

CANADA / JUDGMENT

Rainey v. Fane

2020 BCSC 1911

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1911 Rainey v. Fane

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rainey v. Fane,

2020 BCSC 1911

Date: 20201204

Docket: 39433

Registry: Kamloops

Between:

Sean Samuel Rainey

Plaintiff

And

Anthony Gordon Fane and

Benner's Refrigeration & Heating (1991) Ltd.

Defendants

Before: The Honourable Mr. Justice Dley

Reasons for Judgment

Appearing on his own behalf:

S.S. Rainey

Counsel for the Defendants:

D. Bilkey, Q.C.

Place and Date of Hearing:

Prince George, B.C.

October 19-22, 2020

Place and Date of Judgment:

Kamloops, B.C.

December 4, 2020

Introduction

- [1] Mr. Rainey sustained significant injuries as a result of a collision between his bicycle and the defendants' van. The defendants were found liable for the collision: 2019 BCSC 447.
- [2] Mr. Rainey refused to retain counsel for this trial. He refused to secure or present updated evidence for general damages, cost of future care, special expenses or income loss. He was prepared to accept \$20 million at the outset of this quantum hearing or \$40 million if his initial offer was not accepted.
- [3] For the reasons set out below, I award the following:
 - a) General damages: \$110,000;
 - b) Past loss of income: \$30,000;
 - c) Loss of future income: \$0;
 - d) Cost of future care: \$2,500; and
 - e) Special expenses: \$2,000.

Background Facts

- [4] On August 12, 2006, Mr. Rainey was riding his mountain bike down a residential lane when Mr. Fane backed out into his path. Mr. Rainey smashed through the rear window of the van and received significant injuries. The injuries were described in his Statement of Claim as follows:
 - a) laceration of the right side of the neck;
 - b) laceration to the anterior aspect of the right arm with damage to the radial nerve; and
 - c) blunt force trauma to the head and face.

- [5] Mr. Rainey had a number of pre-collision health issues. For example, in 2004, Mr. Rainey had enrolled in a heavy duty mechanic course, but was forced to withdraw because of significant pain in his knees.
- [6] Since 1991, Mr. Rainey had been receiving social assistance at various intervals. From 2000 onwards, Mr. Rainey has been regularly receiving social assistance.
- [7] Mr. Rainey was about to commence employment as a farmhand when this collision occurred. He had received an advance on his wages and took a short vacation. Before he could commence working, this accident occurred. He has not worked since.

Background to the Trial

- [8] Mr. Rainey was initially represented by counsel; however, as a result of differences between them, Mr. Rainey discharged counsel and conducted this case on his own.
- [9] The trial commenced February 15, 2017. Mr. Rainey's attending physician, Dr. Daskarev, testified as to Mr. Rainey's injuries (pre and post-accident) and the treatments that had been provided.
- [10] The trial was adjourned so that Mr. Rainey could retain counsel. He was unable to retain counsel and the liability trial proceeded in February 2019. After completion of the liability issues, the court implored Mr. Rainey to retain counsel for the quantum assessment. It was emphasized that the onus was on Mr. Rainey to prove his damages and it was up to him to present evidence in support of his claim.
- [11] Mr. Rainey repeatedly rejected and ignored suggestions and advice as to how he might prove his entitlement to damages. He has been verbally abusive, unnecessarily argumentative and dismissive.
- [12] Mr. Rainey was provided with a detailed outline as to the various heads of damage available in a personal injury action along with several cases as examples of quantum assessments. It was apparent that Mr. Rainey paid scant attention to the material provided.
- [13] Mr. Rainey was reminded constantly during Trial Management Conferences that the onus was on him to prove his case and that he needed to provide updated medical information and proof of income loss. When it became obvious that Mr. Rainey was not going to secure current medical evidence, the court authorized Mr. Bilkey to request a medical report from Dr. Daskarev. Dr. Daskarev did not respond to the request.
- [14] Mr. Rainey acknowledged that he had discussed an updated medical report with Dr. Daskarev. Mr. Rainey was asked if he had told Dr. Daskarev not to provide a medical report. Mr. Rainey said: "I've never come right out and said - hey don't do it. I might have said - I wouldn't do it if it were me "

- [15] I infer that Mr. Rainey deliberately interfered with the production of an updated medical report. The burden of proof rests with Mr. Rainey and, as a result of his obstinacy, damages shall be assessed based on the medical evidence that was presented in February 2017.
- [16] At most appearances--whether Trial Management Conferences or trial proceedings--Mr. Rainey has been critical of Mr. Bilkey and his firm, accusing them of lying, slander and enjoying a "perverse pleasure" out of their alleged misconduct. Mr. Rainey has maintained that their conduct amounts to criminal conduct and requires a police investigation.
- [17] Counsel are officers of the court and have a duty to act professionally. There is no such duty for a self-represented litigant such as Mr. Rainey. He does not face the sanctions that a member of the Law Society is subject to where conduct has been unbecoming. However, that does not give a litigant free rein to hurl the kinds of insults and baseless accusations that have occurred in this case.
- [18] Mr. Bilkey has been exemplary and fair in his conduct of this action. He has not responded to Mr. Rainey's attacks. Instead, he has shown enormous patience, courtesy and restraint.
- [19] Mr. Rainey was given much leeway during this assessment phase of the trial. He refused to take the witness box, indicating that he had not made up his mind as to whether he wished to testify.
- [20] Mr. Rainey's recalcitrance and unruly behaviour does not prevent the court from assessing damages. More evidence would have been preferable, but there comes a point in any trial when the matter must come to a conclusion based on the state of the evidence as presented.
- [21] Mr. Rainey's conduct can be addressed when dealing with the matter of costs.
- [22] An inordinate amount of time has lapsed between the time of the accident and the trial; the defence is not the cause of the delay.

Mr. Rainey's Background

- [23] Mr. Rainey is 54 years old; he was 39 at the time of the collision.
- [24] Mr. Rainey was born in Ontario and moved to Prince Albert, Saskatchewan at the age of 11 to live with his father. He worked at various jobs, including for CN Rail, where he injured his back in about 1987. He worked as a roughneck on the oil rigs for the following two years and then worked as a waiter and bartender at a bar in Lloydminster. He came to British Columbia in the early 1990s, working in the Lower Mainland at an appliance store and installing alarm systems. Mr. Rainey then worked as a roofer, logger and motel maintenance person in Hope for another two years, beginning in late 1992.
- [25] In the mid-1990s, he moved to Williams Lake and began selling drugs. He spent about two years in jail for drug-related charges and assault. After he was released from jail, he moved to Prince George.

- [26] From 1991 until his incarceration, Mr. Rainey periodically received social assistance. Since 2000, social assistance has been Mr. Rainey's source of income.
- [27] Mr. Rainey was only able to produce income tax returns for the years 1999-2002; his only reported income during the period was from social assistance. Mr. Rainey does not file income tax returns.
- [28] Mr. Rainey's employment history reveals that when he was employed, he would only last a year or two at any one job.

Mr. Rainey's Pre-Collision Medical Condition

- [29] Mr. Rainey suffered from a number of medical conditions prior to the collision, including the following:
- a) chronic back pain since 1987;
 - b) injuries to both of his legs, including a crush injury to his right leg from a logging accident, a fractured left leg requiring surgery and surgery to his right knee in 2005;
 - c) dysphagia (swallowing problems), which he was diagnosed with in 2005; and
 - d) a long-standing history of anxiety and depression.
- [30] In particular, Mr. Rainey's knee pain was so severe that he was forced to withdraw from a heavy-duty mechanic's program in 2004. In the months (June 2006) leading up to the accident, Mr. Rainey continued to complain to Dr. Daskarev of pain in his knees.
- [31] On June 26, 2006, a month and a half prior to the accident, Dr. Daskarev completed Mr. Rainey's application for social assistance benefits for persons with multiple disabilities. Dr. Daskarev noted that Mr. Rainey had chronic pain in both knees and long-term depression and that the impairment was likely to continue for more than two years ("to continue for long time"). Dr. Daskarev indicated that Mr. Rainey's ability to complete everyday tasks was significantly limited; unaided, he was only able to walk one to two blocks, climb two to five steps, lift up to two kilograms, and sit for less than an hour. Dr. Daskarev also noted that Mr. Rainey had significant deficits with emotional disturbance and motivation.

Mr. Rainey's Injuries from the Accident

- [32] After the collision, Mr. Rainey was taken to the hospital where his injuries were noted in the Admission History:
- a) blunt trauma to the forehead with a 4 cm skin laceration in the right supraorbital area;
 - b) blunt soft tissue injury to mainly the right side of the face;
 - c) superficial abrasions to the chest;
 - d) a large laceration approximately 10 cm in length at the level of the right neck; and

- e) a large, deep laceration of the right forearm with a disruption of the right radial nerve.
- [33] Dr. Dreyer, an orthopaedic surgeon, summarized Mr. Rainey's injuries as "significant lacerations on the right eyebrow, right arm and right neck area".
- [34] Mr. Rainey was hospitalized for four days. The most serious injury to his right arm was the severance of the radial nerve. Dr. Dreyer performed surgery to repair the cut to the radial nerve. On August 23, 2006, Dr. Dreyer noted the following:

This 39-year-old gentleman was seen in follow-up in the cast clinic today, 23 August 2006. He was involved in a bike accident 10 days ago and needed debridement of a wound on the right upper arm and repair of his radial nerve. He also had a laceration on the neck, which was sutured. All his wounds have healed up well and his staples were removed. There are no signs of infection. He still has the wrist drop in keeping with his radial nerve palsy and has been referred to physiotherapy and occupational therapy for splinting and maintaining range of motion

- [35] Mr. Rainey maintains that the lingering physical injuries from the accident are a loss of vision in his right eye together with a drooping eyelid, difficulties eating as a result of his throat laceration and weakness and spasm in his right arm resulting from the severed radial nerve.

Right Eye

- [36] Mr. Rainey says that the vision in his right eye has been compromised as a result of the collision. He says that his eyelid droops and causes him to feel self-conscious about his appearance.
- [37] I accept that his right eye droops; it was apparent from having seen him over the course of the trial. This is referred to as Horner's Syndrome by various physicians. Mr. Rainey's appearance is affected to some degree, but it is not a significant cosmetic defect. Nonetheless, it is an injury for which he must be compensated.
- [38] However, there is insufficient evidence connecting Mr. Rainey's eyesight complaints to the accident. The onus is on Mr. Rainey to prove a casual connection. There is no compelling medical evidence that discharges the burden of proof. Most notably, there is no mention by Dr. Daskarev regarding visual impairment in the "Specific Diagnosis" section of the application for disability completed in March 2011. There are no medical opinions that refer to vision disturbance being caused by the collision. I conclude that Mr. Rainey has failed to prove that any visual impairment is connected to the collision.

Laceration to Neck and Difficulties Swallowing

- [39] Mr. Rainey says that the laceration to his neck has resulted in the worst of his ongoing symptoms. He says that he lives in constant fear of choking and is unable to eat solid food the way he was accustomed to. He is forced to cut food into small bites or he resorts to a diet that requires less chewing. He describes his esophagus being shaped like an hourglass with the narrow portion causing difficulties swallowing. He also described his choking to occur as if food was caught in the staples that are still in his throat.
- [40] There is no question that Mr. Rainey sustained a significant cut to his throat. There is residual scarring, but that is not the substance of Mr. Rainey's complaint. Rather, his complaint is with respect to swallowing food.
- [41] Mr. Rainey complained of swallowing before the collision. As noted, he was diagnosed with dysphagia in 2005.
- [42] Dr. Mullins, a gastroenterologist, examined Mr. Rainey and provided a consultation report to Dr. Daskarev on June 3, 2015. Mr. Rainey had indicated that since the neck surgery after the collision, he had symptoms that worsened four months prior. Dr. Mullins noted the following clinical problems:
- a) reflux with dysphagia for investigation;
 - b) cough, episodes of choking;
 - c) heightened sensitivity; and
 - d) previous motor vehicle accident with surgery to the neck.
- [43] Dr. Mullins provided the following opinion:
- He has reflux with intermittent dysphagia that may be related to reflux, could indeed be related to stricture formation, but may indeed be related to reflux -induced spasm. He also has respiratory symptoms which may be a manifestation of airways disease plus also impairment of protection of airway, and I am not sure whether his previous injury has resulted in some degree of impairment of vocal cord function. I will leave it to your discretion to ask a respiratory ENT opinion about those aspects.
- [44] It is not apparent from Dr. Mullins' opinion whether the collision contributed to Mr. Rainey's difficulties with swallowing. The onus is on Mr. Rainey to prove a causal connection between his symptoms and the collision. I cannot conclude on the evidence that there is a causal connection. Mr. Rainey is entitled to be compensated for the laceration to his neck, scarring and symptoms during his recovery, but not for problems that he has with swallowing.

Right Arm and Radial Nerve

- [45] There is no question that the ongoing symptoms and permanent disability associated with the right arm are caused by the collision. Mr. Rainey has taken physiotherapy and done his own exercises in an attempt to regain some strength and function to his arm and hand.
- [46] Dr. Loomer examined Mr. Rainey on May 24, 2011 at the behest of the defence. He described Mr. Rainey's orthopaedic injuries as follows:

His orthopedic injury consisted of a soft tissue injuries of the triceps and biceps muscles on the right side which have been repaired and seem to be working quite adequately. The principal problem was a complete severance of the radial nerve on the right which has been repaired and has only recovered very partially. He has weakness of extension of the wrist and extension of the fingers and radial deviation of the wrist. He has full pronation and supination and he seems to have good strength in pronation and supination. Since he is right-handed these are quite disabling injuries for him.

- [47] Dr. Loomer noted that Mr. Rainey had achieved only a partial recovery of his radial nerve and had recovered as much function as he ever would. That left Mr. Rainey with a dominant right hand useful for only "very light tasks".
- [48] I am satisfied that Mr. Rainey has been diligent with his efforts at rehabilitating his right arm and hand injuries and is entitled to full compensation.

Psychological Impact

- [49] Mr. Rainey says that he has lost friends and his behaviour has changed since the collision. He has proffered no expert opinion linking the collision to the change in his behaviour.
- [50] Mr. Rainey suffered from anxiety and depression before the collision. There is insufficient evidence to confirm that these conditions have been affected by the collision.
- [51] Mr. Rainey says that he can no longer ride his bike because of his aversion to handle bars. That is understandable in the context of how this collision occurred.
- [52] Mr. Rainey also says that he can no longer ride in the back of a car. Without expert evidence linking the collision to this phobia, I cannot conclude that there is a causal connection.
- [53] Mr. Rainey has been advised by Dr. Daskarev to seek treatment for his psychological issues, but Mr. Rainey has refused to do so. The result is that even if I was able to find a causal link of the car phobia, anxiety and depression to the collision, there would be a significant deduction for failure to mitigate.
- [54] In spite of a paucity of evidence, I am satisfied that Mr. Rainey has suffered some long-term psychological damage from the collision that he must be compensated for.

Non-Pecuniary Damages

- [55] I conclude that Mr. Rainey suffered the following injuries in the collision for which he must be compensated:
- a) a laceration to his right arm and severance of the radial nerve leaving a permanent disability;
 - b) a laceration above his right eye which has left a permanent drooping of the eye lid with some disfigurement;
 - c) blunt trauma to the right side of his face;
 - d) long-term psychological effects; and
 - e) a significant laceration to the right side of his neck.
- [56] Mr. Rainey's most significant injury is the severance of his radial nerve in his right arm. As Dr. Loomer pointed out, this injury is "quite disabling". I accept this is a chronic condition that will limit Mr. Rainey's day-to-day functioning and has had an adverse effect on his ability to work.
- [57] Mr. Rainey's drooping eye shows no prospect of recovery and must be considered to be permanent.
- [58] Although Mr. Rainey did not make much mention of the scarring from his lacerations, they are noticeable and a permanent feature of his appearance.
- [59] Mr. Rainey has an aversion to riding his bicycle since the collision. Given the severity of the collision and the seriousness of the injuries, I accept that Mr. Rainey has sustained a psychological injury. He must receive some compensation for it, but given his refusal to seek psychological treatment, the award is not significant.
- [60] Mr. Rainey sees Dr. Daskarev every week. Mr. Rainey was reticent to divulge what they spoke about. However, Mr. Rainey confirmed that he received a weekly injection of V-12 to provide him with vitamins because he cannot afford them himself and because of his dietary issues related to his swallowing difficulties.
- [61] I have been referred to a number of cases, all of which are helpful in establishing a range of damages that have been awarded in other cases. No two cases are identical; the award must take Mr. Rainey's personal circumstances into account.
- [62] The purpose of non-pecuniary damages and the factors to consider in an assessment were set out in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45--46:
- [45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

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.).

[Emphasis added.]

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

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

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

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

[63] From the many cases referred to by the defence, I find the following to be particularly relevant (present values have been rounded off):

- a) *Turcotte v. Wells*, [1997] B.C.J. No. 498 (S.C.): 23-year-old man with brachial plexus injury and permanent loss of function in his hand and arm. He had a burst fracture of L1 vertebrae. He had to curtail active sports and was likely to require back surgery for the chronic pain. Mackenzie J. awarded \$125,000 for general damages or \$190,000 in present value.

- b) *Power v. White*, 2010 BCSC 1084: 54-year-old man with a torn pectoral muscle that left a permanent loss of function to his dominant arm and a cosmetic deformity. His very active lifestyle had been significantly affected. He had become short tempered and easily frustrated. Verhoeven J. awarded \$135,000 for general damages or \$158,000 in present value.
 - c) *Westbroek v. Brizuela*, 2012 BCSC 1955: 37-year-old man suffered injuries to neck, back, shoulder and arm. He had reoccurring headaches and neck pain, together with loss of strength and function in his hand and forearm. His mood changes affected his marriage. His active outdoor recreational activities had become virtually non-existent. Grist J. awarded \$90,000 for general damages or \$105,000 in present value.
- [64] The defence argues that because of Mr. Rainey's pre-existing conditions and his failures to mitigate by not taking recommended treatment, his award should be reduced. The defence says that "before taking into account the issues of Mr. Rainey's original condition, mitigation and causation of psychological condition", the range of damages might be in the range of \$125,000-\$175,000. I agree with that assessment.
- [65] Mr. Rainey is entitled to be compensated for damages, but only those arising out of the defendants' tortious conduct. He must prove that the defendants caused or contributed to his injuries. The causation test, as set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-14, requires the plaintiff to prove that the injuries for which he seeks damages would not have occurred "but for" the defendants' wrongful acts.
- [66] Mr. Rainey was limited to some extent by his pre-existing conditions. His knees were a chronic source of pain. He was compelled to withdraw from his mechanics' course two years before the collision because of his knees. He wore braces when riding his bike. Mr. Rainey's knees were not just a minor irritant.
- [67] Mr. Rainey suffered from anxiety and depression before the collision. I cannot conclude that the collision was the probable cause of any additional mental health injuries beyond his aversion to riding his bicycle.
- [68] The cases referred to by the defence are helpful, but some are distinguishable on their facts. In *Turcotte*, the plaintiff's injuries were more severe, particularly with respect to the chronic back condition. In *Power*, the plaintiff's injuries had a greater impact on his lifestyle and emotional wellbeing.
- [69] *Westbroek*, on the other hand, is an attractive comparison. Although the plaintiff had recurring headaches and neck pain, the nerve damage caused a similar disability to that sustained by Mr. Rainey. However, the plaintiff in *Westbroek* did not have a drooping eyelid or lacerations to various parts of his body as Mr. Rainey has had.
- [70] The defence says that taking into account the injuries that are causatively linked to the collision, the proper range of damages should be in the range of \$80,000-\$120,000. I agree that such a range is a fair assessment.

- [71] The question, then, is how to assess the damages in Mr. Rainey's particular circumstances.
- [72] Mr. Rainey's injuries have "piled on" to his pre-existing conditions. A person without the limitations that Mr. Rainey had would likely adapt better to the changed circumstances imposed by the new injuries. As such, Mr. Rainey must be compensated in a manner that recognizes the loss as unique to him. To that end, I have taken into account the disability application made two months prior to the collision in my assessment of non-pecuniary damages.
- [73] I have included an amount for loss of housekeeping services in my award of general damages. There is no question that Mr. Rainey's right arm limits what he can do around his home. It is a disability, but not significant enough to warrant a separate award.
- [74] The collision occurred in 2006. Mr. Rainey suffered a deep laceration to his throat. It has healed uneventfully, but has left a scar. Mr. Rainey sustained lacerations over his right eye which have left him with a drooping eyelid and a disfigurement which, while not significant, is noticeable. He also suffered significant lacerations to his dominant right arm and a severance of the radial nerve. The radial nerve injury has left him with a permanent weakness, constant discomfort and ongoing spasms. In addition, Mr. Rainey has sustained emotional trauma and is no longer able to ride his bicycle.
- [75] I have considered all of the factors outlined in Stapley and conclude that a fair award for pain and suffering and loss of amenities of life is \$110,000.

Past Loss of Income

- [76] Mr. Rainey's history of employment is sporadic; the longest he remained in any particular job was one to two years at most. It is not surprising that Mr. Rainey's jobs were of limited duration.
- [77] It is apparent that Mr. Rainey's personality was, and is, a factor in his ability to either secure employment or sustain it. Mr. Rainey takes great delight and pride in challenging authority. For example, he has turned down employment because he was required to cut his hair. He says that if an employer gives him "attitude", he gives it right back.
- [78] Mr. Rainey claims that he was going to earn the equivalent of \$50,000 per year as a farmhand working a 200-acre haying operation for Ms. LePage. He says that Ms. LePage agreed to pay him \$2,400 per month during the summer months and \$2,000 per month during the winter. Ms. LePage was also to keep him supplied with cigarettes (\$600 per month), food and transportation. Mr. Rainey says that if he needed assistance, Ms. LePage agreed to provide help for him. All of his payments were to be in cash and there was no written documentation. He says that he had a special relationship with Ms. LePage.

- [79] Mr. Rainey received a \$200 advance and, even though he had not worked since at least 1999, he left for a vacation. He says that he was going to start work the day after the collision occurred.
- [80] Mr. Rainey lost touch with Ms. LePage a year or two after the collision. He had been renting a room from Ms. LePage, but was evicted by her boyfriend in December 2007. Ms. Rainey says that Ms. LePage's boyfriend had taken control over her and had spent all of her money, including the \$10,000 that Mr. Rainey says he left with Ms. LePage for safekeeping.
- [81] Even if the collision had not occurred, it is apparent that Mr. Rainey's special relationship with Ms. LePage was going to come to an end when her boyfriend took control of her finances and evicted Mr. Rainey. Mr. Rainey did not have a favourable relationship with Ms. LePage's boyfriend and it is unlikely his employment would have continued.
- [82] Mr. Rainey must prove on a balance of probabilities that the defendants' wrongful conduct impaired his ability to earn income. Once he satisfies that threshold, Mr. Rainey is required to show a real and substantial possibility that his impaired or diminished earning capacity has resulted in a pecuniary loss: *Caffrey v. Davies*, 2020 BCSC 792 at paras. 119-121.
- [83] There is no question that the injuries sustained by Mr. Rainey impaired his ability to earn income. I accept Mr. Rainey's evidence that he was going to start working as a farmhand for Ms. LePage, but his injuries prevented him from doing so.
- [84] The goal of assessing Mr. Rainey's loss of past income is to put him in the position he would have been in, had the collision and resulting injuries not occurred.
- [85] In spite of the challenges that Mr. Rainey faced with his other ailments, I conclude that he was intent on and determined to work for Ms. LePage. The work would have been demanding, but he would at least have started the job. The questions are :
- a) What would his earnings have been; and
 - b) How long would he have worked at the farm?
- [86] In these circumstances, it is not surprising that there was no written employment agreement. It would be an unrealistic expectation to assume that Mr. Rainey and Ms. LePage would have taken the time and care to draw up a contract setting out their respective obligations. This was a venture that was just getting started. It is reasonable to infer that both parties were hoping to generate revenue through hay sales, albeit with no assurance of success.
- [87] Without additional evidence it is difficult to determine the nature of the arrangement between Ms. LePage and Mr. Rainey. I accept that he was to be paid for his work. He was going to live rent-free at the farm and receive some remuneration. However, the details of the remuneration are not clear.

- [88] Mr. Rainey says that he was to receive a summer salary and a winter salary, together with cigarettes, food and transportation. I accept that Mr. Rainey was to receive a salary. I do not accept that he was going to be provided with cigarettes and food as well. The arrangement that Mr. Rainey urges me to accept, including potential bonuses, would provide him with the kind of income and benefits that sounds too good to be true. If it sounds too good to be true, it probably is. There is simply no reliable evidence to support an assertion that such benefits would be provided in addition to his salary.
- [89] Moreover, I do not find that there is a real and substantial possibility that this employment would have been long-term. Mr. Rainey's sporadic work history shows that he is unable to sustain any job for more than a year or two. It is also apparent that Ms. Lepage was losing control of her finances by December 2007. Mr. Rainey recalled that within one to two years of the collision, Ms. Lepage had gone "downhill" and he had lost touch with her. Ms. Lepage's boyfriend had taken control and his relationship with Mr. Rainey was fractured in December 2007. I, therefore, conclude that Mr. Rainey's employment with Ms. Lepage would have ended in December 2007.
- [90] Mr. Rainey's pre-existing conditions, particularly with his knee problems, were going to make farm work challenging. That is the opinion expressed by Mr. Lee, a vocational rehabilitation consultant. Although I do not find the opinion to be particularly helpful because of the somewhat superficial assessment, I nonetheless accept the concern regarding Mr. Rainey's ability to do heavy work.
- [91] Mr. Rainey stated that he has passed up employment because he did not want that used against him in this litigation. He has remained on social assistance since the collision.
- [92] An assessment of damages must be done with the evidence as it has been presented. Speculation or guesswork is not part of the assessment.
- [93] I conclude that Mr. Rainey's employment opportunities were limited to those presented by Ms. LePage. They had a special relationship which sheltered Mr. Rainey from the ordinary requirements of other employers. When Mr. Rainey gave Ms. LePage's boyfriend "attitude", his relationship with Ms. LePage came to an end. I also conclude that Mr. Rainey was incapable of sustaining the kinds of heavy work he was trained to do because of pre-existing conditions. Accordingly, I award Mr. Rainey \$30,000, net of taxes, for past loss of earnings.

Future Loss of Income

- [94] I am not satisfied that Mr. Rainey has shown that there is a future loss of income.
- [95] Mr. Rainey worked sporadically and received social assistance periodically from 1991 until around 1999. Since at least 1999, his sole source of income has been social assistance.
- [96] The injuries sustained in the collision, particularly the severed radial nerve, have left Mr. Rainey with a disability that, on its own, would impair his ability to work. However, Mr. Rainey considered himself to be disabled before the collision, as evidenced by the disability

application he completed with Dr. Daskarev. His pre-collision condition prevented him from securing employment, with the sole exception of his special arrangement with Ms. LePage. That relationship with Ms. LePage has long since ended and there is no indication of any employment opportunity that he is reasonably suited for, even without the collision-related injuries.

- [97] In any event, Mr. Rainey has chosen to take himself out of the work force. He cannot vacate the income-earning marketplace and expect to be compensated.
- [98] I conclude that Mr. Rainey's collision injuries do not impair his capacity to earn future income. His capacity for future income was already impaired by his non-collision conditions.

Cost of Future Care

- [99] Mr. Rainey was assessed by Ms. Ponder, an occupational therapist, in May 2011 at the request of the defence. Mr. Rainey objects to her report because the testing was conducted by others. He says that she had "attitude" towards him and she was not a professional. He argues that her report is biased against him.
- [100] I accept Ms. Ponder's report for the assistance it provides Mr. Rainey. Without the report, Mr. Rainey would have no evidence of the cost of future care.
- [101] Ms. Ponder has set out a number of costs that Mr. Rainey could incur. However, Mr. Rainey has made it clear that he does not intend to incur most of those costs, such as therapies, counselling and consultants. As a result, he is not entitled to an award for costs that will not be incurred.
- [102] Mr. Rainey does not require assistance for homemaking or maintenance. As such, I do not award costs for those.
- [103] Mr. Rainey does, however, require equipment for self-care and homemaking. Defence counsel has suggested an award for those items totalling \$1,895 is reasonable, based upon Mr. Rainey's life expectancy of 70 years. While this argument is not unreasonable, I prefer to assess the cost of future care by rounding the sum off to \$2,500.

Special Expenses

- [104] Mr. Rainey has provided no proof of any out-of-pocket expenses. To make an award without any evidence would simply be guesswork, which would not be appropriate.
- [105] Mr. Rainey does not have a driver's license. His primary mode of transport before the collision was his bicycle; however, he is now unable to ride his bicycle as a result of the collision. Therefore, it is reasonable to conclude that Mr. Rainey has paid for other modes of transport such as bus travel and cabs.

[106] Mr. Rainey takes the bus, and occasionally a cab, to see his doctor. Those are an out-of-pocket expense that should be compensated.

[107] Mr. Rainey's weekly visits to his doctor since the collision have largely concerned mental health or other matters that are not related to the collision. Nonetheless, he needs to be compensated because the expenses of those visits arose only because of his inability to ride his bicycle.

[108] Mr. Rainey estimates the cost of a monthly bus pass to be \$60 and his monthly cab expenses to be about \$50. Doing the best that I can with the limited evidence, I award \$2,000 for special expenses. This amount is designed to cover the costs of bus and cab travel.

Pre-judgment Interest

[109] The parties are at liberty to speak to the matter of pre-judgment interest which applies to special expenses and past income loss.

Costs

[110] The parties may speak to the issue of costs. Either party is at liberty to schedule the costs hearing within 60 days of this decision.

Summary

[111] Mr. Rainey is awarded the following damages:

- a) General damages: \$110,000;
- b) Past income loss: \$30,000;
- c) Future income loss: \$0;
- d) Cost of future care: \$2,500; and
- e) Special expenses: \$ 2,000.

[112] Any applications relating to this decision must be scheduled within 60 days.

"S.D. Dley J."

DLEY J.

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