. Rahemtulla has complained of pain in his feet. This complaint arose subsequent to the surgery performed by Dr. Heran. The pain was to the degree that the plaintiff was seen by a medical specialist.
- [27] In April 2018, about a year after his surgery, Mr. Rahemtulla returned to work at thyssenkrupp. He provided his employer a Functional Ability form completed by his physician stating that Mr. Rahemtulla was able to return to his job full-time without modification. This was a necessary condition prior to being cleared by his employer to work. The documentation provided by the employer for the physician included a description of duties and a functional demand analysis for Mr. Rahemtulla's position. The form was completed in early April 2018. Mr. Swing, Safety Manager for thyssenkrupp testified that the form sets out several questions to be answered by the plaintiff's physician such as if there were any limitations as to the amount of weight that the worker could manage, the amount of lifting, twisting, climbing of stairs, standing, shoulder activity and back activity; and whether graduated duties were to be employed and the duration. Mr. Swing testified that no limitations were indicated. Mr. Swing met with Mr. Rahemtulla to go over the documentation and determine Mr. Rahemtulla's ability to return full-time. He was satisfied that Mr. Rahemtulla could return to full duties. Because of the company's need for the skill level of Mr. Rahemtulla, he was placed in the Service department as a mechanic helper.
- [28] As a result of being subpoenaed to testify at trial, Mr. Swing contacted Mr. Rahemtulla's supervisor regarding Mr. Rahemtulla. Based on what he was advised, Mr. Swing was satisfied that there were no performance problems with Mr. Rahemtulla. The testimony of Mr. Hutt, the elevator mechanic who Mr. Rahemtulla was assigned as helper and Mr. McBurney a mechanic and uncle of his spouse confirmed the absence of performance issues though they noted Mr. Rahemtulla was having some struggles. Mr. Hutt who worked with Mr. Rahemtulla closely stated that Mr. Rahemtulla could do the work, though questioned if he do so in his fifties. There is some evidence of Mr. Hutt taking on some work to assist Mr. Rahemtulla; however, my view of the evidence is that the assistance was minor in the totality of the work duties. I discount the evidence of the two men to the extent that it could be taken to indicate that Mr. Rahemtulla cannot do the job. They are co-workers with Mr. Rahemtulla and in addition Mr. McBurney is the uncle to Ms. Shipley and close to the couple. The men have 20 years and 24 years experience as elevator mechanics, respectively. If Mr. Rahemtulla was a risk to himself or to other co-workers, this would be noted given the safety consciousness of the workers and the company. I note that Mr. Hutt testified to having various physical limitations, a chronic knee injury which swells and pops out when he runs and shoulder cuff injury which was "torn right apart" and required surgery in 2017 and from which has not fully recovered, yet he is able to work full-time.

IV. Medical Evidence

A. Neuro-Surgery

- [29] Dr. Heran performed decompression surgery on Mr. Rahemtulla's spine in April 2017 to address the plaintiff's low back and sciatic symptoms. In an assessment one year after the surgery, Dr. Heran reported to Mr. Rahemtulla's family physician in a letter dated April 12, 2018, that the plaintiff "has had substantial improvement in his back pain and leg pain. He still has a lot of stiffness in his low back, aching pain in his low back. The more he does, the more it becomes a problem for him. It does limit his activities over the course of the day."
- [30] Dr. Heran also noted in his report to Dr. Perri that the plaintiff stated that he developed some bilateral heel symptoms with discomfort "which worsened over the course of the day such that he has to get off of his feet after a full day."
- [31] Dr. Heran also noted his examination of the Mr. Rahemtulla "demonstrates no root tension sign positivity, no focal loss of bulk and no deformities. He has healed up nicely. He has excellent mobility throughout his spinal axis. There is no resting neurological dysfunction."
- [32] Dr. Heran stated in his letter of April 2018 that there was still a year to go in terms of overall maximal plateauing of the plaintiff's healing. He confirmed this opinion at trial.
- [33] Dr. Paquette, a neurosurgeon, conducted an independent medical examination of Mr. Rahemtulla on December 18, 2017. His expert report is dated January 22, 2018 and was tendered at trial. In his report Dr. Paquette states:

It is my opinion that the motor vehicle accident has led to the increased slippage and nerve root irritation at his L4-L5 vertebra. Absent the events of the motor vehicle accident, it is very difficult to predict if or when Mr. Rahemtulla would have ever developed symptoms. Based on the history provided and the records provided, it is more likely than that Mr. Rahemtulla would not have developed symptoms from his pars interarticularis defect and would not have required surgery within his lifetime.

- [34] In respect to the surgery performed and result he states:

As a result of the surgical intervention, Mr. Rahemtulla has benefitted in a significant reduction in his leg symptoms; however, he has lost an additional motion segment in his lumbar spine. This will cause increased stiffness in his lower back and will also slightly increase his risk of developing arthritic degeneration as he ages. Most research articles on adjacent segment sign degeneration above or below spinal fusions suggest an increased rate of medical intervention being required in 5% of individuals within five years of surgery. It is, therefore, likely that within Mr. Rahemtulla's lifetime that he will develop adjacent segment degeneration at the L3-L4 level that is due to the surgical intervention.

- [35] In respect to return to work, he states:

Mr. Rahemtulla should be able to return to work on a full time basis without limitations once his period of rehabilitation is over. Mr. Rahemtulla should be able to return to the majority of his sporting activities, although he will likely have some degree of low back stiffness and intermittent low back pain for the remainder of his life. At this stage, he is not requiring the use of any narcotic medication and the chances of that changing in the near future is low.

B. Neurological opinion

[36] Dr. Cameron provided an opinion regarding the medical condition of Mr. Rahemtulla from a neurological perspective. An assessment was conducted by Dr. Cameron on November 6, 2018 which included an examination.

[37] Dr. Cameron's report is dated November 11, 2018. In it he opined that Mr. Rahemtulla had suffered a mild traumatic brain injury from the Accident but has not developed symptoms of post traumatic brain injury syndrome. He also opined that the plaintiff also suffered soft tissue and musculoskeletal injuries involving his back, neck, shoulders and chest areas at the time of the Accident. He also had a probable traumatic herniated disc at the time of the Accident, which combined with the congenital narrowing of the foramen, or spaces between the L4 and L5 vertebrae, and the bulging disc, led to the plaintiff developing symptoms radiating to the right lower extremity due to compression of the exiting nerve root at that level. This pain was found to have resolved post-operatively through successful neurosurgical treatment by Dr. Heran.

[38] In respect to the back pain and to lower extremities, Dr. Cameron opines:

I agree with Dr. Paquette that despite suffering with a congenital pars defect at the L4-L5 Level. Mr. Rahemtulla was essentially asymptomatic with respect to this congenital bony defect and that he probably would not have suffering with this chronic pain had he not be involved in the motor vehicle accident of September 22 2013.

[39] In respect to disability and work capabilities, he states:

It is my opinion that Mr. Rahemtulla remains partially disabled with respect to his work capabilities. These limitations are outlined in the functional capacity report. Mr. Rahemtulla also remains partially disabled in that he has not been able to resume previously enjoyed recreational activities or perform household chores in the same manner that he had performed prior to the accident of September 22, 2013.

[40] I note that Dr. Cameron refers to a functional capacity report. The reference he gives in his appendix is a report dated August 25, 2015 and was not produced. As a result reliance on his opinion is lessened by this.

- [41] At the time of the neurological assessment, Dr. Cameron documented subjective decrease in pin and temperature sensation in both soles of Mr. Rahemtulla's feet. Dr. Cameron states in his report that the complaints of pain in Mr. Rahemtulla's feet following surgery maybe related to chronic muscle spasm, change in stature, or gait as a result of the fusion surgery. He was of the opinion that these complaints are probably not neurological nor a direct complication of the surgery that Dr. Heran performed in 2017.
- [42] In a further report of November 18, 2018, Dr. Cameron reassessed the plaintiff. He performed electro diagnostic studies, specifically nerve conduction studies involving the motor and sensory nerves serving the left and right lower extremities. He found the nerve conduction that serve the soles of both feet to be normal and states:

In summary, I cannot explain why [the plaintiff] is complaining of bilateral heel and sole pain following the surgery in April of 2017.

C. Opinion of Dr. Waseem, physiatrist

- [43] At the request of plaintiff's counsel, Dr. Waseem conducted an independent medical examination of the plaintiff. The assessment was conducted on April 21, 2018 and the report is dated May 15, 2018.
- [44] Mr. Rahemtulla reported to Dr. Waseem that his current exercise routine includes "exercising at a gym 6 days per week where he will alternate back-specific exercises (e.g. core, stretches) with a specific body region (e.g. chest, arms). He also performs stretching on a nightly basis using a foam roller that he has been provided." Dr. Waseem also notes that Mr. Rahemtulla "expressed an interest in continuing with his current treatments until he returns to work by May 2018, at which point he intends to start tapering treatments and focusing on self-management."
- [45] In terms of Mr. Rahemtulla's complaint of foot pain post surgery, Dr. Waseem noted that Mr. Rahemtulla began experiencing bilateral heel pain two months following his lumbar spine surgery and that the pain continues to date and worsens as the day progresses, limiting his standing and walking tolerances. Dr. Waseem opined that "this complaint would not appear to be related to either of the subject accidents."
- [46] Dr. Waseem's prognosis was as follows:

The prognosis for a full symptomatic recovery is poor given the long-standing nature of his symptoms that have persisted for over 4.5 years post-accident despite appropriate conservative measures, medical attention, pharmacological management and surgery. While some further improvement is possible over time, he will continue to experience pain. His physical condition would be considered chronic and unremitting and, therefore, permanent.

I expect he will be able to return to physical labour with pain while working gingerly. He may find himself less competitively employable over time and, if needed, it would be medically reasonable for him to seek out less strenuous work to remain employable.

As a result of injuries arising from the September 22, 2013 accident, he will be unable to sit for as long as he could before the accident, will experience more discomfort with repetitive bending and heavy lifting will cause him to be in more pain. Housekeeping tasks will be performed less often, and he will need to continue to be careful to engage only in those avocational activities that are tolerable.

[47] In terms of reasonable future treatment, Dr. Waseem's recommendations included tapering of formalized treatments that Mr. Rahemtulla was engaged in over a period of six months following his return to work; emphasis on self-management of his physical ailment; continuation of medical marijuana given his "efficacious response to medical marijuana"; intermittent access to formalized treatments once every four months for management of symptom exacerbation or to refresh his current exercise program, however, regular treatments should be eschewed in favor of self-directed exercises at the gym as he is currently performing. Dr. Waseem says that referral to a mental health practitioner would be medically reasonable given his reported psychological concerns.

V. Functional Capacity Evaluation Reports

[48] A functional capacity evaluation report was tendered by the plaintiff. The evaluation was conducted by occupational therapist Cheryl Black. Testing was conducted on June 7, 2018 and the report is dated July 13, 2018. At the request of the defence, Ms. Black appeared for cross-examination.

[49] As a result of the functional testing, Ms. Black opined Mr. Rahemtulla was capable of strength demands within the occasional Medium strength capacity category; that he is able to manage some aspects of Heavy strength work on an occasional basis and select aspects of frequent Medium strength work between waist and shoulder level; he would be best suited to positions where material handling demands above the occasional Medium strength level are not tied to productivity demands; that he is not well-suited for jobs with rigorous demands for prolonged sitting. For optimal durability he should be provided opportunity to alternate between sitting and standing work postures as needed throughout the day; that he would be most durable in settings where he has the opportunity to weigh shift and stretch in order to manage accumulated spinal pain during intervals of static standing; that continuous stooping should be limited to a few minutes at a time and he should be provided with opportunity to stretch and work in alternate postures as needed for symptom management; that he will not be durable in settings requiring regular exposure to sustained spinal flexion postures i.e. tasking intensive kneeling, crouching and stooping; that he is able to manage intervals of work in such postures but is not able to durably manage regular and prolonged exposure to work in such postures.

[50] An earlier functional capacity evaluation dated November 10, 2015 was obtained by the plaintiff from Phil Towsley, occupational therapist. The evaluation occurred on October 9, 2015 and the report was tendered at trial.

[51] Mr. Towsley opined that:

Functional testing results, findings of the musculoskeletal assessment, demonstrated movement patterns, pain mannerisms and performance when distracted support Mr. Rahemtulla's symptom reports. Physical effort during testing was determined to be high and pain and disability reports were reliable.

Function decreased during testing related specifically to low back function as indicated by slowing velocity with bending and sit-stand testing (partial squatting). Pain mannerisms occurred during testing. These were limited weight shifting when sitting and stretching his low back at times.

[52] The report also provided a general description of Mr. Rahemtulla's work as an elevator mechanic apprentice from the National Occupational Classification and the Dictionary of Occupational Titles as follows:

The NOC indicates that the Elevator Mechanic Apprentice job (NOC#: 7318) requires a MEDIUM (loads between 10 kg and 20 kg) strength level. Body position requirements include other body positions. Upper limb coordination is required. The DOT indicates that the job of Elevator Mechanic Apprentice (Elevator Constructor - DOT#: 825.361-010/Elevator Repairer Helper -- DOT#: 825684-014) requires HEAVY (100 lbs. Lifting) strength capacity.

It is important to understand that the DOT and the NOC reveal only general job requirements for each given occupation. They should not be relied upon exclusively when attempting to understand the demands of a job. Other sources such as client reports and evaluator experience are incorporated into the occupational data. In this case however the descriptions and physical demands outlined in the DOT and NOC do appear to correspond well with Mr. Rahemtulla's description of the jobs.

[53] The report also describes the work provided by Mr. Rahemtulla:

Mr. Rahemtulla reported that his present job duties include loading rails (16 metal rails for sides on a escalator), wiring (pulling, lifting and lowering one and a 1/2' cable and wiring the computer and mechanical system), cleaning (broom, put boxes away), installing 15 pound brackets into concrete with a hammer drill while standing on a false platform, put together door locks, preparing elevator doors and frames and moving equipment (governors, the large mechanical elevator lift and the computer). Awkward positioning occurs when wiring the bottom part of the elevator and when in the elevator pit. He also has to reach down into areas to reach nuts and bolts on escalators. He indicated that lifting required can be up to 75 to 100 pounds and up to 240 pounds when lifted with another worker. This would place the work into the heavy or very heavy strength category. Mr. Rahemtulla indicated that although the work can involve heavy level strength and awkward positioning there are adequate opportunities for activity breaks built

into the day to allow him to manage symptom increase.

[54] The report notes that the testing results support that Mr. Rahemtulla possesses the strength and postural tolerance to continue to work as an elevator mechanic. Mr. Towsley notes Mr. Rahemtulla as indicating that:

although the work can be heavy in nature hoists are often used for the heavier handling and breaks and changes in posture are naturally built into the workday. Working with a partner enables one to change position or perform a less aggravating aspect of the job as needed. The presence of decline in performance related specifically to his low back function did indicate some functional decline during testing. Although symptom and disability reports did not increase substantially during testing follow-up reports indicated significant soreness (more pain and discomfort than normal for three days following) and poor sleep quality following testing. This would indicate some concern as to Mr. Rahemtulla's ability to maintain his capacity and tolerance for heavy level work over the long term.

[55] Mr. Towsley opines in his report that:

Mr. Rahemtulla was able to function at a full Medium strength level during testing with aspects of the Heavy strength level. This would indicate that he demonstrated the strength capacity during the assessment to perform the Elevator Mechanic Apprentice job.

[56] I also note that Mr. Rahemtulla reported to Mr. Towsley that he is able to perform all of his own personal care and pre-accident housekeeping and home maintenance duties. Mr. Towsley states that "[t]est findings would support Mr. Rahemtulla's reports.

VI. Vocational Assessment

[57] Dr. Dean Powers, a vocational specialist conducted a psycho-vocational assessment and report. The assessment took place May 28, 2018 and the resulting report is dated August 27, 2018. Dr. Powers conducted various tests.

[58] Dr. Powers opined that:

Should Mr. Rahemtulla leave or lose this position [elevator mechanic] for whatever reason, I am guarded that he would find similar supports and accommodations from an alternative employer in the same industry which could impact both earnings and his ability to manage the pain symptoms and physiological stresses due to ongoing soft tissue discomfort (lower back and upper shoulder and neck regions).

4. The functional capacity evaluation provided (Towsley) in general, supported Mr. Rahemtulla's physical abilities to maintain his employment in his current occupation of Elevator Mechanic. I noted that the FCE was conducted in October 2015, nearly three years ago. Since that time, and in interview with Mr. Rahemtulla, his physical condition (and specifically the lower back tolerances and accompanying pain disorder) has further deteriorated and he has expanding pain in his lower extremities and in both feet as well. I

recommend an updated FCE given that Mr. Rahemtulla has been referred recently by his family doctor for an MRI due to complaints of increased pain and reduced function. I would appreciate reviewing an updated FCE once available.

5. Assuming Mr. Rahemtulla's lower back condition is worsening and now has impacted function/ability in his lower extremities, I considered his vocational alternatives based on vocational test results rendered for this report. In my view and my opinion, Mr. Rahemtulla will be challenged at upgrading his education standing for alternative occupations at comparable wage ranges to that of an Elevator Mechanic. In my opinion, unresolved chronic pain and psychological symptoms, interrupted sleep regimen, daily fatigue, concentration and memory difficulties, combined will likely contribute to diminished motivation and reduce tolerance for formal and competitive classroom learning settings even if he attends on a part-time basis. Based on his complaints, I am guarded as to Mr. Rahemtulla's potential for success with any training that requires prolonged sitting and concentration, and for example, seated in 3 hour classroom sessions coupled with homework and reading assignments typical of post secondary college/university programs. Mr. Rahemtulla's aptitude and achievement test scores contraindicate formal post secondary educational programs and further that he would likely perform more reliably in short courses and/or on-the-job training where hands on applications of skills learned under supervision for both membership and accomplishing more complex skilled tasks leads to certification. The vocational test scores also strongly suggest that Mr. Rahemtulla prefers the trades and occupations where hands on work with tools and/or electronics are preferred as integral to employment performance. Mr. Rahemtulla's highest career interest appeared on the occupational scales canvassed for this assessment.
11. I am guarded as to Mr. Rahemtulla's ability to obtain his Red Seal in elevator mechanics/technology and then further apply for supervisory and management jobs in this field given his post surgery symptoms and limitations and lower extremity complaints. In summary and from a vocational rehabilitation perspective, I am of the opinion that Mr. Rahemtulla has likely suffered a significant loss of vocational capacity at a critical juncture in his working life, as a result of his injuries and residuals of the subject motor vehicle accidents. It has now been nearly 5 years since the first motor vehicle accident. Mr. Rahemtulla continues to experience psychological symptoms, chronic pain, and ongoing significant physical limitations. If not for the motor vehicle accidents in question, it is more likely than not given his unhindered physical abilities, would have certified as a journeyman (red seal) Elevator Mechanic. This is now in question. In terms of alternative work, Mr. Rahemtulla's pain exacerbations, reduced physical tolerance, significant limitations of the lower extremity functions has limited his suitability for physically demanding work and even in lighter duty employment positions, he will likely require employer accommodations. Mr. Rahemtulla is likely to remain at a competitive disadvantage when compared to other workers who do not have the same difficulties. Further in my opinion, with no substantial resolution of his medical condition, he will be at an increased risk for underemployment and unemployment. As a result of the current and future predicted difficulties, his number

of employment prospects/occupations is significantly reduced in my professional opinion.

[59] Dr. Powers in his report provides a list of vocations which had the highest career interest for Mr. Rahemtulla and their related salary levels.

[60] I have discounted Dr. Powers' opinion as to Mr. Rahemtulla's diminished motivation and tolerance for formal and competitive classroom learning, as well as his findings on alternative occupations and Mr. Rahemtulla's ability of obtaining his red seal ticket, on the basis that a significant feature of his report is his belief that Mr. Rahemtulla's physical condition is "further deteriorated" since October 2015 and assumption that the plaintiff's "lower back condition is worsening". This assumption has not been established. I discount the report also as pointed out in the defence submissions:

Dr. Powers began his report noting that he was the "person primarily responsible for the contents of this report" and stated, during his direct examination, that he had conducted tests with the Plaintiff and then written his report, his evidence under cross examination demonstrated that he had not actually done so. It is notable that Dr. Powers:

- a. Agreed that portions of his report had been authored by a "technical writer" and not himself;
- b. That he had not conducted the intake interview with the Plaintiff and instead relied upon a questionnaire filled out by his associate;
- c. That he did not meet with the Plaintiff in person, but rather conducted a brief interview over the phone; and
- d. That he had not conducted the vocational testing of the Plaintiff.

Dr. Powers' lack of direct participation in the Plaintiff's vocational assessment and his heavy reliance on other parties to provide him test result and observations, undermines the "degree of vocational certainty" he alluded to in his report and renders his opinions unreliable.

[61] I also have discounted Dr. Powers' commentary regarding his knowledge of the elevator mechanic industry. At trial, it was apparent that his knowledge was limited to the non-union setting; he had little knowledge of the union context and how such work is distributed and allotted in that environment.

VII. Economic Evidence

[62] Economic reports were tendered by the plaintiff. The report was authored by Sergiy Pivnenko and are dated November 16, 2018 and November 22, 2018.

[63] Mr. Pivenko provided projections of past and/or future earnings for an elevator mechanic, elevator inspector, steamfitter/pipefitter on the Alberta Oil and Gas industry and B.C. resident telephone repair technician.

VIII. Credibility of the plaintiff

- [64] Mr. Rahemtulla does not have an unblemished character. His credibility and reliability was brought into question at trial. He admitted that as a younger man he had difficulties with the law and has convictions for aggravated assault and common assault and received a three year custodial sentence.
- [65] During the course of his cross examination his responses to questions probing whether he had been truthful in certain instances were raised. Mr. Rahemtulla appeared to be evasive in relation to an Employment Insurance application he had made. He stated in the application he had been laid off, yet the employer information indicated that he had been dismissed for breaching the company rules on the use of alcohol and drugs and that he had failed to attend a conference. Mr. Rahemtulla at first stated he did not recall whether that was in fact true, then argued that the circumstances were unfair as his conduct was during his personal time. Ultimately, he conceded that he may have lied on his application. He also agreed that he was not untruthful about the date he was terminated.
- [66] He was also confronted in cross examination about the income he stated he had earned to Dr. Dean Powers, who had conducted a vocational assessment of the plaintiff. Mr. Rahemtulla was challenged about what he had told Dr. Powers that he had earned up to \$90,000 in a year while working in Alberta. Mr. Rahemtulla was taken through his income tax information and he conceded he never earned that much in a year. He argued hopelessly that his income for some of the years did not cover a full year. However, it was pointed out that his partial income covered eleven months; it was apparent that extrapolating out would not get him close to \$90,000. He conceded that what he told Dr. Powers was inaccurate.
- [67] There appears as well to have been an inconsistency between what he stated at his examination for discovery and what he stated at trial regarding whether he played floor hockey before the Accident or not. In his examination for discovery he stated he had not played floor hockey prior to the Accident yet at trial he stated he had. He insisted at trial that he had and stated that he had been mistaken at his discovery.
- [68] He also agreed that he had told Dr. Heran that he did not use recreational drugs. He acknowledged that he did use marijuana and stated that what he meant when responding to Dr. Heran was cocaine. I found this to be a stretch.
- [69] He also testified that he was placed in the service area of the company on his return because it was less strenuous that was contradicted in two ways. First, Mr. Swing testified that Mr. Rahemtulla was placed in service because of need in that area. Mr. Swing rejected the notion that the lighter duties for Mr. Rahemtulla were assigned to him. Second, it was clear from the testimony of Mr. Hutt and Mr. McBurney that all jobs/duties of elevator mechanics were equally hard including the service area. It is apparent there is an element of exaggeration in Mr. Rahemtulla.

[70] Mr. Rahemtulla also acknowledged in cross examination that he had knowingly put in false income reports to employment insurance agency, and was wrongfully collecting EI benefits. The documentation indicates this exceeded \$16,000. Only after he was audited by the agency and was exposed did he take responsibility for his conduct. He testified that he has agreed to pay back the overpayment. I found his rationale for taking the money because he needed the money to be less than compelling given had he earned \$80,000 in that year.

[71] I have kept the foregoing in mind in determining the issues.

IX. Findings on injuries

[72] At the time of the Accident, the plaintiff was a healthy, physically-active and hard-working 31 year old with no history of chronic lower back pain though he did suffer low back pain while working as a labourer prior to being an elevator mechanic apprentice and would from time to time get massage therapy for this. He shared in household duties such as doing laundry, taking out the garbage, making meals and caring for the children. He participated regularly in sporting activities and worked out at the gym six times per week.

[73] Following the Accident, he suffered headaches, soreness from his shoulders down through his back, sore legs, and tingling in his feet. He remained off work for two weeks. The problem that remained and persisted was lower back and lower extremities pain. This impacted his sleeping, made sitting for a prolonged period painful and carrying groceries and Isaac difficult, and made carrying out household duties difficult. My view, however, is that his limitations doing household activities resolved to a significant level at latest by mid-2015, given the Towsley report. However, his lower back and extremities were a problem, for which he turned to a surgical solution.

[74] Taking into consideration the medical evidence and the testimony of witnesses, as well as the submissions as to the plaintiff's credibility, I find that as a result of the Accident, the plaintiff has suffered the following:

- (a) disc herniation and nerve root compression at L4-5;
- (b) chronic back pain;
- (c) sleeplessness;
- (d) neck pain;
- (e) headaches;
- (f) shoulder pain;
- (g) upper, mid and lower back pain; and
- (h) anxiety.

- [75] I accept that the lumbar spine symptoms and need for surgery arose as a consequence of the Accident.
- [76] I find that the surgery was successful. However, he required a significant time to recuperate before returning to work and that the plaintiff is not entirely pain free.
- [77] I accept that the plaintiff continues to have some residual back pain. His other problems have resolved. However, I do not accept that Mr. Rahemtulla is as debilitated by his Accident related injuries as much as he asserts. Based on the medical evidence it is my view that the level of pain he suffers will reduce further and his abilities will improve as per the opinion of Dr. Heran and Dr. Waseem. I find he is able to perform household duties. His spousal relationship has improved to his description that it was now "great". In addition to the credibility issues regarding Mr. Rahemtulla identified earlier, the additional evidence which militates against the extent of his condition as he asserts includes:
- (a) That contrary to his evidence in direct that the first family road trip post-surgery had been in December 2018 to 100 Mile House. Mr. Rahemtulla was able to drive a considerable distance, Vancouver to Calgary, within six months of his surgery in August 2017.
 - (b) His ability to attend classroom studies each week for his apprenticeship where the classes lasted four hours.
 - (c) The evidence of Mr. Rahemtulla's abilities to satisfactorily perform the elevator mechanic work as testified by Mr. Hutt, the evidence from his employer and the functional capacity reports.
 - (d) The functional capacity assessment which indicates a capacity greater than the minimal level of household activity to which Mr. Rahemtulla testified he is presently limited.
- [78] The medical evidence does not establish that the feet pain which hampers Mr. Rahemtulla in his work is related to the Accident. In this regard, I note the evidence of Dr. Waseem and Dr. Cameron who were unable to relate the feet pain to the Accident. As a result, I am not persuaded that Mr. Rahemtulla's problems with his feet is as a result of the Accident. It is my view, that a significant contributor to his struggles at work are due to his feet pain.
- [79] With the foregoing in mind, I turn to damages.

X. Damages

A. General Damages

- [80] In *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at p. 637, the Supreme Court of Canada stated the approach to damages under this head this way:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the

maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.).

- [81] Damages under this head is an assessment. Awards made in other cases involving similar circumstances and injuries provide guidance but each case requires an assessment on its own unique circumstances. Assessments under this head are guided by many factors and a non-exhaustive list of considerations is listed in *Stapley v. Hejslet*, 2006 BCCA 34: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism (which should generally not detract from the award).
- [82] Ultimately, an award must be fair and reasonable to the parties.
- [83] Prior to the Accident, Mr. Rahemtulla led an active life. He was 31 years old at the time. He is now 36 years old. He was particularly involved in caring for his son Isaac who had as mentioned significant health issues. He worked out regularly at a local gym, played street hockey and baseball with the children in the neighbourhood, played golf, had family outings regularly in the summer such as going to water parks and having barbecues with other families. He was an active partner in parenting. He was socially active.
- [84] Mr. Rahemtulla also worked in physically demanding jobs prior to the Accident. He was able to secure such employment as an apprentice elevator mechanic following the Accident and performed it satisfactorily.
- [85] Following the Accident, he suffered various difficulties as I have identified above. However, they have resolved except for residual pain in his back. He is not incapable of working in his chosen field and performs the work well. Also, he is capable of doing house duties and activities such as attending the gym regularly.
- [86] The plaintiff submits that \$175,000 is appropriate compensation under this head.
- [87] The cases relied upon are: *Chow v. Goodman*, 2016 BCSC 1486; *Jafferi v. Hardcastle*, 2018 BCSC 486; *Ali v. Padam*, 2017 BCSC 1849; and *Sirak v. Noonward*, 2015 BCSC 274.
- [88] The defence submits that an award in the range of \$80,000 to \$100,000 is appropriate under this head.
- [89] The cases relied upon are: *Park v. Donnelly*, 2017 BCSC 778; *Klein v. Sangha*, 2016 BCSC 1864; and *Tathgur v. Dobson*, 2018 BCSC 1384.

- [90] In my view, a fair award is \$115,000. The cases relied upon by the plaintiff describes circumstances that are on the whole more severe than the plaintiff.
- [91] In *Jafferi v. Hardcastle*, 2018 BCSC 486, the plaintiff was awarded \$150,000 in general damages. The plaintiff, who immigrated from Pakistan, was around 54 years old at the time of his accident. His injuries included chronic pain resulting from soft tissues, musculoskeletal injuries to his neck/back/shoulders, and a traumatic herniated disk. A doctor opined that he would likely remain "permanently partially disabled" (at para. 133). In February 2017, he had surgery to relieve his neck pain. Despite his surgery, the court at para. 106 found that his neck pain has worsened and his shoulder pain remains. At the time of the trial, he was receiving injections for pain and experienced sleep problems. The plaintiff argued that he had depression as a result of the accident and his work and personal life suffered.
- [92] In coming to a conclusion on general damages, Justice Greyell at para. 134 found that the plaintiff was healthy and active prior to the accident; he participated heavily in family social activities and the family business. The accident caused him to have difficulty lifting heavy boxes, fatigue, difficulty driving, ongoing pain, and altered mood caused by the pain and the possibility of a future operation.
- [93] In *Sirak v. Noonward*, 2015 BCSC 274, the plaintiff was awarded \$160,000 in general damages. The plaintiff's injuries in this case were severe and included neck/shoulder/back pain, headaches, and pain in his legs. The court concluded that these injuries cause the plaintiff were "severe" and caused "disabling" pain and neurological symptoms (at para. 160). The plaintiff was taking heavy pain medication, and his neck pain had worsened every year since the accident. The pain prevented him from exercising and he gained a significant amount of weight. In addition, the plaintiff's injuries had a significant impact on his ability to work as a painter, as the work aggravated his neck and back (at para. 36). As a result, he had to significantly reduce the number of hours he worked, which was particularly difficult given his lack of education and the fact that he had to support himself.
- [94] In coming to a finding on non-pecuniary damages, Madam Justice Warren emphasized the severity of the injuries suffered: the condition was likely permanent and the plaintiff faced many years of ongoing pain and a compromised lifestyle (at para. 160). The court also commented on the impact of the accident on the plaintiff's personality and mental health. Prior to the accident, he was described as energetic, healthy, and physically active. He enjoyed life and had many friends. After the accident, he gained a significant amount of weight, became "sloppy and unkempt", and did not participate in recreational activities with his family and grandchildren.

- [95] In *Chow v. Goodman*, 2016 BCSC 1486, the plaintiff was awarded \$165,000 in general damages. The plaintiff experienced two accidents causing significant neurological damage, which was partially addressed by surgery. At trial, he had difficulty making a fist with his left hand. His headaches continued to the point where he had to receive Botox injections for his headaches. His upper neck and back pain were dependent on his activity level. The plaintiff was unable to perform physically at work, which made him self-conscious.
- [96] Madam Justice Duncan found that the plaintiff did not return to work full-time after the accident, and had not enjoyed the same career advancement that others with his education would have. He was unable to enjoy simple things like go to the movies because he could not sit through them. Further, he had difficulties performing household tasks, which caused him embarrassment. His inability to sleep affected his relationship with his wife. The court also noted that the plaintiff was stoic in recanting his injuries and pain (at para. 127).
- [97] In *Ali v. Padam*, 2017 BCSC 1849, the plaintiff was awarded \$180,000 in general damages. Both the nature of the injuries and the impact of the accident on the plaintiff's life in this case were extreme. By the time of trial, the plaintiff was unable to walk or stand for more than ten minutes, and had difficulty in performing basic everyday tasks and sleeping. She was unable to continue her job because she was unable to stand on her feet. She had surgery, and after suffered from anxiety, depression and nightmares.
- [98] Prior to the accident, the plaintiff was described as being in good health, active, and energetic. The accident clearly took a large toll on the plaintiff mentally and emotionally. She isolated herself from her loved ones, was irritable and ill-tempered, gained a substantial amount of weight, and experienced suicidal thoughts. She was described as having major depressive disorder and PTSD, which combine in a "debilitating fashion and have severely affected all aspects of her life" (at para. 235). Her relationship suffered with her partner, as they had difficulties being intimate and had to see a divorce counsellor. In addition, her relationship with her son suffered, as she was no longer able to play with him or give him the attention he needed.
- [99] The defence cases describes circumstances that on the whole are closer to the present circumstance but not as severe on the whole.
- [100] In *Park v. Donnelly*, 2017 BCSC 778, the plaintiff was awarded \$85,000 in general damages. As a result of the accident, he suffered a mild brain injury and soft tissue strains/injuries to the neck, back and left leg, although his neck and back pain were found to have largely resolved within six months. He also suffered with anxiety and depression. Justice Voith found that the most serious injury was to the plaintiff's left shoulder, which would likely be ongoing. His shoulder injury directly affected the nature of his work (as a sprinkler/steam fitter). After the accident, he was off work for a month.

- [101] The plaintiff was a good athlete, participating in volleyball, golf and snowboarding, but had not snowboarded since the accident as a result of his shoulder pain. Instead, he took up hiking and going to the gym. His father said he had somewhat changed since the accident, but described this change rather acutely.
- [102] In coming to his conclusions, Voith J. noted that in cases where the shoulder injury did not require surgery, an award of \$65,000-\$75,000 is appropriate, whereas where surgery is required, damages are approximately \$85,000 (at para. 123).
- [103] In *Klein v. Sangha*, 2016 BCSC 1864, the plaintiff was awarded \$90,000 in general damages. The plaintiff was in two car accidents which caused him neck and back pain, as well as headaches. His symptoms were aggravated by the second accident, and he often experienced muscle spasms. His pain required him to take muscle relaxants and pain killers.
- [104] The court noted the plaintiff's spine injury affected all aspects of his life, including his ability work, play, sleep, and conduct household work (at para. 57). He was left bed-ridden for prolonged periods of time which interfered with his return to work. Before the accident, the plaintiff was in a well-established occupation which provided financial and personal satisfaction to him. He could not continue his chosen line of work and had become self-employed to account for the flexibility he needed. The court also commented on the plaintiff's stoicism.
- [105] In *Tathgur v. Dobson*, 2018 BCSC 1384, the plaintiff was awarded \$95,000 in general damages. The plaintiff was in two motor vehicle accidents. He suffered with pain in his neck, upper/lower back, with radiating pain in his right leg, wrists, and hands. He also had severe headaches and episodic severe back spasms for several months following. His symptoms from the first accident were aggravated by the second accident. At the time of the trial, he continued to experience headaches, neck and upper back stiffness, and pain in his body, and the occasional severe back spasm. The court found his symptoms were worsened with activities such as bending, lifting, prolonged sitting, and it was difficult for the plaintiff to participate in activities with his children and family.
- [106] In coming to a conclusion on general damages, the court found that the most significant Stapley factors were the plaintiff's age, and the severity and duration of his pain. The plaintiff was relatively young at the time of the accidents, and had already lived with roughly ten years of pain, stiffness and recurring spasms (at para. 140). The pain would likely contribute to emotional suffering. However, the court also noted that the plaintiff's lifestyle was not as significantly impacted, as he had learned to manage his day-to-day symptoms sufficiently to continue working and progress in his career notwithstanding his physical limitations (at para. 140).
- [107] As discussed earlier is that Mr. Rahemtulla suffers from the injuries from the Accident, however, the effects are not as great as asserted. He was able to carry on in his work as an elevator apprentice prior to his surgery and he has been able to carry on the work following

his recuperation from surgery. While the functional capacity reports and the psycho vocational report indicate physical limitations the weight to be given these reports is limited by the evidence of what he has been observed to be capable of as well as his actual attendance for work. He is able to do household activities and his troubles in his home life have resolved. Mr. Rahemtulla's credibility problems also do not lead me to accept the extent of his disabilities. I also do not find that his feet pain is related to the Accident. The feet pain is a significant contributor to the difficulties he has at work and in other circumstances.

B. Loss of Earning Capacity

[108] Goepel J.A. in *Grewal v. Naumann*, 2017 BCCA 158, recently summarized the approach to the past and future loss of earning capacity:

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. 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: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[109] I add that loss of earning capacity can be established even if the plaintiff has returned to his or her usual job: *Perren v. Lalari*, 2010 BCCA 140 at para. 122.

[110] As an initial threshold issue, the plaintiff must demonstrate:

- (a) impairment to earning capacity; and
- (b) a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. It is not to be an exercise in the abstract though at the same time it was described in *Andrews v. Grand & Toy Alberta Ltd.*, (1978), 83 D.L.R. (3d) 452 (S.C.C.) as "gaz[ing] deeply into the crystal ball".

[111] Once the two conditions are met then the quantification of the impairment is initiated.

There are two ways of quantifying loss: the earnings approach and the capital asset approach. An earnings approach is more useful when the loss is more easily measurable.

The capital asset approach will be more useful when the loss is not easily measurable. With respect to the latter approach, Finch J. (as he then was) in *Brown v. Golaiy*, (1985), 26 B.C.L.R. (3d) 353 (S.C.) identified several considerations for assessing loss, namely, 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.

[112] My view of the evidence leads me to conclude that the plaintiff suffered an impairment to his earning capacity as a result of the Accident and that there is a real and substantial possibility of future income loss.

1. Past loss

[113] The plaintiff submits that an appropriate award under this head is \$75,366.67 net.

[114] The plaintiff calculates this by taking into account that the \$80,000 he earned in income in 2016 and submitting that it is a reasonable amount of annual income he would have earned during his period of recovery from surgery. This period was from the date of his surgery, April 12, 2017 until approximately May 8, 2018, after which he returned on a graduated basis. The amount translates to a monthly amount of \$6,666.67. Multiplying this amount by the 13 months of recuperation results in \$86,666.67. The plaintiff adds to this amount the 80 hours of work he missed right after the Accident multiplied by this hourly rate of \$25. This amounts to \$2,000. After taking into account deductions for three children, potential RRSP contributions his net income is submitted to be \$75,366.67 or 85% of his gross income.

[115] The defence submits that an appropriate award under this head should be in the range of \$70,000 to \$80,000 less deductions for income tax.

[116] I accept the defendants' position regarding the amount to be awarded for the loss of two weeks pay immediately following the Accident of \$1,581 and \$1,995.38.

[117] With respect to compensation during his period of recuperation following surgery, some recognition for the real possibility of lay off or other contingency is required.

[118] I was provided only directional guidance on deriving a net figure. The total award on a net basis is assessed at \$68,300.

2. Loss of Future Earning Capacity

[119] The plaintiff submits that there is a real and substantial possibility that Mr. Rahemtulla will not be able to work as an elevator mechanic for the balance of his career; and that it is more likely than not that he will be unable to do so and even substantially likely that his career in that field will come to an end in the near future. It is submitted that it is most likely that Mr. Rahemtulla will not get his red seal ticket.

[120] Reliance is placed on the evidence of Dr. Waseem, Ms. Black, Dr. Cameron, Dr. Paquette and Dr. Powers.

[121] The specific submissions are as follows:

(a) The findings of Dr. Waseem referred to above:

I expect he will be able to return to physical labour with pain while working gingerly. He may find himself less competitively employable over time and, if needed, it would be medically reasonable for him to seek out less strenuous work to remain employable.

(b) The evidence of Cheryl Black:

Based on his demonstrated difficulties with his tolerance for spinal flexion postures, I have concerns regarding Mr. Rahemtulla's ability to durably manage the full scope of physical demands of elevator mechanic work over the long term.

Given his demonstrated strength capacity in testing, I believe Mr. Rahemtulla to be capable of strength demands within the occasional Medium strength capacity category. He is able to manage some aspects of Heavy strength work on an occasional basis and select aspects of frequent Medium strength work between waist and shoulder level. I am of the opinion that he would be best suited to positions where material handling demands above the occasional Medium strength level are not tied to productivity demands.

I am of the opinion that Mr. Rahemtulla will not be durable in settings requiring regular exposure to sustained spinal flexion postures, i.e. task intensive kneeling, crouching and stooping. I am of the opinion that he will not be able to durably manage regular and prolonged exposure to work in such postures. Overall, I am of the opinion that Mr. Rahemtulla is capable of full-time employment as long as the functional/work demands of such work are within the guidelines and limitations as outlined in this report.

(c) The evidence of Dr. Powers:

Mr. Rahemtulla's future employability as an Elevator Mechanic (NOC 7318) has been significantly compromised as a result of the injuries sustained in the motor vehicle accidents of September 22, 2013 and October 24 [sic], 2015 in my opinion. In my experience, his future employment and employability in this occupation is at risk of collapse if his medical condition does not resolve substantially. In my view, Mr. Rahemtulla is best advised to have a vocational alternative and plan for a more suitable occupation should he lose his job at thyssenkrupp elevators where he has

been employed as a 3rd year apprentice earning \$42.77 per hour. At this point in his recovery, there is a strong probability that he will not be able to sustain the duties required of an Elevator Mechanic at a competitive level.

- (d) The anecdotal evidence of Mr. Hutt, with 30 years experience in the industry, who does not believe the Plaintiff could last to age 50 and who personally could not see himself doing such work with a bad back.
- (e) Perhaps most concerning is the evidence of Mr. Swing, who referred to chronic low back pain as a "red flag" regarding the physical ability of a worker to perform the job of an elevator mechanic. Even more so, his reaction to the findings of Dr. Waseem, Ms. Black and Dr. Powers when they were put to him in cross-examination make it apparent that not only is there significant doubt about the Plaintiff's long-term career prospects as an elevator mechanic, but that even the Plaintiff's current employment may be in question.

[122] The plaintiff argues that best available occupations for which he seems reasonably suited are Electronic Service Technician and Telephone Repair Technician. The midpoint of the median annual salary for these two positions is \$58,647.

[123] The plaintiff takes the difference between the mid-point range of potential annual earnings as an Elevator Mechanic of \$104,664 and the above mentioned \$58,647 and arrives at a differential of \$46,017.

[124] Based on the assumption that Mr. Rahemtulla would have completed his red seal ticket in 2019 and that now he will not be able to complete this, and is relegated to less remunerative work as identified by Dr. Powers, the annual reduction of \$46,017 has a present value of \$1,036,624 before reducing for contingencies.

[125] The plaintiff submits a modest contingency of 10% is warranted based on the facts of this case. As a result, the amount of \$932,962.46 is sought.

[126] On the alternative capital asset approach the plaintiff submits:

In our submission, having regard to the very strong likelihood that the Plaintiff, absent the Accident, would have enjoyed a full-time career as an Elevator Mechanic from 2019 to age 65, the very substantial likelihood that he will be unable to do so as a result of the Accident injuries, his inability to return to the kind of work he performed pre-Accident, the limited number of suitable alternatives open to the Plaintiff, his substantially increased risks for underemployment and unemployment, his barriers to re-education, and his relatively young age, mean that the appropriate quantum of damages for impaired capital asset is \$800,000-\$850,000, after taking account of contingencies.

[127] The defence position is that Mr. Rahemtulla has not established a real and substantial possibility of a future income loss.

- [128] The defendants submit that while the plaintiff has demonstrated that he may get some minor accommodations from co-workers he has not required even minor accommodations from his employer but rather he has been able to return to "full duties" and has done so successfully. Thus while Mr. Swing gave evidence that the company does set aside some short term "light duties" for workers returning from injury the evidence has shown that the plaintiff did not even need to be accommodated in that way.
- [129] Moreover, it is the defendants submission that the plaintiff's evidence that he may ultimately need to leave the trade that though he has continued to work in, since the time of the Accident, should be viewed with an air of skepticism given the difficulties with his credibility and his history of a willingness to lie for financial gain.
- [130] It is submitted that the evidence is not sufficient to establish a real and substantial possibility of Mr. Rahemtulla losing his job. In this regard the defence relies upon:
- (a) The plaintiff did have clearance from a medical practitioner, of his own choosing, who had been provided a job description and a functional evaluation form to return to work. Mr. Swing agreed he would rely on that medical practitioner;
 - (b) Mr. Swing gave no evidence to suggest that the plaintiff would be dismissed functional limitations but rather testified that the withholding of information would simply require further exchanges of information between the union and the company, with potential discussions about accommodation if they were deemed necessary; and
 - (c) Mr. Swing's only evidence relating to termination was that when an employee is terminated, he returns to the "bench" with the union, where he joins the queue for the next available position. He further gave evidence that there is plenty of work available in this industry and that the plaintiff would fall ahead of "permit holders", "first year" and "second year" helpers in terms of priority.
- [131] On an earnings based approach the defence submits no loss has been established.
- [132] On a capital asset approach the defendant submits that if some loss of capacity if established then such loss should be in the range of \$75,000 to \$85,000 less deductions from contingencies of 15-20%.
- [133] In these circumstances, my view is that the earning based approach is preferable given the employment circumstances of Mr. Rahemtulla.
- [134] I find that there is a real and substantial possibility of a future event leading to an income loss. The strongest likelihood is for Mr. Rahemtulla to continue and obtain his red seal ticket and work as an elevator mechanic. Mr. Swing's reservations are incomplete given he had only part of the evidence related to Mr. Rahemtulla. However, I do find a possibility includes a failure to obtain his red seal ticket, but I find this possibility to be very low. Mr. Rahemtulla is well into his apprenticeship and there have been no issues as to his performance on the job. As to failing one exam, the failure is not out of the norm and I am

not persuaded that the Accident was the cause.

- [135] Mr. Rahemtulla may not be able to work as an elevator mechanic at some point after obtaining his red seal ticket based on the medical evidence of degeneration as a result of surgery. But this has a low likelihood. The difficulty here for the plaintiff is the evidence regarding his clearance from his physician to return to his job; the evidence of his co-workers who testified to his work performance, his satisfactory work performance since his return to work and absence of any negative reports; the functional capacity reports which indicate some limitations but also report of his positive abilities; and the concerns raised in respect to Mr. Rahemtulla's credibility. Further, Mr. Rahemtulla was able to perform the duties of an elevator apprentice prior to surgery and the surgery was to improve his condition. That surgery is said to have been successful; and Mr. Rahemtulla should be after the full two years post-surgery be in better condition than before surgery. I accept this will be the case.
- [136] Though the evidence that Mr. Rahemtulla's co-workers provided some accommodation, my view is that they were minor and not to their own detriment. There is a safety conscious culture in the industry and particularly with his employer and co-workers. Had there been a real concern with Mr. Rahemtulla's inability to do the work, that condition would be expressed and noted. I also note that the evidence indicates that the heavier work is lessened following an apprenticeship. These all limit my ability to find that he will not be able to continue with his job as the elevator mechanic.
- [137] Reasonable job alternatives for Mr. Rahemtulla were identified by Dr. Powers, namely Electronic Service Technician and Telephone Repair Technician. The median salary ranges for those two jobs are \$55,555 and \$66,739, respectively. The mid-point is \$58,647. I have discussed earlier my concerns regarding that report. However, Mr. Rahemtulla testified that should he be unable to carry on as an elevator mechanic, he would pursue becoming an elevator inspector. The economic evidence tendered includes earnings for such a position. The income for such a position in 2019 is reported as \$82,052.
- [138] I have taken into consideration the real possibilities including their likelihood that include Mr. Rahemtulla not being able to continue as an elevator mechanic at some point and alternative scenarios. I have considered the impact of Mr. Rahemtulla's problems with his feet that affect him and which may affect his ability to work as an elevator mechanic. As noted his condition in respect to his feet is unrelated to the Accident. Also, as mentioned earlier, I have taken into account the concerns regarding Mr. Rahemtulla's credibility and reliability.
- [139] I assess a reasonable award under this head at \$280,000.

3. Cost of Future Care

- [140] An award under this head is governed by the principles set out in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.), namely that: (a) there must be a medical justification for the claim; and (b) the claim must be reasonable.
- [141] While a physician need not testify to the medical necessity of every item of care that is claimed, there must be some evidentiary link drawn between the physician's assessment of the plaintiff's condition and recommended treatment and the care recommended by a qualified health care professional.
- [142] The plaintiff seeks an award for kinesiology or physiotherapy sessions between 6 to 18 sessions per years. This is based on the recommendation of Dr. Waseem to taper off the plaintiff's reliance on manual therapies and instead focus on maintaining fitness and core strength in order to maximize long-term functionality and manage ongoing symptoms. It is submitted that the plaintiff will spend an average of \$1,000 per year for such treatments for the remainder of his life.
- [143] The present value of \$1,000 per years to age 65, 67, and 70 is \$22,527, \$23,667, and \$25,264, respectively. It is submitted that the plaintiff will live past the age of 70 years, all other things being equal, and argue that \$30,000 is a reasonable estimate of the present value of the plaintiff's lifetime future care costs.
- [144] The defendants submit that the plaintiff should not be awarded any amount for future care. They based this on Dr. Paquette's report dated January 22, 2018 in which he opines that the plaintiff does not need any more medical interventions and suggest that the plaintiff continue with his core strengthening exercises. They submit that this was not challenged by the plaintiff.
- [145] My view of the evidence is that Mr. Rahemtulla has a good understanding of the exercises he needs to do in order to maintaining his fitness and core strength. However, his condition requires him to continue with his exercise routines and this necessitates periodic visits to a trained professional for updates to his routine and newer exercises to fit his needs, particularly as he ages. His age will dictate what exercises are optimal for his circumstances. I note Dr. Waseem's evidence that the sessions do not have to be every four months and that they do not have to be conducted by a registered kinesiologist. My view is that one or two sessions twice a year will be appropriate. This translates to two to four sessions a year. A reasonable amount based on the general knowledge of the court for such things is \$75 per session. This equates then to an average of \$225 per year. I assess a fair award is \$5,700.

XI. Special Damages

- [146] The parties have agreed on the plaintiff is entitled to \$8,799.85 as special damages.

XII. Financial Investment Services

[147] The plaintiff seeks an award for the costs of financial services and investment counselling relating to an award for future losses. The plaintiff submits 5% of such an award would be appropriate.

[148] The rationale for making an award for this type of service was most recently expressed in *Pestano (Litigation guardian of) v. Wong*, 2019 BCCA 141 at para. 9 where the court reiterated that "the purpose of including fund and investment management fees in a future loss award is to ensure that the value of the award is maintained over time and thus to adhere to the principle of awarding the plaintiff full and fair compensation".

[149] It is noted however at para. 10 that an award for such services is "not automatic" and that "[en]titlement for an award for such fees is a question of fact to be resolved based on the evidence in every case": *Mandzuk v. I.C.B.C.*, [1988] 2 S.C.R. 650 at 651. The court notes that a plaintiff is to provide a factual basis including:

- (a) evidence that management assistance is in fact necessary;
- (b) evidence that investment advice is in fact necessary in the circumstances; and
- (c) evidence as to the cost of such services.

[150] The plaintiff in support of an award under this head argues:

- (a) the evidence, particularly the testing of Dr. Powers, reveals that the Plaintiff has no educational or vocational background in finance, banking or investment. He is an individual who, as Dr. Powers identified, was a low-average student academically, which is supported by the results of the testing which he had performed.
- (b) that it can be inferred from that evidence that the Plaintiff would require at least some initial investment counseling and periodic review in order to properly manage any award which may be made for future losses.
- (c) that the basis of present value calculations of future amounts assumes that such funds will earn a return on investment over time. In the Plaintiff's case, that he will require the services of a professional financial advisor in order to achieve that presumed rate of return.
- (d) The Plaintiff in *Hodgins* was awarded the sum of \$40,000 in respect of future loss awards totaling approximately \$440,000, or approximately 9% of the principal sum. That Plaintiff was 20 years younger than the Plaintiff in the present case.

[151] The defence submits that the plaintiff has not adduced evidence with respect to his financial abilities and thus he claim for an award here has not been made out. The defence cites the recent cases of Cyril v. George, 2018 BCSC 635 to support its position. In that case, the plaintiff testified that she had very little experience investing substantial funds but provided other evidence in that regard and the court refused to make an award for management fees due to lack of evidence.

[152] In this case, there was little evidence of necessity. While the report of Dr. Powers is relied upon to support an award given the low average academic rating achieved, this does not lead to a finding of the plaintiff being unable to manage his financial affairs capably. He falls in the average range. His ability at financial management or his approach to managing his finances was not canvassed at trial. Further, there was no evidence adduced as to the costs of the financial services that Mr. Rahemtulla may require. In many circumstances financial advice for conservative investments can be obtained without costs from established financial institutions. The 5% figure put forth is simply an arbitrary figure. My view is that an award has not been established.

XIII. Conclusion

[153] In viewing the totality of the damages I conclude in terms of overall fairness to the parties, I conclude that the plaintiff is entitled to the following:

(a)

General damages

\$115,000.00

(b)

Loss of past income

\$68,300.00

(c)

Loss of future earning capacity

\$280,000.00

(d)

Cost of future care

\$5,700.00

(e)

Special damages

\$8,799.85

(f)

Financial services

\$0.00

TOTAL:

\$486,800.85

[154] The plaintiff is awarded costs and disbursements at Scale B.

"The Honourable Mr. Justice Masuhara"

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/11/2019BCSC1105.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/rahemtulla-v-sutton-2019>

Prepared on 29 October 2026 · Esheria