
CANADA / JUDGMENT

Revak v. Rosenberger

2017 BCSC 2370

COURT

Supreme Court of British Columbia

DECIDED

21 December 2017

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2017 BCSC 2370 Revak v. Rosenberger

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Revak v. Rosenberger,

2017 BCSC 2370

Date: 20171221

Docket: M51737

Registry: Vernon

Between:

Douglas Scott Revak

Plaintiff

And

Michelle Elaine Rosenberger

Defendant

Before: The Honourable Mr. Justice Grist

Reasons for Judgment

Counsel for the Plaintiff:

C.T. Hart

Counsel for the Defendant:

S.C. Driver

Place and Dates of Trial/Hearing:

Vernon, B.C.

July 4-7, 2017

Place and Date of Judgment:

Vernon, B.C.

December 21, 2017

- [1] The plaintiff was injured in a motor vehicle collision on June 25, 2013, at the intersection of Highway 97 and Gordon Drive, in Kelowna, B.C. His pickup truck was struck by the defendant's vehicle as it turned left eastbound onto Gordon Drive. The defendant was proceeding south through the intersection, in the HOV lane on Highway 97.
- [2] The parties have agreed there should be a 50-50 split on liability and this action is presented to determine the quantum of damages appropriate to the effects of the plaintiff's injuries. Once this sum is known, the parties will reduce the sum to conform with the division of liability.
- [3] The point of impact was to the rear of the plaintiff's truck, and the vehicle was spun around so that it faced the opposite direction by the time it came to rest. The plaintiff suffered an injury to the side of his rib cage and he had difficulty breathing. He was somewhat disoriented and confused at the scene. He went home after dealing with the police, but is unsure how he got there. Later that evening, he went to the Kelowna Hospital Emergency Room where he was examined and advised to attend his family doctor the next day.
- [4] The next day, the plaintiff said he felt as if he had been run over by a truck. He said he woke with a severe headache and was nauseous, and had a hard time organizing his thoughts and speaking. He attended his family doctor later that day, and the doctor's clinical records list complaints of ongoing headaches, nausea, pain in his right shoulder and scapula, confusion and inability to think clearly, and pain in the lumbar spine and right side of the neck. He was treated for a concussion and myofascial injury.
- [5] Mr. Revak described his condition approximately six months after the collision in the winter of 2013 - 2014. He said his speech was getting better, that he was not repeating himself as much, but he was still disoriented when trying to follow instructions or keep to a schedule. He continued to have headaches as well as back and neck pain, was unsteady, had a loss of coordination, and difficulties with his balance.
- [6] Mr. Revak was a self-employed painter. His work included contracts for newly constructed houses and renovation work. He found he was unable to continue with this work following the collision. In a July 2014 letter, his family doctor noted him as continuing to be disabled from his work. Para. 2 of the letter sets out the following:

... the patient's symptoms currently consist of episodes of severe dizziness as well as pain of the C-Spine. This severely impacts the patient's mobility of his neck and also his ability to do his employment as a painter. The patient's continuous symptoms of dizziness make it dangerous to climb ladders and negotiate heights which is required for his employment.

- [7] Mr. Revak said that his mood and emotional state suffered as a result of his continuing symptoms. He described a change from someone who was used to being seen as bright and capable, to feelings of inadequacy and self-consciousness because of his difficulties following conversations and expressing himself. He said he started to be left out of social situations.
- [8] Mr. Revak was 45 years of age at the time of the collision. He was not married or involved in a long-term relationship. He led an active social life, and had always been involved in a number of sporting activities. He played hockey in a local men's league until ten years before the collision, and pick-up hockey in the years following. Lay witnesses called on his behalf gave a similar account of his disorientation and loss of ability to interact with others following the collision and of his lack of ability to return to his former work as a painting contractor.
- [9] Both Mr. Revak's mother and his former employer, Mr. Lariviere, described Mr. Revak's attempt to take on a painting project in his mother's home approximately two years before trial. He was attempting to cut-in the border between the ceiling and the wall in the room he was painting and needed to climb up a few steps on the ladder to reach the border. His attempt to step up onto the ladder brought on an attack of dizziness, and he had to discontinue his efforts. Mr. Lariviere was brought in to complete the project.
- [10] Mr. Bull, a friend of the plaintiff who has used him in the past to provide painting services to buildings he was developing, confirmed that Mr. Revak could not go up ladders and that his dizzy spells made it difficult for him to navigate stairs without holding onto the handrail. They also caused him to avoid riding on escalators. Mr. Bull described Mr. Revak's comparative lack of ability to organize himself or any projects he was involved in, his rambling conversation, and withdrawal from social interaction with his previous circle of friends.
- [11] Mr. Bull had Mr. Revak stay at a home he purchased in Las Vegas for a time, to help care for the vacant premises and give him an opportunity for something useful to do. This gave Mr. Revak a place to stay for a few months, but Mr. Bull said that he was not of much use in taking on any chores or seeing that bills were paid in respect of the premises.

WORK HISTORY

- [12] Mr. Revak was a professional painter for approximately twelve years before the motor vehicle collision. Originally, he worked for others earning \$20 to \$25 per hour. He then began to take contracts on his own and to jointly contract with his previous employer, Mr. Lariviere. Mr. Revak primarily painted newly constructed homes. He said this work suited

him better than dealing with homeowners involved in renovation projects. This work was available to him during most years but there was a significant decline in construction for a year or so, in 2009. For approximately six months during this time, Mr. Revak moved to a cabin his parents owned near Nakusp, British Columbia. This roughly corresponded to a time when he was recovering from treatment for a back injury suffered during a hockey game. He said he only did one house during the time he lived in Nakusp and for a few months received provincial income assistance. Mr. Revak returned to Vernon in 2010, and continued to contract painting jobs until the motor vehicle collision in June 2013. Both Mr. Lariviere and Ms. Foubert, the manager of the local Cloverdale Paint store, have known Mr. Revak over the years he participated in the painting trade. Ms. Foubert said that customers had recommended him as providing "good quality work" and Mr. Lariviere described the plaintiff as "a professional painter, knowledgeable in all painting applications".

- [13] During the years he worked as a contractor, Mr. Revak often took time off to take extended vacations outside of Canada. He could be gone from two to four months per year generally visiting a foreign destination. In other respects, he maintained fairly steady employment. He said that he would paint one to one-and-a-half houses per month, while he was working.
- [14] Mr. Revak's case suffers from a lack of documentary evidence relating to his earnings prior to the collision. For a number of years, he failed to file any tax returns. In March 2016 he filed a number of returns to bring his filings up to date. The filings for 2011 and 2012 showed gross business income from painting jobs of \$16,000 and \$18,000. His filing for 2013 for work done in the six months prior to the date of the collision showed gross income of \$9,500. He said the income he declared in these returns was not based on his actual earnings. He said the income declared was chosen on the basis that it reflected what he could earn without paying any appreciable tax. His evidence was that he was capable of earning \$60,000 to \$80,000 per year.
- [15] Mr. Revak's history in this regard does him no credit and is a serious deficit to his case for lost income and future loss of earning capacity. Notwithstanding this feature of the case, which reflects badly on Mr. Revak's credibility, it is not the court's function to punitively discount any credible evidence that Mr. Revak earned more than he declared or to similarly discount evidence that he would have been capable of earning more than he declared into the future: *Iannone v. Hoogenraad*, 66 B.C.L.R. (2d) 106 at paras. 5-6, 1992 CanLII 1630 (B.C.C.A.).
- [16] The painting contracts undertaken by Mr. Revak were charged out at \$2.50 per square foot with special work adding \$1.00 per square foot to the price. Mr. Revak said that by the time of the collision the per-square-foot average had increased to \$3.50 to \$4.00 per square foot.

- [17] There was various evidence given about the expense that could be expected in covering paint and supplies needed to paint a house. I accept the evidence of Mr. Lariviere in this regard as being most likely correct. He is and was involved in essentially the same business as Mr. Revak, and said that an average house of 2,500 square feet would require materials of approximately \$1,200.
- [18] Using the lowest of the contracting rates, at \$2.50 per square foot, the average size just spoken of, 2,500 square feet per house, less \$1,200 in supplies indicates a profit of approximately \$5,000 per house.
- [19] Mr. Revak's evidence was that he worked about eight to ten months per year, and that a house would not take him a full month. He thought that this would amount to eight to twelve houses completed per year. I found some support for this in Mr. Lariviere's evidence. He did similar work to that done by Mr. Revak and said that his expenses per month were typically \$1,500 to \$2,000, with an average house requiring \$1,200, indicating that he completed more work than required for one average sized house per month. I choose eight houses per year as being a likely level of work activity in determining Mr. Revak's past earning ability. This would indicate annual earnings of \$40,000. This is significantly less than Mr. Revak's estimate that he was capable of earning \$60,000 to \$80,000 per year, but is also notably different from other estimates he gave off the top of his head to other witnesses; and, in my view, on the totality of the evidence, represents the most credible figure to be applied in determining past income earning ability and loss of future earning capacity.

PRIOR MEDICAL HISTORY

- [20] Mr. Revak sustained a thoracic fracture almost ten years prior to the collision. This was a relatively severe injury at the time but Mr. Revak markedly improved after a prolotherapy in 2010, and caused no major disability at the time of the collision.
- [21] Mr. Revak also had symptoms from degenerative changes to his cervical spine that were investigated over several months in 2010 - 2011. He continued to have neck pain from this condition to the date of the collision, but there was no further treatment during the two years prior to the collision or evidence that Mr. Revak's then ongoing complaints were disabling.
- [22] The medical evidence did not identify any ongoing medical issues from prior to the collision that would have exacerbated this pre-accident condition to the level of complaints he presently suffers from.

MEDICAL EVIDENCE

- [23] Specialists who provided evidence were as follows:
- 1) Evidence introduced by the plaintiff:
 - a) Dr. T. Giantomaso - physical medicine and rehabilitation; and

- b) Dr. N.S. Longridge - otolaryngology.
- 2) Evidence introduced by the defendant:
 - a) Dr. F. Kemble - neurology;
 - b) Dr. F. Leung - orthopedic surgeon; and
 - c) Dr. E. David - otolaryngology.

Dr. Giantomaso

[24] Dr. Giantomaso provided the following diagnoses after a February 2016 examination of Mr. Revak, and a review of prior medical investigations and documentation:

1. Mild traumatic brain injury (concussive force through the body or head, posttraumatic nausea, alteration of consciousness, no recorded GCS, normal CT head).
2. Post-concussive syndrome. Chronic and ongoing.
3. Exacerbation and aggravation of previously existing neck pain.
4. Exacerbation and aggravation of previously existing thoracic pain.
5. Exacerbation and aggravation of previously existing lumbar and SI joint pain.
6. Posttraumatic headaches.

[Dr. Giantomaso's Report, at p. 9.]

[25] In his Discussion of Diagnoses (at p. 9 of his Report) he wrote:

Douglas has an extensive pre-existing history of chronic pain dating back many years. However, he has little to no history of prior headaches, major sequelae of concussion or major post-concussive syndrome in the past. Based on his available documentation, I think it's most reasonable to say that his ongoing axial pain is an exacerbation and aggravation of pre-existing issues, which were extensive. However, his head injury and other cognitive issues are new and seemed to be present immediately after the accident in question. Based on my examination today, he did have symptoms of concussion including poor balance, difficulties with accurate eye movements and feelings of vertigo.

[26] His prognosis (at p. 11 of his Report) was as follows:

It is now more than two and a half years post trauma. The vast majority of improvement through natural history and rehabilitation would have been expected to have occurred in the first 6 to 12 months post trauma or earlier. This includes recovery from concussion or brain injury.

Thus, in my opinion, in all probability, he will continue to experience chronic pain and ongoing cognitive issues to some degree long term into the future. By following my recommendations, he may experience decreased pain and increased function in the future; however, this should be considered part of a long-term pain management strategy and should not necessarily be considered curative.

Dr. Longridge

[27] Dr. Longridge has an extensive history of related work, publications and achievements as a specialist in otolaryngology, with a concentration in tinnitus, hearing loss and dizziness. On review of the authorities cited by counsel, it becomes apparent that a number of his opinions relating to dysfunction of the vestibular system have been accepted by B.C. Courts.

[28] Dr. Longridge saw Mr. Revak in April 2016. His testing included a procedure known as a Computerized Dynamic Posturography ("CDP"). This is a test of balance, measuring the extent of swaying a person exhibits when challenged by prescribed movements of a platform he stands on during the course of the test. Testing of Mr. Revak's hearing revealed certain deficits. In particular, the ability to hear in the presence of background noise and sensitivity to certain noises. Mr. Revak's main problem, however, was found to be the dizziness he suffered post-collision.

[29] At pp. 12-13 (lines 401-436) of his Report, Dr. Longridge said:

His main problem since the accident is dizziness. There is documentation of this (Appendix 4, Item #4), within 3 days of the accident. The close temporal relationship between the accident and complaints of dizziness indicate the probable cause as being the accident. By dizziness he means a feeling of having poor balance and of things appearing to move when they are not moving. Pre accident he had excellent balance as a hockey player. Since the accident his balance is not as good as it was. He describes on jumping up quickly that the room will change colour, go black and he would have to grab on and wait for three to five seconds. This also occurs if he stoops and then stands. On approaching an escalator he has a feeling that he is being pulled physically towards it. Pre accident he worked 30 or 40 feet up a ladder with confidence and no difficulties because he had good balance and would jump the ladder across a wall without having to come down. Subsequent to the accident he attempted going up a ladder and got about half way up a 14 foot ladder and stated that he had a feeling that the ladder was rotating slowly, even though he knew it was still, and that he had to lean forward as he might go over backwards. He was noted to go pale and had nausea and became sweaty with this. Since the accident, on a flight to Los Angeles he had motion sickness, something which he did not have pre accident. He can no longer ride in the back seat of a vehicle because he becomes nauseated and at times has taken Gravol to control this since the accident. Because of his awareness that his balance is poor he has slowed down his movements and is careful in order to avoid physical falls and, as yet, has not fallen. He stopped wearing high heeled cowboy boots and uses flat shoes now. If he is in a crowded place, because of his balance he has to maneuver carefully. Because of this he avoids going to such places as the shopping mall and the supermarket. He feels queasy on an elevator

and vehicles going by at a crosswalk can cause him to feel imbalance. Checkered floors are distressing and he used the example of the carpeting in the Diamond Centre where I am located as doing this, inducing a feeling that it was shifting. The foyer of the building where I am located is on a fourth floor with a glass wall down to the ground and when he saw this he became distressed and had to move away from it. Because of poor balance he has changed his technique of showering. There was an existing handle in his shower which he never used, but since the accident he now uses it. To avoid imbalance he now puts his head down to rinse his hair rather than raising it. These complaints he has are characteristic of a disturbance involving the balance system, probably of the inner ear.

[30] Dr. Longridge also identified that Mr. Revak exhibited a form of visually induced dizziness called Visual Vestibular Mismatch ("VVM"). This occurs when the balance system of the inner ear provides a stimulus at odds with what a person sees. At p. 14 (lines 458 to 465) of his Report, Dr. Longridge said:

Particular situations where this occurs are ones with a lot of movement. Characteristically rippling water and also the standard situation of a lot of movement in a supermarket or shopping mall produces awareness of dizziness. Complaints of dizziness caused by checkered floors, busy carpets or patterned tiles is seen. Dislike of elevators and escalators, which caused dizziness is common. Busy television programs, such as car chases and hockey games cause dizziness. Scrolling a computer causes dizziness. The bright light in these circumstances is frequently complained of. People around the patient are moving relatively indiscriminately and this results in a dizzy sensation.

[31] Dr. Longridge said Mr. Revak's condition was permanent, likely becoming more pronounced with age. At p. 15 (lines 485 to 488) of his Report, Dr. Longridge said:

He should avoid being at height, up ladders or on scaffolding. Changing light bulbs and curtains should be done with caution. He should not be around dangerous equipment. From the recreational point of view he should avoid sports which put him at hazard of falling such as ice-skating.

Dr. Kemble

[32] Dr. Kemble saw Mr. Revak on February 26, 2015. After a physical examination and review of the medical documents, Dr. Kemble concluded at p. 15 of his Report, "[f]rom a purely neurological perspective, he doesn't have any significant disability, which would prevent him from returning to the work force or from returning to any of his recreational activities."

[33] In response to Mr. Revak's history of increased neck and upper and lower back pain following the collision, Dr. Kemble thought these were due to soft tissue injuries. At p. 16 of his Report, Dr. Kemble said, "[t]he probability is that the automobile accident accentuated a preexisting underlying problem and with adequate treatment the pain should reduce to be no worse than it was prior to the automobile accident."

- [34] In respect of Mr. Revak's complaints of dizziness, confusion, loss of memory and fatigue, Dr. Kemble thought this was likely due to stress following the collision and would abate if he were treated for anxiety and depression.

Dr. Leung

- [35] Dr. Leung, an orthopedic surgeon, saw Mr. Revak in March 2015. She concluded (at p. 8 of her Report) from the history taken from Mr. Revak and the medical file that, "Mr. Revak has pre-existing back and neck conditions and symptoms of ulnar neuropathy that were exacerbated by the MVC."
- [36] Dr. Leung could not determine if the pre-existing symptoms were mild or were more pronounced and showed a decline in his function, and so could not say if the collision was primarily responsible for his disability (Dr. Leung's Report, at p. 9).
- [37] Dr. Leung noted that Mr. Revak told her he could not return to work or to other activities because of dizziness and instability, and said he had difficulty lifting. She concluded that his orthopedic condition was degenerative, not treatable by surgery, and likely to persist into the future (Dr. Leung's Report, at p. 9).

Dr. David

- [38] Dr. David, a further expert in otolaryngology, challenged the opinion presented by Dr. Longridge. He viewed the Computerized Dynamic Posturography ("CPD") testing, and two other tests conducted by Dr. Longridge, Ocular Vestibular Evoked Myogenic Potential ("oVEMP") and Circular Vestibular Evoked Myogenic Potential ("cVEMP") as being procedures of minimal value. There were also differences between the two experts on whether certain test results were statistically significant. This debate largely related to whether scores exceeded accepted base levels.
- [39] Dr. David's Report prompted a lively reply from Dr. Longridge, and both specialists gave evidence at the trial.
- [40] Dr. David concluded that:
- (1) the medical history provided a lack of significant findings indicating an inner ear injury in the period shortly following the collision;
 - (2) his interpretation of the CDP testing done by Dr. Longridge and himself was not in keeping with an inner ear cause; and
 - (3) his reservations in respect of the oVEMP and cVEMP testing done by Dr. Longridge and the results of his own testing, which he judged to be normal, left "insufficient medical evidence of posttraumatic inner ear injury, due to MVA" (Dr. David's Report, p.4).

- [41] Dr. David went further to identify that Mr. Revak "has medical conditions including generalized anxiety disorder, and major depressive disorder, that can be associated with feelings of light-headedness and tinnitus" (Dr. David's Report, p. 5).

VOCATIONAL ASSESSMENT

- [42] Mr. Revak's vocational prospects were assessed by Ms. Webster, a vocational rehabilitation consultant. She conducted a battery of tests to determine Mr. Revak's suitability for a wide range of potential occupations. Ultimately, she determined that although Mr. Revak demonstrated some levels of aptitude as a result of the testing, she found that he would not likely present as a competitive applicant for any of the potential occupations she considered.

DISCUSSION

- [43] In dealing first with Mr. Revak's complaints relating to his soft tissue injuries, I note there are significant points of agreement between Dr. Giantomaso and Dr. Leung. Both view Mr. Revak's present neck and back complaints as likely to persist into the future (Dr. Leung); or are chronic in nature (Dr. Giantomaso). Both experts note previous degenerative spinal problems but the evidence in total indicates Mr. Revak's present level of pain and impairment of function are significantly greater than he suffered prior to the collision and are not the result of a degenerating prior condition.
- [44] Dealing with the evidence of the otolaryngologists, resolving direct conflicts between experts is rarely an easy task. There is some assistance offered in the analysis indicated in *R. v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419.
- [45] Canadian appellate courts have recognized that, ultimately, it is the task of the trier of fact to assess competing expert opinions in light of the whole case before them, and to then assign the appropriate weight to these opinions: *Mezzomo v. Mezzomo*, 1995 CarswellBC 1743 at para 8, [1995] B.C.J. No. 700 (B.C.C.A); *Toniguzzo Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 122, 145 D.L.R. (4th) 699. This is not an easy exercise. In many cases the court begins from a position of ignorance with respect to the complicated matter at hand, and has to carefully attend to the points of difference and the other evidence bearing on the question in coming to a conclusion as to which presentation is more worthy of belief.
- [46] Here, I find support for Dr. Longridge's opinion in the points he presented in reply to Dr. David's Report. The medical records following the collision are not silent as to complaints indicating the onset of organic causes for Mr. Revak's loss of orientation, nor would such complaints necessarily stand out in the context of effects of other injuries sustained.
- [47] Further, Dr. Longridge was able to bring to the Court's attention studies that refuted Dr. David's discounting of testing conducted by Dr. Longridge, and was able to establish that certain results of the testing should not be interpreted as indicating an "aphysiologic finding" (one without anatomical causation).

- [48] Lastly, Dr. David went further than to offer his otolaryngological opinion that there was insufficient medical evidence to conclude Mr. Revak sustained posttraumatic inner ear injury, (Dr. David's "Conclusion" at para. 8.1, p. 4 of his Report), which is an opinion he is qualified to present. Dr. David went a step further, and offered his view that, "Mr. D. Revak has medical conditions including generalized anxiety disorder, and major depressive disorder, that can be associated with the feelings of light-headedness and tinnitus" (para 9.1, p. 5 of his Report).
- [49] Dr. David concluded his report at p. 5 of 19, but continued with further paragraphs outlining his opinions. At para. 28 (p. 12), he speaks again of "documentation of diagnosis of anxiety and depression", and "generalized anxiety disorder", and "major depressive disorder". At this point he says, "[f]urther discussion is deferred to psychiatric opinion."
- [50] In my view, Dr. David has already gone beyond his expertise in offering the diagnoses at p. 5 of his report.
- [51] On my review of the related evidence, there never has been a diagnosis of generalized anxiety disorder or major depressive disorder, nor was Mr. Revak referred to a psychiatrist or otherwise treated for these conditions. There are references to anxiety and descriptions of Mr. Revak being depressed, but these descriptors are often used without constituting a formal diagnosis.
- [52] There is support in Dr. Kemble's report for the view that anxiety and depression have been associated with Mr. Revak's complaints, but his comments beyond his finding that from a neurological perspective he doesn't have any significant disability, also diverge into areas beyond the major focus of his expertise.
- [53] On balance, I accept Dr. Longridge's opinion that Mr. Revak has the inner ear disorder described and that this is to be expected to be a permanent condition with disabling effects upon Mr. Revak's employment and previous recreational activities.

SUMMARY

- [54] In summary, I accept that Mr. Revak suffered:
1. the effects of a concussion received in the collision;
 2. exacerbation of neck and back complaints that were significantly less troubling before the collision;
 3. onset of headaches; and
 4. dizziness and VVM.
- [55] The first three of these conditions have shown significant improvement since the collision but improvement over the last two years has been very limited. There may yet be some further recovery but as several witnesses noted his recovery appears to have plateaued.

- [56] The conditions described by Dr. Longridge, however, are likely permanent; and, with the continuing neck complaints, disable Mr. Revak from continuing as a house painter.
- [57] Ms. Foubert, the manager of the paint store who gave evidence in this case, said she would be interested in offering Mr. Revak employment, which could be part-time if necessary. I think this was a charitable offer on her part, but, as described by Ms. Webster, even minimal physical responsibilities would likely lead to an unsuccessful result. Mr. Revak, in my view, is unlikely to sustain any significant future employment.
- [58] The lost earning opportunity this would present is moderated in this case by the fact that the evidence reveals that Mr. Revak presently receives some support from his elderly parents and ultimately stands to inherit a significant estate from them. He is now 49 years of age and, in light of this, and his less than full-time work history, I expect he would not have worked another 10 years.

GENERAL DAMAGES

[59] *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, sets out considerations often taken into account in assessing general damages. These include:

- (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.

[60] Additional factors to the above were provided in *Stapley* as follows:

- (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 [Internal citation omitted.]

[61] In this case, in considering these factors, I note that Mr. Revak has ongoing conditions that disable him from his employment. His work as a self-employed painter suited him in allowing flexibility to travel and to free himself from the direction of an employer. Others spoke of him as being well-organized and capable before the collision; aptitudes that he no longer presents. Further, whereas he formerly was outgoing and maintained an active social lifestyle, he now is more withdrawn and no longer is included, or excludes himself, from his former social circle.

[62] Mr. Revak's physical abilities have declined and he does not participate in sporting or other physical activities.

Case Law

[63] The most disabling of Mr. Revak's residual complaints relate to the dizziness and VVM conditions. There were a number of cases cited by the parties which considered the effects of these conditions in assessing general damages. These included, in chronological order:

1. Moukhine v. Collins, 2012 BCSC 118 [Moukhine]: general damages assessed at \$90,000;
2. Miolla v. Fick, 2015 BCSC 616 [Miolla]: general damages assessed at \$90,000;
3. Hancott v. Barnes, 2015 BCSC 1308 [Hancott]: general damages assessed at \$68,000; and
4. Wright v. Mistry, 2017 BCSC 239 [Wright]: general damages assessed at \$110,000.

[64] In my view, the Hancott decision has less relevance than the others cited. In Hancott at para. 119, Fleming J. said:

[119] I conclude therefore the accident caused the plaintiff to suffer ongoing, but not severe symptoms of dizziness and nausea that did not prevent him from working more than full time up to August 2012, and were much improved by July 2014 at which point the plaintiff experienced only occasional dizziness and nausea to a modest degree.

The plaintiff in that case was able to sustain his employment to the date of trial and there was no award of loss of earning capacity.

[65] In Moukhine, the plaintiff, 53 at the date of the collision, was disabled from his employment as a computer programmer as a result of continuing disability from dizziness and VVM. Prior to the collision, the plaintiff was very active in many outdoor activities. He was able to work part-time from home but the conditions significantly impacted his earning ability.

[66] In Miolla, the plaintiff, age 53 at the date of the collision, was employed in a supermarket. Her disorder following the collision was identified as acute vertigo and VVM. She was a candidate for a form of physiotherapy which was likely to offer her some relief and she had some limited ability to continue with her employment, assessed at a 30% disability.

[67] In Wright, the plaintiff was 54 at the time of the collision, 65 at the time of trial. He suffered vertigo, soft tissue injuries and aggravation of his pre-existing depression. He had been able to sustain intermittent forms of employment to age 65, but in light of a lack of substantial earnings prior to the collision, the award of lost earning capacity to the date of trial was limited to \$80,000. The general damages awarded in this case, \$110,000, appears to be a generous award.

[68] Mr. Revak was 45 years of age on the date of the collision. His loss of employment is a more significant factor than in the previous cases. In light of the features of this case, I assess general damages towards the upper end of the range indicated, in the sum of \$100,000.

PAST LOSS OF EARNING CAPACITY

[69] It has been four and a half years since of the date of the collision. As previously indicated, I assessed Mr. Revak's earning capacity as being in the sum of \$40,000 per year. This results in an assessment of past loss of earning capacity of \$180,000.

LOSS OF FUTURE EARNING CAPACITY

[70] The finding that Mr. Revak is disabled from any significant form of future employment meets the test in *Perren v. Lalari*, 2010 BCCA 140. In assessing the loss the courts have adopted two methods of quantification. In cases where the remuneration from employment has more concrete criteria and a fair assessment is more of an arithmetic valuation of the lost income stream, the calculations constituting this "earnings approach" (*Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at paras. 27-29, [1995] 3 W.W.R. 728 (B.C.C.A)) may dominate the assessment. In other cases, the "capital asset" approach, indicated (at para. 8) in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (B.C.S.C.), may be more appropriate. In *Brown* the court considered the loss of income received from an employer and the following factors were featured:

1. [Whether the] plaintiff has been rendered less capable overall from earning income from all types of employment;
2. [Whether the] plaintiff is less marketable or attractive as an employee to potential employers;
3. [Whether the] plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. [Whether the] plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[71] These are factors that need to be modified in a case where the plaintiff is self-employed to reflect the loss of marketability and his value to himself, as a person contracting directly to the public. In many cases, this form of "capital asset approach" may be more useful in assessing lost earning ability in light of the contingencies that need to be taken into account in determining the substantial possibilities of loss of future earning capacity. Here there are the negative contingencies associated with possible downturns in the construction industry, as occurred in 2008 - 2009, the likelihood that the plaintiff may not have chosen to work a full year, or otherwise may have other opportunities to support himself beyond income from employment, and I view the "capital asset approach" as being the most appropriate. Mr. Revak has often worked less than a full year, taking time off to travel. He had some effects

from previous injuries that may have lessened his capacity for physical work as he aged, and he very likely will have an opportunity to retire early through inheritance. In assessing this head of loss I would not have expected him to have worked as a painter for more than another ten years, with decreasing output over that time. I assess future earning capacity in the sum of \$250,000.

LOSS OF HOUSEKEEPING CAPACITY

[72] The evidence supporting this head of loss is scant. Mr. Revak said his housekeeping had deteriorated to a marked degree, but he has only himself to see to and I do not judge his ability to do so is so impaired as to qualify for damages in this regard. I think his loss of energy and initiative is responsible and this, in this case, is a factor better left to the consideration of general damages.

CONCLUSION

[73] The parties have agreed that they have settled the issue of special damages. The damages I have assessed are as follows:

- (a) non-pecuniary general damages: \$100,000;
- (b) past income loss: \$180,000;
- (c) future earning ability: \$250,000;

Total: \$530,000.

[74] The parties can enter judgment in the above sum with the agreed special damages added, divided in accordance with the agreement on liability.

"W.G. Grist J."

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Prepared on 26 October 2026 · Esheria