

CANADA / JUDGMENT

Reid v. Robinson

2020 BCSC 574

COURT

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2020 BCSC 574 Reid v. Robinson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Reid v. Robinson,

2020 BCSC 574

Date: 20200415

Docket: M193281

Registry: New Westminster

Between:

Kevin Kenneth Reid

Plaintiff

And

Ryan Robinson

Defendant

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

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Place and Date of Trial/Hearing:

New Westminster, B.C.

February 24-28 and

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Introduction

- [1] In this action the plaintiff Kevin Reid claims for damages arising from a multi-vehicle motor vehicle accident that occurred on the Fraser Highway in Abbotsford on March 24, 2016 (the "Accident"). In the Accident, the defendant Ryan Robinson's vehicle rear-ended a vehicle which was then pushed forward into Mr. Reid's vehicle. Mr. Robinson has admitted liability for the Accident.
- [2] Mr. Reid claims that as a result of the Accident he sustained a lower back injury, including an L4-5 disc hernia which progressed into radiating pain symptoms in his buttock and leg and a right knee injury which resulted in post-traumatic arthritis. He seeks damages for pain and suffering, loss of past and future income earning capacity, cost of future care and special damages. Mr. Reid seeks an award of damages of \$950,000, which includes a claim of \$625,000 for loss of future income earning capacity arising from an alleged inability to continue working as a personal trainer.
- [3] The defendant concedes that Mr. Reid sustained a minor soft tissue injury to his back in the Accident but denies that the Accident caused an L4-5 disc hernia and the related symptoms in Mr. Reid's buttock and leg. The defendant also concedes that Mr. Reid's right knee was injured in the Accident but contends that this injury only accelerated a pre-existing degenerative condition which would have eventually impacted Mr. Reid's knee function, likely requiring a total knee replacement, even if the Accident had not occurred. The defendant denies that Mr. Reid is entitled to the quantum of damages claimed.

Background

- [4] Mr. Reid was 48 years old at the time of the Accident. He is currently 52. He has three children including a 23-year-old son and two daughters who are 22 and 16. He was married for approximately 25 years until he separated from his wife in 2015. After they separated the couple's matrimonial home was sold and Mr. Reid moved to a rented home in Surrey where he currently lives with his son.

- [5] Despite his current symptoms, Mr. Reid is a fit, strong man. He started working as a personal trainer approximately 13 years before the Accident, at first training clients in the gym located in his previous matrimonial home and now in the gym in his rented home in Surrey. Most of his clients were older couples. Although he continued to train some clients after the Accident he stopped training all but two of his clients in the summer of 2018.
- [6] Mr. Reid has a history of back and knee injuries. He sustained a workplace back injury in 2001 while helping move a photocopier on a flight of stairs, which resulted in surgery in 2003 to repair a herniated disc. In or about 2006 his right knee was injured after he was struck by a vehicle in the lot of the car dealership where he worked. He suffers from degenerative arthritis in both of his knees and underwent two right knee surgeries prior to the Accident.

Issues

- [7] The issues to be determined in this case are as follows:
- Which of Mr. Reid's injuries and related physical symptoms were caused by the Accident?
 - What damages is Mr. Reid entitled to as a result of the injuries he sustained in the Accident and the related physical symptoms?

Causation

- [8] A plaintiff must establish on a balance of probabilities that a defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [9] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [10] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin, C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

- [11] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey* at paras. 32-35.
- [12] The extent to which Mr. Reid was suffering from similar symptoms prior to the Accident is relevant to the issue of whether the Accident caused the alleged injuries.

Mr. Reid's Testimony - Direct Examination

- [13] During his direct examination Mr. Reid testified that prior to the Accident he was not suffering from any residual symptoms arising from his 2001 back injury, other than some right calf wasting, and was not suffering from knee pain resulting from arthritis.
- [14] He testified that during the Accident his right knee hit the dash and that he experienced both knee and back pain immediately afterwards. He said that in the week following the Accident his knee was swollen and painful and that his back was sore. He testified that after the Accident he stopped working out for ten days and that his first workout went badly, resulting in pain across his lower back when he performed a shoulder press.
- [15] Mr. Reid testified that into the remainder of 2016 his knee went from being swollen and painful to "locking". He said that in the months following the Accident his back began to feel better because he had reduced his level of physical activity. He received 25 physiotherapy sessions to treat his back and knee symptoms over a three-month period in 2016. He did not have any back-specific treatments in 2017.
- [16] Mr. Reid testified that in October 2016, during a car trip to Vernon with his then girlfriend, he started to experience pain and numbness in his hip and buttock and down his right leg which caused him to get out of the car and stretch.
- [17] Mr. Reid testified that in 2017 he continued to experience significant knee pain. He had orthoscopic surgery to his knee which helped with locking but he continued to have right knee pain and swelling almost daily. He said that his buttock and right leg pain symptoms continued to increase in severity throughout 2017 and that he continued to suffer from low back pain and stiffness even though he had reduced his workouts.
- [18] Mr. Reid testified that by 2018 he was experiencing right leg pain daily, which he described as radiating through his hip, knee and foot and just above his ankle. He said that after returning from a trip to San Diego that year that he had to attend at the hospital as a result of symptoms of severe pain.

- [19] Mr. Reid testified that his right leg pain has improved since he received lumbar surgery in 2019 and that he now only experiences leg pain when he is "out of midline". He said that his back and knee continue to bother him and that in particular, his knee pain impacts his ability to sleep. He said he takes long baths in the morning to help alleviate his pain symptoms.

Mr. Reid's Testimony - Cross Examination

- [20] During cross-examination Mr. Reid admitted that prior to the Accident he had residual symptoms resulting from his 2001 back injury including permanent numbness along his right leg calf and foot and right calf weakness. He also admitted that he had had back pain once and a while. He agreed that prior to the Accident he had difficulty participating in activities which involved a "toe-off" and was unable to hike, mountain climb, run, or walk on inclines.
- [21] Mr. Reid agreed that after the Accident his back was a little stiff and not painful and that he did not think much of it at that time. He agreed that his neck and shoulder stiffness resolved shortly after the Accident. He confirmed that knee pain was his principle complaint.
- [22] Mr. Reid confirmed that he purchased a Harley Davidson motorcycle a few months after the Accident, in August 2016, and rode it regularly until the summer of 2018 when he began to ride less.
- [23] He agreed that he did not complain about back pain to his family doctor, Dr. McKnight, until December 2017 and was only referred to specialists in June 2018. He agreed that he had very slight knee pain and that for at least one year following the Accident his knee bothered him much more than his lower back.

Lay Witness Evidence

- [24] Mr. Reid called evidence from his girlfriend at the time of the Accident. Her evidence was that Mr. Reid came to her home after the Accident and complained of both knee and back pain.
- [25] Mr. Reid also called evidence from a new girlfriend he dated between August 2016 and the summer of 2019. She testified that during a road trip to Vernon in October 2016, during which she drove, that she had to pull over to allow Mr. Reid to stretch and take breaks. She testified that during the drive Mr. Reid reclined back in his seat and rolled onto one side and that while they were in Vernon Mr. Reid appeared to have difficulty sitting. She also testified that Mr. Reid displayed similar symptoms during a later trip to Vernon in May 2017 and had difficulty sitting on long flights, including during flights to New York in July 2017 and July 2018. She said that after returning from a trip to San Diego in 2018 that Mr. Reid appeared to be experiencing excruciating pain and was lying in a fetal position on the floor before he was taken to hospital.

- [26] Two of Mr. Reid's personal training clients testified at trial. One client testified that after the Accident Mr. Reid stopped demonstrating leg exercises and that he no longer set up weights as he had previously done. Another client testified that it appeared that Mr. Reid's movements were guarded in relation to his knee after the Accident.

The Medical Evidence

The Pre-Accident Records

- [27] A radiological report of Dr. Janzen was prepared following an examination of Mr. Reid on July 28, 2003, listed a moderate sized, diffuse disc bulge at the L4-5 vertebra.
- [28] Mr. Reid received WCB Benefits and a disability settlement as a result of the back injury he sustained in 2001 when helping move a photocopier. The WCB Permanent Functional Impairment Evaluation report prepared following an examination of Mr. Reid on July 29, 2005 recorded that Mr. Reid advised as follows:

He has a constant numbness down the back of the right thigh and over the lateral aspect of the right foot, extending to the undersurface. He can walk for about 20 minutes before he needs to rest but finds that walking for longer than this causes an increased dull ache in his lower back He can sit for about two hours maximum and can stand for up to one hour

He has quit playing soccer, hiking and biking ...

The Post-Accident Records

- [29] During his cross-examination Mr. Reid was referred to a number of clinical records of his family physician, Dr. McKnight and other relevant records. I refer below to some of the notes within these records, the accuracy of which was not disputed by Mr. Reid.
- [30] Mr. Reid attended at a walk-in medical clinic on April 5, 2016 and saw Dr. O'Brien. Dr. O'Brien's clinical note records that Mr. Reid reported that after the Accident he was experiencing "no real symptoms" but felt some knee pain when his knee hit the dash. Dr. O'Brien noted right knee tenderness and a lower back spasm. Dr. O'Brien also noted that on April 5, 2016 Mr. Reid experienced acute lower back pain after doing a shoulder press.
- [31] During subsequent visits with Dr. McKnight in April 2016 Mr. Reid reported that his right knee was troubling him more than his back. He also reported that he was taking it easier in his workouts and attending at physio, which was helping and that his muscle spasms had stopped. In June 2016 Dr. McKnight noted that Mr. Reid's right knee was swelling and locking and although Mr. Reid had two earlier knee surgeries, that he had not experienced knee problems before the Accident.

- [32] Subsequent clinical notes taken during Mr. Reid's visits from July 2016 and prior to December 2017 refer primarily to knee issues. The clinical note of Dr. Mitchell made in December 2017 records that Mr. Reid's right knee was improving at that time and that he was experiencing muscular back pain with sciatica. Dr. Mitchell also recorded that Mr. Reid had a long history of chronic back pain resulting from a previous MVA and a workplace injury and that pain was now radiating down his right leg.
- [33] In her CL19 Report to ICBC after an examination of Mr. Reid on November 22, 2016, Dr. McKnight recorded only a knee injury under the heading "LIST ALL CLINICAL MVA RELATED DIAGNOSIS(ES) AND ". In a follow up CL19, after an examination on May 29, 2018 Dr. McKnight recorded both a knee and lower back injury.
- [34] The consultation report of Dr. Yao, an orthopaedic surgeon, dated January 26, 2017, indicates that Mr. Reid reported that "his low back pain resolved three to four weeks" after the Accident.
- [35] In a consultation report to Dr. McKnight dated August 1, 2018 Dr. Maloon, an orthopaedic surgeon, noted that Mr. Reid told her that his right sided low back pain began "almost eight months ago" - that is, December 2017.
- [36] Mr. Reid received surgery to repair his L4-5 disc hernia on January 3, 2019. In her consultation report to Dr. McKnight dated March 1, 2019 the surgeon, Dr. Nadeau, reported that Mr. Reid advised that "he has had great improvement of his leg pain since the surgery, almost no residual symptoms, aside from baseline right calf weakness from previous surgery [which was completed in 2003] at L5-S1".

The Expert Reports - Back Injury

- [37] The only expert qualified to provide an opinion concerning the cause of both Mr. Reid's lower back and radiating nerve pain issues in his buttock and right leg was Dr. Sahjpaul. Dr. Sahjpaul was qualified as an expert neurosurgeon and allowed to provide opinion evidence on spinal and musculoskeletal injuries.
- [38] In his written report Dr. Sahjpaul provided his opinion that the probable cause of Mr. Reid's short term lower back pain was soft tissue injuries sustained in the Accident. This opinion is shared by Dr. Koo, a physiatrist with expertise in the diagnosis of musculoskeletal, soft tissue injuries and chronic pain, who was called by Mr. Reid at trial.
- [39] With respect to Mr. Reid's radiating nerve pain to his buttock and right leg, Dr. Sahjpaul's report includes his opinion that this pain was caused by an L4-5 disc hernia likely caused by the Accident. He specifically noted in his report that there was a discrepancy in the reports of other doctors with respect to the onset of Mr. Reid's right buttock and leg symptoms which showed the onset of such symptoms between three months (that is, June 2016) and ten months after the Accident (that is, January 2017). It appears that in coming to his conclusion regarding the cause of Mr. Reid's buttock and right leg symptoms Dr. Sahjpaul

assumed that these symptoms started within approximately three months of the Accident.

- [40] During cross-examination Dr. Sahjpaul confirmed that generally, the onset of radiating pain generally occurs soon after trauma resulting in a disc hernia, but this symptom can take several months to manifest. He agreed that if Mr. Reid had not started to experience radiating pain in his right leg until the spring of 2017 that it was unlikely that the Accident caused Mr. Reid's L4-5 disc hernia. He also testified that a disc hernia can occur naturally.
- [41] Dr. Sahjpaul also confirmed during cross-examination, when taken to information obtained from Mr. Reid's WCB file, that when he formed the opinions set out in his report he was not aware that in or around 2003 Mr. Reid had reported similar right side symptoms, including numbness and leg pain and various related physical limitations, as those which Mr. Reid testified manifested after the Accident. Dr. Sahjpaul agreed that having this information earlier might have resulted in a different opinion. It also appears that Dr. Sahjpaul was also not aware of the 2003 diagnosis of a diffuse disc bulge at the L4-5 vertebrae.
- [42] Although Dr. Koo also provided opinion evidence with respect to the cause of Mr. Reid's L4-5 disc hernia and the related radiating pain symptoms, he was not qualified as an expert in neurology. With all due respect to Dr. Koo, I do not consider his opinion as instructive as that of Dr. Sahjpaul, which as I have noted above was modified by Dr. Sahjpaul during his cross-examination.
- [43] The defendant called Dr. Simon Horlick who was qualified as an expert orthopaedic surgeon. In the history section of his report Dr. Horlick recorded that Mr. Reid's back symptoms began to worsen by December 2016. He referenced this date later in his report in support of his finding that Mr. Reid's back pain had by that time developed into radiculopathy (that is, radiating pain). It appears that Dr. Horlick relied at least in part upon Mr. Reid's reporting of the timing of the on-set of his buttock and right leg pain in forming his conclusion with respect to causation. As was the case with Dr. Koo's opinion regarding the cause of Mr. Reid's buttock and right leg pain, Dr. Horlick was not qualified as an expert in neurology. Again, with all due respect to Dr. Horlick, I do not find his opinion regarding the cause of this pain as instructive as that of Dr. Sahjpaul.

The Expert Reports - Knee Injury:

- [44] Mr. Reid called Dr. Peter Zarkadas as an expert witness who he sought to qualify to provide opinion evidence in diagnosis, assessment, treatment and prognosis of orthopaedic and musculoskeletal injuries.
- [45] During cross-examination Dr. Zarkadas testified that his brother assisted him in reviewing and summarizing the clinical and other records provided by Mr. Reid's counsel prior to his independent medical exam of Mr. Reid. Dr. Zarkadas testified that after he received clinical and other medical records from Mr. Reid's counsel, that he sent them to his brother, who organized these records chronologically. His brother then extracted portions of relevant records which he then incorporated into a draft of Dr. Zarkadas' expert report as a summary

of Mr. Reid's clinical history.

- [46] Dr. Zarkadas testified that he relied upon the summaries completed by his brother, his own review of the relevant documents and his in-person examination of Mr. Reid in forming his conclusions with respect to Mr. Reid's injuries, including causation.
- [47] I pause to note that I am satisfied that counsel for Mr. Reid was not aware that Dr. Zarkadas had utilized the services of his brother in this respect prior to Dr. Zarkadas' cross-examination at trial. At trial Mr. Reid's counsel appeared to be as surprised by Dr. Zarkadas' testimony as counsel for the defendant.
- [48] Dr. Zarkadas' written report includes the following statement: "I am solely responsible for the preparation and content of this report". Despite Dr. Zarkadas' contention at trial that he considered himself to be responsible for the conclusions contained within his report, his statement that he was solely responsible for its preparation and content is simply not correct.
- [49] Dr. Zarkadas' report contains the typical language "the facts and assumptions on which the report is based include information obtained from written materials as well as by the history and physical examination that I performed myself". In my view Dr. Zarkadas must have relied upon Mr. Reid's pre-Accident reports of symptoms in forming his conclusion on causation. Given that Dr. Zarkadas did not complete a review of Mr. Reid's clinical history himself and could not say with certainty whether the clinical history extracted and summarized by his brother included all relevant history, I declined to admit Dr. Zarkadas' evidence with respect to causation. I did allow Dr. Zarkadas to provide evidence regarding the observations he made during his examination of Mr. Reid, including his prognosis for Mr. Reid's recovery after knee surgery, subject to weight.
- [50] In my view Dr. Zarkadas' practice of using his brother to review and summarize clinical history was inappropriate and should be strongly discouraged. Dr. Zarkadas' evidence was that his brother had completed such work for him in the past on other assignments. I trust that Dr. Zarkadas will think carefully before allowing his brother, who I note is not a medical doctor or directly affiliated with Dr. Zarkadas' clinical practice, from doing so again.
- [51] As I have already stated, the defendant tendered an expert report from its own orthopaedic expert, Dr. Horlick. In his report Dr. Horlick provided his diagnosis that Mr. Reid suffered from moderate to advanced osteoarthritis in the right knee joint. In his opinion, although the degenerative changes to his right knee were present prior to the Accident, the Accident likely materially contributed to the acceleration of Mr. Reid's right knee osteoarthritis. Further, in Dr. Horlick's opinion, even if the Accident had not occurred, Mr. Reid would have developed symptoms resulting in a requirement for a total knee replacement at some point in time, although Dr. Horlick could not say when this would have been required.

Credibility Issues

- [52] The defendant contends that Mr. Reid has been inconsistent in his evidence and reporting to his doctors concerning the onset of radiating pain in his buttock and right leg. The defendant says that this impacts Mr. Reid's credibility and the weight which should be put on the findings of various medical experts. He points to the following evidence:
- a) In January 2017 Dr. Yao noted that Mr. Reid reported his back pain developed the week after the Accident;
 - b) In July 2018 Dr. Singh noted that Mr. Reid reported lower back and radiating buttock and right leg pain in July 2017;
 - c) In August 2018 Dr. Maloon noted that back pain started around the end of 2017 or beginning of 2018;
 - d) In August 2018 Mr. Reid told Dr. Koo that the onset of his right leg pain was January 2017 after a long drive to Vernon;
 - e) Mr. Reid's evidence at his discovery in September 2018 was that he started to experience this pain in December 2016 during the trip to Vernon but at trial testified that this pain started in October 2016;
 - f) In October 2018 Mr. Reid told Dr. Nadeau that his back and leg pain started within three or four months after the Accident; and
 - g) In December 2018 Mr. Reid told Dr. Sahjpaul that this pain started three months after the Accident.
- [53] In my view this evidence suggests Mr. Reid was a poor historian with respect to the timing of the onset of his buttock and right leg symptoms.
- [54] Although Mr. Reid's girlfriend testified that Mr. Reid displayed signs of discomfort standing on a trip to Vernon in December 2016 this evidence does not establish that Mr. Reid was experiencing the type of radiating pain which the medical evidence indicates is suggestive of a disc herniation.
- [55] I find it unlikely that Mr. Reid, who had experienced radiating pain in his buttock and right leg prior to his first disc surgery in 2003, would not have recognized a similarity in symptoms occurring within a few months after the Accident and reported such symptoms to his family doctor, Dr. McKnight. Again, the first record of Mr. Reid reporting this type of pain was December 2017, 23 months after the Accident.

- [56] I also find the fact that Mr. Reid purchased a motorcycle in August 2016 which he rode regularly until the summer of 2018 to be probative. Common sense suggests that it is unlikely that Mr. Reid would have purchased and then regularly rode a motorcycle in 2016 and 2017 if he was experiencing significant back and right leg pain during this period of time.
- [57] Finally, the fact that Mr. Reid ceased personal training and riding his motorcycle in the summer of 2018 suggests that his back pain did not manifest until that time.
- [58] In summary, I do not find Mr. Reid's evidence that he developed the symptoms associated with an L4-5 disc hernia within a few months of the Accident to be reliable. I find it more likely than not that Mr. Reid did not experience such symptoms until some time around December 2017.

Conclusion on Causation

- [59] I find that Mr. Reid sustained a soft tissue injury to his lower back in the Accident, which resolved within a few weeks or perhaps a few months. I come to my conclusion regarding the resolution of these symptoms based on the reports of pain symptomology contained within the clinical records and CL19 report to ICBC prepared by Dr. McKnight. This is also consistent with the note made by Dr. Yao in January 2017 that Mr. Reid advised his low back pain resolved within three to four weeks after the Accident.
- [60] I note that Mr. Reid only received physiotherapy treatment to his back over a three-month period in 2016 and received no such treatment in 2017. He was only referred for specific treatment in the summer of 2018 when his back symptoms became more significant.
- [61] I am not satisfied that Mr. Reid sustained an injury to his L4-5 disc as a result of the Accident which caused the radiating pain in his buttock and right leg. I refer to the note of Dr. Mitchell made December 8, 2017 where she recorded "now pain radiating down right leg". I also refer to the opinion of Dr. Sahjpaul that it is unlikely that the Accident caused the L4-5 disc injury if the relevant symptoms did not manifest until after the spring of 2017. I find it more likely that the L4-5 disc hernia arose either spontaneously or as a result of degenerative changes some time around December 2017.
- [62] I note for completeness, that Mr. Reid received surgery to repair the L4-5 disc herniation in January 2019. Dr. Horlick noted in his report that Mr. Reid no longer has back pain and that his residual leg complaints have improved by 75%.
- [63] I note that although Mr. Reid's left knee is also arthritic, the same pain and limitations in left knee function which developed in the right knee after the Accident have not manifested. This supports a conclusion that the Accident caused an acceleration of pre-existing, pre-Accident degenerative arthritis in Mr. Reid's right knee which resulted in a premature reduction in right knee function. I also find that as a result of the early onset of his right knee symptoms, that Mr. Reid will require total right knee replacement sooner than he

would have if the Accident had not occurred. This is consistent with the opinions of Mr. Reid's experts and that of the defendant's expert, Dr. Horlick.

- [64] Although Mr. Reid did not make submissions at trial with respect to damages arising from a mood disorder at trial he has plead that he sustained damages resulting from mood related impacts from the Accident. I am not satisfied that Mr. Reid's reported mood issues arise from the Accident. I find that Mr. Reid suffered from some pre-existing mood issues related to in part difficulties in dealing with his son's disability and the break-up of his marriage. I find it more likely than not that this mood decline in 2018 resulted mainly from his struggles in dealing with his son and perhaps pain and disability related to his L4-5 disc hernia.

Non-Pecuniary Damages

- [65] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Comparable cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Benavides v. Doe*, 2015 BCSC 1831 at para. 94; *aff'd by Benavides v. Insurance Corp. of British Columbia*, 2017 BCCA 15.
- [66] The effect of the injuries on a plaintiff's particular circumstances must be taken into consideration. Factors to be considered in assessing non-pecuniary damages include the age of the plaintiff, nature of the injury, severity and duration of pain, disability, emotional suffering, loss or impairment of life, impairment of family, marital and social relationships, impairment of physical and mental abilities and loss of lifestyle: *Stapley v. Hejslet*, 2006 BCCA 34, at para. 45 [Stapley].
- [67] The correct approach to assessing injuries which depend on subjective reports of pain was discussed in *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.) by McEachern C.J. (quoted with approval in *Edmondson v. Payer*, 2012 BCCA 114 at para. 2). In *Price*, the court explained that evaluating a plaintiff's subjective complaints about injury, pain and loss into compensatory damages is never simple.

Discussion on Non-Pecuniary Damages

- [68] In my view the relevant factors set out in *Stapley* to be applied in this case include the following: the nature of the injury and the severity and duration of associated pain; the extent of any on-going disability; the level of emotional suffering; the loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and, loss of lifestyle.
- [69] I do not find that Mr. Reid's injuries and the symptoms which arose immediately after the Accident to be severe. This does not mean that they do not result in compensable impacts.

- [70] The soft tissue injury to his back resolved within a few months of the Accident and does not appear to have resulted in significant on-going pain or disability. Accordingly, in my view nominal damages are appropriate for this injury.
- [71] The right knee injury accelerated a pre-existing degenerative arthritic condition. The important question to be answered is to what extent the early onset of arthritic symptoms was disabling or otherwise impacted his family, social, vocational and recreational activities.
- [72] Mr. Reid took approximately ten days off from his personal workouts after the Accident. After that time, as a result of his knee symptoms he was and remains restricted in his ability to perform squats and lunges or to safely carry heavy weights as part of his personal training routine. Nonetheless, I am satisfied that Mr. Reid continued to exercise and remains, aside from his knee and back symptoms (the latter unrelated to the Accident), strong and fit.
- [73] The next question is, to what extent did Mr. Reid's accident-related injuries impact his vocational pursuits? In my view, a reduction in the ability to work a chosen field as a result of accident-related injuries can have an impact on an individual's sense of self-worth which is a factor to be considered in assessing non-pecuniary damages.
- [74] In his report Dr. Sahjpaul provided an opinion that Mr. Reid will probably not be able to resume work as a personal trainer to the extent he did prior to the Accident. It is unclear whether Dr. Sahjpaul considered whether this limitation results from Mr. Reid's knee symptoms or the unrelated back symptoms. Even if I assume that some of this limitation arises from Mr. Reid's knee injury, I do not give significant weight to Dr. Sahjpaul's opinion regarding Mr. Reid's functional capacity. He agreed during his cross-examination that he was not an expert in functional capacity, did not conduct a functional capacity assessment of Mr. Reid and had limited knowledge of his work as a personal trainer.
- [75] Dr. Koo provided a similar opinion to that of Dr. Sahjpaul, with respect to Mr. Reid's likely inability to continue to work as a personal trainer. In his report Dr. Koo stated that the persistence of limitations to Mr. Reid's right leg likely permanently render him at least partially disabled from his personal training occupation. In particular, Dr. Koo expressed his view that Mr. Reid would have difficulty demonstrating lunges, squats or dynamic stability exercises involving the right leg - irrespective of his low back condition.
- [76] Dr. Koo agreed on cross-examination, and in response to questions from the court, that he did not complete a task analysis to determine the nature of training services provided by Mr. Reid. It appears that he made assumptions with respect to Mr. Reid's requirement to lift and move heavy weights. I do not accept Dr. Koo's opinion that Mr. Reid is completely disabled from working as a personal trainer because of his knee symptoms.
- [77] The evidence establishes that prior to the accident Mr. Reid would demonstrate exercises to his clients and would set up some equipment, including placing weights. I am satisfied that his ability to set up heavy weights and his ability to demonstrate lunges, squats and exercises involving dynamic stability has been reduced.

- [78] I am not satisfied that Mr. Reid is unable to demonstrate all exercises to his clients. First, not all of Mr. Reid's training involved the use of heavy weights. With one exception Mr. Reid's clients before and for a time after the Accident were older and lifted lighter weight. During his testimony Mr. Reid confirmed that much of his personal training work involves verbal instructions to his clients. In addition, Mr. Reid continued to train a number of his clients into 2018 until his back pain became more acute. The defendant provided more recent video evidence showing Mr. Reid training a client.
- [79] In summary, I do not find that as a result of his knee symptoms that Mr. Reid's ability to provide personal training services has been eliminated, although I accept that this ability has been temporarily reduced.
- [80] Mr. Reid testified that he is on a wait list to receive total right knee replacement surgery. The evidence indicates that he may receive such surgery as early as May 2020 - although given the current global health crisis concerning COVID 19 it is likely that such surgery will be delayed. Dr. Horlick's evidence, which I accept, is that a well done knee replacement surgery lasts between ten and twenty years and given Mr. Reid's young age, he will likely require a further knee replacement within his lifetime.
- [81] For the purposes of assessment of damages, I assume that Mr. Reid will undergo total knee replacement surgery by the end of 2020 and that he will require a further knee replacement surgery by approximately 2035, which is the midpoint of Dr. Horlick's estimated timeline for further knee replacement surgery.
- [82] The evidence of Dr. Horlick supports a conclusion that when Mr. Reid receives total right knee replacement surgery that his knee symptoms will likely significantly improve. On cross-examination Dr. Zarkadas testified that after Mr. Reid receives a total right knee replacement that prognosis in respect of his right knee symptoms would significantly improve, would only have difficulty with some exercises and could still lift weights. I find that after Mr. Reid receives knee replacement surgery that it is likely that the extent of any current limitations on his ability to train clients resulting from right knee pain will be significantly reduced or at least will return to pre-Accident levels.
- [83] Mr. Reid testified that as a result of back pain arising from the Accident that he was no longer able to help his son in his firewood business which has negatively impacted their relationship. Given my finding that Mr. Reid's lower back pain resulting from soft tissue injuries resolved shortly after the Accident and my finding that the L4-5 disc hernia was not caused by the Accident, I do not consider that the Accident had this result.

Position of the Parties on Non-Pecuniary Damages

- [84] Mr. Reid submits that non-pecuniary damages in the range of \$150,000 are appropriate in the circumstances. He relies upon the following cases involving knee injuries (with amounts adjusted for inflation to 2019):

a)

Dulay v. Lachance, 2012 BCSC 258

[\$85,000]

b)

Reddy v. Staples, 2015 BCSC 87

[\$88,000]

c)

Majchrzak v. Avery, 2013 BCSC 1626

[\$107,000]

d)

Cook v. Symons, 2014 2014 BCSC 1781

[\$156,000]

[85] Mr. Reid also relies upon a number of cases involving back injuries in which damages of between \$113,000 and \$180,000 were awarded.

[86] The defendant submits that non-pecuniary damages of between \$60,000 and \$80,000 are appropriate and relies upon the following cases, in which the defendant contends the injuries were more significant:

a)

Reddy v. Staples, 2015 BCSC 87

[\$88,000]

b)

Zhang v. Graham, 2014 BCSC 1578

[\$90,000]

Conclusion on Non-Pecuniary Damages

[87] It is not necessary for me to review the details of the cases cited by counsel in these reasons. I have reviewed and considered the similarities and differences between the cases cited by counsel and the case at bar. While I take some guidance from authorities referred to by counsel, each case turns on its particular facts. In consideration of all of the relevant Stapley factors, I consider that non-pecuniary damages are appropriately assessed in the amount of \$70,000.

Loss of Past Income Earning Capacity

- [88] Mr. Reid seeks damages for past loss of earning capacity over an approximate four-year period, in the amount of \$100,000. This is based on the assumption that but for the Accident he would have earned approximately \$50,000 per year as a personal trainer but in fact made far less during this time.
- [89] Mr. Reid reported pre-Accident income from his personal training business of \$28,216 in 2013, \$26,160 in 2014 and \$17,446 in 2015. In the year of the Accident, 2016, he reported income of \$16,840. To support his submission that past wage loss should be calculated based on pre-Accident annual earnings of \$50,000, Mr. Reid contends that his pre-Accident average actual income is much higher than that which he declared for tax purposes as he was often paid in cash by his personal training clients.
- [90] The defendant submits that there is only evidentiary support for a finding that Mr. Reid was unable to work for a period of six months between September 2019, when the defendant contends Mr. Reid's knee pain worsened considerably, and trial. Further the defendant submits that Mr. Reid's evidence with respect to his unreported income, both before and after the Accident is unreliable. The defendant contends that past wage loss from September 2019 to trial should be calculated based on average annual earnings of \$11,437 for the period 2010 to 2015, which results in a net amount for past wage loss of \$4,089.50 after deducting income from the clients he did train.
- [91] Compensation for past and future loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [92] A claim for past income loss is actually a claim for past loss of earning capacity. That is, a claim for the loss of the value of the work that the injured party would have performed but was unable to perform because of the injury. Loss of earning capacity rather than the loss of actual income is to be considered, although loss of income may provide some basis in determining the value of loss of capacity: *Mojahedi v. Friesen*, 2016 BCSC 1225 at para. 73 referring to *Rowe* at para. 30.
- [93] The burden of proof of actual past events is proof on a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. A plaintiff is not required to prove these hypothetical events on a balance of probabilities. A hypothetical possibility can be considered so long as there is a real and substantial possibility that it would have occurred, or will occur, and is not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48 - 49.

- [94] The amount of past or future income loss may be proven using the "earnings approach" or the "capital asset" approach. The former will be more useful when a loss is more easily measureable - for example where a plaintiff's income is not expected to fluctuate, up or down, over time. The latter is more useful when the loss is not easily measured: *Perren v. Lalari*, 2010 BCCA 140 at para. 32

Discussion and Conclusion on Loss of Past Income Earning Capacity

- [95] As I have stated above, compensation for past and future loss of earning capacity is to be based on what the plaintiff would have earned, not could have earned. In this case it is not possible to apply an income approach to the assessment of Mr. Reid's past wage loss. In part this is because of the uncertainty with respect Mr. Reid's plans to train more clients than he had prior to the Accident.
- [96] The evidence establishes that in the years leading up to the Accident Mr. Reid lost a significant number of personal training clients. Mr. Reid did not provide any testimony at trial with respect to his plans for continuing to train clients before the Accident, including for example, how many hours per week he expected to train.
- [97] In closing argument Mr. Reid's counsel submitted, in effect, that it should be assumed that but for the Accident Mr. Reid would have worked to increase his client base and therefore his training revenue. In this respect counsel point to a publication prepared by Mr. Reid shortly before the Accident designed to attract more personal training business, which he never ended up issuing.
- [98] There is evidence to suggest that Mr. Reid was not planning, or able, to increase his personal training clientele from the level just prior to the Accident. For example, it appears, and this goes to Mr. Reid's credit as a father, that prior to the Accident and afterwards he committed significant energy to helping his son who was experiencing difficulties as a result of his disability. In addition, Mr. Reid started to seek work as an actor and body model and achieved some very modest success in that respect. I do not find that there is a real and substantial possibility that but for the Accident Mr. Reid would have increased his personal training income before trial to \$50,000 per year.
- [99] In my view it is necessary to apply a loss of capital asset approach in assessing Mr. Reid's past wage loss. In this respect, I have only considered the impacts resulting from his relatively short lived lower back soft tissue injury and the early on-set of his right knee symptoms. I find that Mr. Reid continued to be able to train clients with some limitations through until the summer of 2018 when his unrelated back problems caused him to stop training almost all of his clients.

[100] I find that but for the Accident that Mr. Reid would have earned approximately \$5,000 more per year. In total, I find that but for the Accident it is possible that Mr. Reid would have earned an additional \$20,000, inclusive of deductions for tax, between the time of the Accident and trial. I assess his damages for past wage loss at this amount.

Loss of Future Income Earning Capacity

[101] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so (2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not on an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232.

[102] The essential task of the court is to compare the likely future of a plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32 [Gregory].

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

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

Discussion and Conclusion on Loss of Future Income Earning Capacity

- [104] Both Mr. Reid and the defendant appear to accept that Mr. Reid will likely undergo total right knee replacement surgery some time in 2020. As I stated above, for the purposes of assessing Mr. Reid's damages I have assumed that he will receive this surgery by the end of 2020.
- [105] Mr. Reid submits that the opinion of Drs. Zarkadas and Koo that he will be unable to work as a personal trainer, even after receiving total knee replacement surgery, should be accepted. In calculating his damages for future income loss Mr. Reid relies on the present value calculations completed by Curtis Peever, who was qualified as an expert economist at trial. Mr. Peever calculated the net present value of future income loss, based on potential annual earnings of \$50,000, \$70,000 and \$100,000 per year to age 65 and 72, to be between \$463,000 and \$1.3 million. Mr. Reid submits that an award for loss of future income earning capacity in the \$650,000 range would be appropriate.
- [106] In my view Mr. Reid has significantly overstated the opinion evidence of Drs. Zarkadas and Koo regarding his future functional capacity. In addition, the evidence does not establish a real and substantial possibility that Mr. Reid would earn more than \$50,000 per year from personal training, but for the Accident. Earnings of more than that amount are in my view, entirely speculative.
- [107] Dr. Zarkadas' evidence at trial was that after total right knee surgery that Mr. Reid will be unable to perform some, not all, of the activities of a personal trainer and will likely experience difficulty kneeling on his right knee.
- [108] Dr. Koo agreed on cross-examination that Mr. Reid's pain symptoms and functional capabilities would likely improve after knee surgery.
- [109] I prefer the opinion of Dr. Horlick over those of Dr. Zarkadas and Dr. Koo. As stated above it is Dr. Horlick's opinion that after knee surgery Mr. Reid's functional abilities would be significantly improved. Dr. Horlick's opinion is that Mr. Reid can continue to work as a personal trainer after surgery but should avoid prolonged kneeling and prolonged heavy load to the knee.
- [110] I find there to be a real and substantial possibility that after he receives total right knee replacement surgery that the functional capacity of Mr. Reid's right knee will return to a level at or better than it was prior to the Accident.
- [111] For these reasons the calculation of damages completed by Mr. Peever relied upon by Mr. Reid, which contemplates that Mr. Reid will never be able to work as a personal trainer again, is not helpful.

- [112] I consider it appropriate to apply the same assessment of damages calculation utilized for past wage loss to an assessment of Mr. Reid's damages arising from loss of capacity for the period from the date of trial to the end of 2020, when he will receive knee surgery. This results in an assessment of damages of \$3,750 for this period ($\$5,000/12 \times 9$).
- [113] The evidence establishes that Mr. Reid will be required to take approximately four to six months off of work to recover after surgery - that is, from January 2021 to the end of June 2021. The question then is what potential income should be considered in assessing his income loss during this time period? The medical evidence establishes that his January 2019 back surgery was successful and resulted in an improvement of approximately 75% back function. Accordingly, for the purposes of assessing Mr. Reid's damages, I assume that there is a real and substantial possibility that by the start of 2021, had the Accident caused his knee symptoms, that Mr. Reid would have been earning approximately \$50,000 per year. Accordingly, I assess his damages for the six-month period when he is recovering from total right knee replacement surgery to be \$25,000. Given my finding that after knee surgery Mr. Reid will be able to continue working as a personal trainer I decline to award any damages for loss of future income earning capacity beyond this date.
- [114] I do not find that there is a real and substantial possibility that Mr. Reid will continue to work as a personal trainer past 65 years of age. Given my finding above that Mr. Reid will not require further right knee surgery until 2035, when he is 68 years old, I do not consider it likely that he will suffer a future income loss due to a requirement to take time off after a later right knee surgery.
- [115] In my view, a fair assessment of damages for Mr. Reid's loss of future income earning capacity is \$29,000 inclusive of deductions for tax. I award this amount.
- [116] Although Mr. Reid will benefit from interest accruing from the date of judgment, given that the award reflects loss of income for a relatively short period of time I do not consider that a deduction to reflect the present value of this award to be necessary.

Cost of Future Care

- [117] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore their pre-Accident condition in so far as that is possible. When full restoration is not achievable, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) [*Milina*]; *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

- [118] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [119] It is not necessary for a medical expert to testify in support of each item of support that is claimed but there must be some evidentiary link between a physician's assessment of pain, disability and recommended treatment and the care recommended by a qualified health care professional: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
- [120] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

Discussion and Conclusion on Cost of Future Care

- [121] Mr. Reid seeks damages for the cost of future care in the amount of \$75,000. He relies on the cost of future care assessment report completed by JoAnne Beattie, occupational therapist. Ms. Beattie was qualified to provide opinion evidence at trial. He also relies on the report calculating the present value of the cost items set out in Ms. Beattie's report, prepared by Curtis Peever.
- [122] Mr. Reid claims the cost of obtaining a prescription for Gabapentin for an unknown period of time. Gabapentin was prescribed for nerve pain associated with Mr. Reid's L4-5 disc hernia and therefore in my view is not causally linked to the Accident.
- [123] Mr. Reid also claims for the costs of obtaining Tylenol 3 for pain, at an annual cost of \$50-\$67, for an unknown period of time. I find the claim for the cost of purchasing Tylenol 3's for a two-year period at a cost of \$67 per year to be justified and reasonable.
- [124] Mr. Reid claims for the cost of receiving physiotherapy treatment once per week prior to knee surgery and a further 44-66 sessions post-surgery, at a cost of \$76.70 per session. Physiotherapy was recommended by Dr. Zarkadas. I find the claim for the cost of obtaining a further 52 physiotherapy sessions at a cost of \$76.70 per session, or \$3,988, to be justified and reasonable.
- [125] Mr. Reid has claimed costs associated with home cleaning, grocery delivery and taxi costs to attend at medical appointments for a 4 to 6-month period following his right knee surgery. I consider these costs in the amount of \$2,323.60 to be both justified and reasonable.
- [126] Mr. Reid has claimed \$88 for the cost of obtaining a shower stool and handheld showerhead, which Ms. Beattie recommends to ensure his safety showering after his knee surgery. I find this cost to be justified and reasonable.

- [127] Mr. Reid has claimed the cost of attending at a total of 21-26 active rehabilitation sessions with a kinesiologist, six before and 15-20 after he receives knee surgery. The sessions after knee surgery are recommended in part to assist Mr. Reid in developing an appropriate exercise regime. Active rehabilitation was recommended by Dr. Zarkadas and the benefits of such treatment are not disputed by any other experts. Ms. Beattie was aware that Mr. Reid is a personal trainer and I have no reason to believe that she failed to consider this when she recommended that he receive active rehabilitation treatments. I find that the cost of obtaining 21 active rehabilitation treatment sessions, at a total cost of \$1,505.70 to be justified and reasonable.
- [128] Mr. Reid has claimed for the cost of obtaining a knee brace, an electric heat pad, a cordless light weight vacuum and an annual aquatics pass. Ms. Beattie indicated in her report that she was told that Mr. Reid's physiotherapist had recommended a knee brace. Mr. Reid's physiotherapist was not called as a witness at trial. None of Mr. Reid's other treating or consulting physicians recommended a knee brace. I do not find this cost to be medically justified. In addition, I do not consider that there is a basis for awarding Mr. Reid the cost of obtaining a heating pad or lightweight vacuum or, given that Mr. Reid is a fit individual, for the cost of an aquatics pass.
- [129] Mr. Reid claims for the cost of regular and heavy seasonal home cleaning at an annual cost of \$4,800 until the age of 75. The medical evidence does not indicate that Mr. Reid is incapable now, or will be incapable of performing these activities in the future. I accept the opinion of Dr. Horlick that Mr. Reid will not require assistance with home maintenance in the future.
- [130] Determination of the cost of future care involves an assessment rather than a precise calculation. I find a reasonable award for the cost of future care to be \$8,000.

Special Damages

- [131] Mr. Reid claims special damages in the amount of \$963.15. The defendant disputes the \$323.87 claimed for Gabapentin, \$80 for ambulance fees to attend at the hospital as a result of back pain and \$56.71 for a cane and cane tips. I find that the disputed items do not relate to costs arising from the Accident. I award Mr. Reid special damages in the amount of \$502.57.

Conclusion

- [132] Mr. Reid suffered injuries and sustained damages as a result of the negligence of the defendant in the Accident.
- [133] I award the following damages, payable by the defendant to Mr. Reid:
- (a)

Non-pecuniary damages

\$ 70,000

(b)

Loss of past earning capacity

\$ 20,000

(c)

Loss of future earning capacity

\$ 29,000

(d)

Cost of future care

\$ 8,000

(e)

Special damages

\$ 502.57

TOTAL

\$127,502.57

"Mayer, J."

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