

CANADA / JUDGMENT

Richmond v. Osztovits

2021 BCSC 2245

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2245 Richmond v. Osztovits IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Richmond v. Osztovits, 2021 BCSC 2245 Date: 20211118 Docket: M54253 Registry:

Kamloops Between: Matthew Cameron Richmond Plaintiff And Maximilian Osztovits Defendant

Before: The Honourable Mr. Justice Macintosh Reasons for Judgment Counsel for the Plaintiff:

A.T. Salyn K. Murray Counsel for the Defendant: B.W. Driedger B. Morrow Place and Dates of

Trial: Kamloops, B.C. October 18-22 and 25-29, 2021 Place and Date of Judgment: Kamloops, B.C.

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18 Special Expenses. 18 Summary. 18 Introduction, the Accident

- [1] Matthew Richmond claims damages from a motor vehicle accident. The Defendant admits liability.
- [2] On June 6, 2015, Mr. Richmond was driving the family car from Kelowna, heading home to Kamloops. His wife, Michelle Richmond, was in the front passenger seat. The couple's son, Levi, who was 18 months old at the time, was in a child's seat in the back.
- [3] The Richmonds were driving north on Benvoulin Road, still in Kelowna. They were stopped at a red light, 10 or 12 cars back in the line. The Defendant's vehicle, a vintage car, like a Model T, struck the Richmonds' car from behind. Their car did not, in turn, hit the vehicle in front.
- [4] Both Mr. and Ms. Richmond suffered injuries. Ms. Richmond brought a separate action for damages. Her claim was decided by this Court on November 20, 2019 (see Richmond v. Osztovits, 2019 BCSC 1984).
- [5] Levi was uninjured by the accident. No one lost consciousness. Airbags did not deploy. In August 2017, Mr. Richmond told a physiatrist that he suffered no head trauma from the accident. He was able to get out of the car unaided. To get home on the day of the accident, Mr. Richmond rented a car, and drove the family back to Kamloops. Causation

- [6] Past and future lost earning capacity are the largest components of Mr. Richmond's claim. For those components, his main complaints are his diminished focus and energy at work, resulting in his reduced working capacity overall.
- [7] The Defendant has placed squarely in issue whether Mr. Richmond has proved that his reduced capacity at work was caused by the accident.
- [8] The Plaintiff's case is that the accident caused him both neck and shoulder pain, and pain in the region of his jaw. In turn, the pain, particularly in the jaw, has interfered substantially with his sleep, and prevented him from maintaining his previously high level of fitness. Both the sleep deprivation and reduced fitness level have, Mr. Richmond asserts, changed him from an outstanding young businessman (he was about 34 at the time of the accident) with exceptional potential, to a comparatively ordinary one. That decline, he argues, is the primary support for his past and future lost earning capacity claims. He relies on the observation of Justice Frankel, in *Morlan v. Barrett*, 2012 BCCA 66 at para. 41:
- [41] Accepting that, to use the expression used at trial and at the hearing of this appeal, Ms. Morlan's condition had "plateaued", the fact remains that she would forever suffer from debilitating chronic pain along with headaches, symptoms that could be reduced, but not eliminated, by medication. In other words, throughout each and every day of her life, Ms. Morlan would have to cope with some level of discomfort. In my view, it was open to the trial judge to find--essentially as a matter of common sense--that constant and continuous pain takes its toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations an employer is prepared to make. Indeed, with regard to Ms. Morlan, this is reflected in Ms. Craig's report: see para. 34 above. [Emphasis added.]
- [9] Mr. Richmond tendered a report from his treating orthodontist, Dr. Flintoff. In her report of January 17, 2021, she diagnosed temporomandibular joint ("TMJ") arthropathy associated with degeneration of the articular discs and mandibular condyles (inflammation and degeneration in the jaw), and occlusal changes resulting in the development of an anterior open bite with functional impairment (the jaw opened in a way that only the right back molars touched, leading to difficulty eating).
- [10] Regarding causation, Dr. Flintoff wrote: It is my opinion that the trauma that Mr. Richmond suffered in the motor vehicle accident on June 6, 2015 was most likely a causative factor in the TMJ arthropathy that followed the incident. Because the occlusal changes that he experienced were secondary to the arthropathy it can be said that this trauma was also probably a causative factor in the development of his anterior open bite malocclusion.
- [11] Her prognosis for Mr. Richmond, from an orthodontic standpoint, is fair to good. He will likely be able to obtain good contact of his front teeth. If that is unsuccessful, jaw surgery remains an option.

- [12] In cross-examination, Dr. Flintoff listed several factors supporting her conclusion that the TMJ injury and jaw structure change occurred as a result of the collision. The Defendant did not tender any opinion evidence to contradict Dr. Flintoff.
- [13] Dr. Giantomaso, a physiatrist, diagnosed in his report of August 20, 2017, that the accident caused a cervical sprain-strain injury consistent with a level 2 whiplash injury, level 1 being the minimum and level 4 being the maximum. Dr. Giantomaso said that injury is chronic. He also diagnosed thoracic sprain-strain injury at grade 1-2, which in his opinion is also chronic. In other words, the accident caused Mr. Richmond injuries to his upper back and neck area, and the injury is chronic. Dr. Giantomaso also diagnosed TMJ pain, possibly from the accident, but acknowledged that a diagnosis for that (jaw) area was outside the scope of his speciality.
- [14] The Defendant did not call opinion evidence to contradict Dr. Giantomaso.
- [15] Mr. Richmond tendered "before and after" evidence of his loss of focus, and other work-related problems, in part through testimony from his supervisor at KPMG, when Mr. Richmond was a young accountant there between 2008 and 2013, and from two people Mr. Richmond has had as mentors in his business career, Kevin Jardine and James ("Vic") Kovacs. From 2013 to the present, Mr. Jardine has been Mr. Richmond's mentor, employer and co-investor.
- [16] Mr. Jardine is a successful entrepreneur. He owns all or parts of many successful businesses. He met the Plaintiff when Mr. Richmond was an accountant at KPMG and Mr. Jardine and his companies were clients of that firm. He spotted what he saw as Mr. Richmond's outstanding potential in business, and hired him into his corporate group of companies. Mr. Jardine now resides in Victoria, BC, and Maui, but he made his start in business in Kamloops. Mr. Kovacs too is a long-standing successful businessman, who continues to reside in the Kamloops area. His connection with the Plaintiff has been less significant than that of Mr. Jardine, but his evidence was informative and corroborative
- [17] Mr. Richmond grew up in 100 Mile House, BC, north and west of Kamloops. He had an ideal upbringing in a nurturing family, playing sports, helping out around the house, and developing a strong work ethic early in life. He has maintained that work ethic to the present day. His only real problem growing up was that he was a slow reader, which slowed him down at school. However, he persevered. In university he became a top student. KPMG recognized his abilities and hired him in its Kamloops office. He was always at or near the top of his cohort at KPMG. The only reason he left the firm in 2013 was, as noted earlier, because Mr. Jardine saw his exceptional potential and hired him. The Plaintiff respected Mr. Jardine and they worked well together from the start.

- [18] I pause to make the overall observation that every witness in this trial impressed me as being honest and generally capable in their recollections. I include in that assessment three witness groups; the "business" witnesses, the "family" witnesses (the Plaintiff's wife and father), and the "expert" witnesses. I will say no more about credibility and reliability.
- [19] Mr. Richmond, in Mr. Jardine's employment and under his mentorship, succeeded from the start. Mr. Jardine characterized him as a "125%" employee, manager, and future partner in the Jardine holding company.
- [20] Mr. Jardine gave evidence of Mr. Richmond's gradual decline in his capacities at work beginning in 2016. His work ethic remained strong, but his work capacity eroded. At present, Mr. Richmond is the Chief Financial Officer of a company in the Jardine group called Snore MD (addressing sleep apnea and related problems). He has been passed over for becoming the head of Snore MD in all probability as a direct result of his diminished capacities at work. That is the reason Mr. Jardine is planning to appoint another person to head that business.
- [21] The Defendant submits that the link between the accident and the Plaintiff's cognitive decline at work is largely temporal, meaning that the Plaintiff's case is that it was after the accident that he experienced his decline, and therefore the accident caused the decline.
- [22] This Court addressed causation based on the sequence of events in *C.D. v. Mostowy*, 2021 BCSC 1920 at para. 54:
- [54] The court must be cautious about inferring causation based on a temporal sequence of events; there is no presumption such a temporal connection between the onset of a plaintiff's injury and the actions of the defendant proves causation: *Madill v. Sithivong*, 2012 BCCA 62 at para. 20. However, as Justice Warren observed in *Hosseinzadeh v. Leung*, 2014 BCSC 2260 at para. 67, the need to exercise caution about drawing such inferences does not mean the sequence of events cannot underlie a finding of legal causation. Temporal reasoning may be invoked in the appropriate circumstances: *Midgley v. Nguyen*, 2013 BCSC 693 at para. 171. When a plaintiff seeks to rely on a mere temporal connection to establish causation, it must be carefully examined: *White v. Stonestreet*, 2006 BCSC 801 at para. 75. This can involve considering whether there are other events or circumstances that have a similar or even closer temporal connection to the plaintiff's change in condition, providing alternative and more persuasive explanations for what caused the change. [Emphasis added.]
- [23] The Defendant further submits that the careful examination of causation, called for in *C.D.*, works against the Plaintiff because he continued to earn good money for some years after the accident.
- [24] The Plaintiff's earnings record from 2015 to 2020 provides some support for that submission: Plaintiff's Employment Income 2015 2016 2017 2018 2019 2020 Snore MD \$0.00 \$0.00 \$0.00 \$33,461.64 \$95,076.84 \$100,000.00 Snore MD Bonus \$112,865.74 Total Snore Income \$0.00

\$0.00 \$0.00 \$33,461.64 \$95,076.84 \$212,865.74 Dealer \$72,000.00 \$99,996.00 \$99,996.00
 \$99,996.00 \$43,333.00 \$7,000.00 Dealer Bonus \$80,000.00 \$20,000.00 Total Dealer Income
 \$72,000.00 \$99,996.00 \$99,996.00 \$179,996.00 \$63,333.00 \$7,000.00 Total Income from both
 \$72,000.00 \$99,996.00 \$99,996.00 \$213,457.64 \$158,409.84 \$219,865.74 In 2021, from Snore
 MD, the Plaintiff is expected to earn \$110,000 in salary and \$100,000 in bonus. (I note that the
 bonus for senior management, including the Plaintiff, is determined largely by the
 company's earnings rather than the individual's performance.)

- [25] "Dealer" in the above data refers to Dealer Intelligence, a company the Plaintiff started with Mr. Jardine's guidance and financial support in 2014. Dealer was in the business of connecting car dealers with potential customers. Mr. Richmond was in charge of Dealer, and had responsibility for its growth. Dealer's net income, before taxes, from 2015 to May 13, 2020, was as follows: 2015 2016 2017 2018 2019 To May 13, 2020 \$31,740 \$31,783 \$92,862 \$108,132 \$130,456 \$20,736
- [26] The Dealer business was hard-hit by the pandemic. Dealer amalgamated with another company, owned by Vic Kovacs, in 2020. The amalgamation was probably driven, at least in part, by the decline in business from the pandemic. Another probable contributor to the company's declining performance was Mr. Richmond's own decline at work.
- [27] The financial data above shows that the Plaintiff's income drastically declined at Dealer in 2019 and that his income at Snore MD only began in 2018. Given the Plaintiff's 2015-2021 income, the Defendant submits, in effect, that the accident in 2015 did not cause any income loss. He says, instead, that the Plaintiff simply transitioned from Dealer to Snore MD.
- [28] However, as Justice Kent said, in *Hoy v. Williams*, 2014 BCSC 234 at para. 161:
- [161] The plaintiff may be able to prove a substantial possibility of future loss of income despite having returned to his or her usual employment and even where he has received a raise or obtained a promotion: *Perren v. Lalari*, supra; *Combs v. Bergen*, 2013 BCSC 321. There is no principle of law requiring the medical evidence to establish an impairment of earning capacity; rather, such impairment is established on the totality of the evidence: *Miscisco v. Small*, [2001] B.C.J. No. 2042.
- [29] Linked to what Mr. Justice Kent wrote, when the evidence in the case before me is scrutinized, it is apparent that the Plaintiff's cognitive decline at work began much earlier than his earnings record, above, would suggest on its own. That in itself lends support to the "temporal" argument, that the accident caused the cognitive decline. The pain the Plaintiff began to suffer after the accident, leading to sleep loss and a decline in his physical fitness, began to reveal itself in his work as early as 2016. Mr. Jardine observed the problem carefully, at close range, in his continual communication with the Plaintiff, usually several times each week. A bookkeeper to perform payroll work was hired at Dealer in 2016, in large part because the Plaintiff could no longer fulfil that task while being in charge of the business. That was the result of his decline more than it was due to the growth in the business. The Plaintiff from 2016 began to miss deadlines, and was slower on the phone in

forming and administering the numerous contracts generated by the business. He was less efficient and effective overall. He described himself, not long after the accident, as "foggy" every morning, with the pain as time went on becoming progressively worse. He described 2016 as being "challenging". He was not getting things done as he once did. In turn, he became defensive and sometimes quarrelsome. By late 2016, Kevin Jardine and the Plaintiff agreed that they needed to hire a general manager at Dealer. That would not have been necessary but for the cognitive decline the Plaintiff experienced. Three general managers were hired in succession, in January 2017, November 2017 and August 2018. As Mr. Jardine put it, the search for a general manager began in 2016 because it was obvious the Plaintiff was now in over his head. Mr. Jardine thought that in the longer run, the Plaintiff would be a better fit at Snore MD, and that he was no longer able to run Dealer at the same time. His focus declined, and his productivity declined.

- [30] In my view, the evidence summarized above supports two conclusions. First, the accident was a cause, and probably the dominant cause, of the Plaintiff's cognitive decline, which stemmed from the pain that resulted in disrupted sleep and physical decline. Second, but for the Plaintiff's cognitive decline, he probably would have earned more than he did earn in the years following the accident. He would have been able to maintain a strong hand in Dealer while at the same time performing effectively at Snore MD. He was able to earn as well as he did after the accident only because his work ethic gave him the doggedness to contribute to the two businesses to the extent that he did.
- [31] While the Defendant emphasized the evidence that the Plaintiff, in September 2018, told his family doctor that he thought he may have ADHD, and her assessment note, from October 2018, states, "ADD", with her prescribing medication as a result, that evidence goes no further. It is not enough to negate, or seriously qualify, my finding that the accident itself caused the Plaintiff to experience cognitive decline at work. It cannot alter the conclusions, expressed earlier, that the accident was likely the primary cause of the Plaintiff's diminished performance at work.
- [32] I turn now to the heads of damages in the sequence they were argued at trial. Nonpecuniary Damages (and an Alleged Failure to Mitigate Loss)
- [33] While the Defendant disputed causation for the Plaintiff's diminished cognitive abilities at work, he accepts that the accident injured the Plaintiff so as to permit a claim for nonpecuniary damages.
- [34] Under this head, Mr. Richmond claims \$100,000 and the Defendant submits the correct range is between \$65,000 and \$75,000, less a reduction of between 10% and 20% for the Plaintiff's alleged failure to mitigate.
- [35] I will first address the Defendant's allegation that Mr. Richmond failed to mitigate his pain and suffering. It is common ground that the Defendant bears the onus for that allegation. The threshold question is whether the Plaintiff acted unreasonably. The Defendant says that he did by failing to follow exercise regimes directed or recommended by healthcare

providers. The short answer against that allegation is that the Plaintiff curtailed his recommended exercise only because the resulting pain was worse than the cure. He encountered severe pain when he exercised as recommended. In the result, he largely confined himself to stretching exercises. The Plaintiff's credibility, in testifying that consequential pain has been the only reason he has not exercised robustly, is bolstered by how exceptionally fit the Plaintiff kept himself before the accident. He had been athletic from childhood to the time the accident occurred. In younger days, he had been a competitive water skier. Up to the accident, he was an ardent and fit road biker and mountain biker. He reveled in exercise. I accept that his exercising now less than his health providers have told him to is due solely to the pain he suffers when he does exercise. That cannot constitute an unreasonable behaviour so as to become a failure to mitigate.

- [36] In the result, I do not need to consider the second thing the Defendant would have needed to show in order to establish a failure to mitigate, namely that the Plaintiff's damages would have been reduced by taking the mitigating steps. See, *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.
- [37] Each side cited three decisions of this Court under the guidance provided by the Court of Appeal's well-known reasoning in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. The Plaintiff cited *Olson v. Ironside*, 2012 BCSC 546; *Pham-Fraser v. Smith*, 2010 BCSC 322; and *Zell v. Carvajal*, 2019 BCSC 1979. The Defendant cited *Glass v. Dhaliwal*, 2020 BCSC 186; *Juelfs v. McCue*, 2019 BCSC 1195; and *Cyril v. George*, 2018 BCSC 635. Incidentally, I commend counsel on both sides for each citing only three authorities on this question. Three well-considered judgments, with facts bearing arguable similarity to the facts at bar, are enough. I do not intend to parse in these reasons the six cases placed before me, cited above. I found the facts in the cases the Defendant cited to be somewhat more readily distinguishable than the facts in the Plaintiff's cases, and I award the Plaintiff \$88,000 as nonpecuniary damages.
- Lost Earning Capacity
- [38] For both past and future lost earning capacity claims, a plaintiff must demonstrate a real and substantial possibility of the lost earning capacity as a result of the injuries sustained in the accident. See, for example, *Perren v. Lalari*, 2010 BCCA 140.
- [39] A judge's task in determining lost earning capacity is one of assessing rather than calculating. See *Crimeni v. Chandra*, 2015 BCCA 131 at para. 40. That observation recognizes the degree of judgment called for in this exercise.
- [40] The Defendant's first position was that there is no valid claim for lost earning capacity because Mr. Richmond could not demonstrate that his cognitive decline was caused by the accident. I found against that submission above, under the Causation heading. As his first alternative, when the Defendant focused on the Plaintiff's post-accident earnings record, he argued that the Plaintiff, over time, simply shifted his earnings from one company, Dealer Intelligence, to another, Snore MD. In my view, as touched on in the causation analysis above, that approach is simplistic because it fails to take into account the fact that the

Plaintiff, with no cognitive decline, probably would have been able to work hard in both companies at the same time, and thereby earned significantly more than he has since the accident. The evidence of Mr. Jardine supports that conclusion.

- [41] An assessment of lost earning capacity in the current times, with the pandemic, is particularly nuanced. The Court has to be careful to not debit a defendant for any reduced earnings caused not by an accident, but instead by the direct and indirect impacts of COVID on a plaintiff's earnings, at least from 2020 onward.
- [42] Mr. Richmond's bonus at both companies, has been and continues to be based on the companies' performances. In 2020 and 2021, the earnings of both companies probably were impacted by COVID, particularly the earnings for Dealer Intelligence given the nature of its business.
- [43] Both sides called expert accounting evidence to calculate the Plaintiff's lost earning capacity in order to assist the Court in its assessment. However, despite both experts being properly qualified, and not apparently committing arithmetic error in their work, their evidence was of somewhat limited assistance in this case. They were not in a position to determine to what extent Mr. Jardine has caused, and will cause, Mr. Richmond to earn less as a result of his cognitive issues. Past Lost Earning Capacity
- [44] Mr. Jardine has been, and continues to be, clearly the person in control of all the businesses operated and owned in whole or in part by his holding company, including Dealer Intelligence up to May of 2020, when it amalgamated with another company, and including Snore MD up to the present day. The fact is, as Mr. Jardine stated, that Mr. Richmond, from sometime in 2016, was not the employee and future partner he had demonstrated himself to be from 2013 to 2016. Mr. Richmond could not disagree with that assessment. Mr. Jardine's assessment was realistic. It is probably the case that Mr. Richmond would have earned significantly more than he did, particularly in 2017 and after, had he been able to work more capably, thus better contributing to both companies at the times they were each in operation.
- [45] Mr. Richmond claims \$195,246 for past lost earning capacity, discounted by 15% for negative contingencies to \$165,959.
- [46] In my view, Mr. Richmond should and will receive \$100,000 under this heading. That rough judgment averages to just \$20,000 a year from 2017 to the time of trial in late 2021. Any larger award would, in my view, probably trespass on the likely affect of COVID on the businesses, particularly Dealer Intelligence. COVID notwithstanding, I am of the view, on the other hand, that to award Mr. Richmond any less under this heading would be to undermine the evidence of Mr. Jardine, when there is no basis for doing so. It is most improbable that the Plaintiff's earnings from 2017 to the time of trial did not suffer by something in the range of \$100,000 as a result of his diminished capacity. Mr. Jardine did not measure the Plaintiff's diminished working capacity in precise financial terms. However, in my view, an award of \$100,000 conservatively captures the thrust of his evidence, which I accepted. Future Lost

Earning Capacity

- [47] The evidence permits at least two means of assessment to lead the Court toward a suitable measure of damages under this heading.
- [48] One approach, which counsel for Mr. Richmond advocated, stems from the Plaintiff being passed over for the senior position at Snore MD. There was at least a real and substantial possibility, but for his diminished capacity at work, that Mr. Richmond would have become the head of that operation. The man who was promoted over the Plaintiff for that position earns at present 15% more than Mr. Richmond. Including his wage and bonus, that translates to \$33,000 per year. A conservative estimate of that person's wage and bonus increase from the promotion is \$20,000 a year, for a total difference between the two men's annual earnings of \$53,000. That loss, if it is extended over 10 years, translates to \$488,000 taking into account a present value multiplier. Mr. Richmond is 40 years old. Limiting his loss under this calculation to 10 years would lead to an award of \$488,000
- [49] Counsel for both parties recognized that the uncertainties inherent from the facts of this case lead to the conclusion that it is a case better suited to what is called the capital asset approach, over the so-called earnings approach, for determining the Plaintiff's future lost earning capacity. See *Wong v. Hemmings*, 2012 BCSC 907 at paras. 149-151. A rough measure under the capital asset approach that is sometimes employed is present earnings multiplied by up to two years.
- [50] The Plaintiff on that basis argues for Mr. Richmond's 2021 annual earnings of approximately \$220,000 being multiplied by two years for a total of \$440,000, close to the figure of \$488,342 derived above from Mr. Richmond not getting the top management position at Snore MD.
- [51] The Defendant, employing the same capital asset approach, submits, in the alternative, that the Plaintiff's 2021 earnings should be only \$110,000 for this calculation, and only six months to a year should be the timeframe, leading to an award of between \$55,000 and \$110,000. In my view, those figures are too low for the lost future earning capacity award. As noted earlier, the bonus for senior management is driven by the company's success, not the performance of the individual employee. The more realistic total income for senior management at Snore MD therefore includes the bonus component. \$220,000 is therefore the right annual earnings measure. When looking at Mr. Richmond's outstanding record from the time of joining KPMG in 2008 to sometime in the latter half of 2016, when his pain caught up with him at work, my view is that one and a half years is better than six months to a year as the timeframe to use under the multiple of annual earnings approach. One and a half years times \$220,000 would result in an award of \$330,000. That is the amount I am awarding the Plaintiff for lost future earning capacity. Earlier in this section of the reasons, I set out the Plaintiff's approach to calculating lost future earning capacity which would result in an award of \$488,000. In my view, that award would be too high. Dr. Flintoff, the orthodontist, is optimistic about the treatments she is performing for the Plaintiff. Neither of the Plaintiff's medical experts, Dr. Giantomaso or Dr. Flintoff, had particular expertise

with respect to jaw pain, but I concluded from Dr. Flintoff's evidence as a whole that Mr. Richmond's improved orthodontics are likely to alleviate his pain, thus permitting him to return to his former self at work over the next 5 to 10 years. Taking together the evidence of Mr. Jardine, the Plaintiff, and his two medical expert witnesses, I conclude that \$330,000 is a suitable assessment of Mr. Richmond's lost future earning capacity.

- [52] The two approaches, above, to determining lost future earning capacity, accord with the reasoning of the Court of Appeal in *Rab v. Prescott*, 2021 BCCA 345. In *Rab*, the Court expressed a three-step test for addressing lost future earning capacity: Does the evidence disclose a potential future event that could lead to a loss of capacity? Is there a real and substantial possibility that the future event will cause a pecuniary loss? Finally, what is the value of the possible future loss, including an assessment of the relative likelihood of the possibility occurring? Although my reasoning did not expressly follow the clear path expressed in *Rab*, the questions posed from *Rab* are addressed in substance at paras. 47-51 above. *Cost of Future Care*
- [53] Under this heading, Mr. Richmond claims \$40,000. The Defendant submits that the award should be \$11,280.
- [54] The difficulty inherent in determining an appropriate award for future care costs is no less than it is in determining the measure for lost future earning capacity. Both are forward-looking exercises, and are therefore laden with guesswork no matter how much we, as judges, endeavor to articulate legal criteria to guide the courts in the process. A useful summary of the applicable criteria that have been formulated is seen in *Abraha v. Suri*, 2019 BCSC 1855 at para. 63: · Providing adequate damages for future care for an injured plaintiff is of paramount importance. · The purpose of such an award is to provide for assistance directly related to the injuries caused by the accident. · The test for determining an appropriate award is an objective one based on medical evidence. · The focus should be on the plaintiff with fairness to the other party being achieved by ensuring that the expenses are legitimate and justifiable. · The plaintiff needs to show: (a) a medical justification for the items claimed; and (b) that the amount claimed is reasonable. · "Medical justification" is broader than "medically necessary". · Specific items of future care need not be expressly approved by medical experts; it is sufficient if the totality of the evidence supports the award for specific items. · Common sense should be employed in this assessment. · No award should be included for items that would be incurred in the absence of the accident.
- [55] Two of the criteria from *Abraha*, as seen above, are that the cost must be medically justified, although it need not be medically necessary, and that expert evidence is not essential to support the cost claim, so long as the evidence as a whole supports it. In *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351, at paras. 29-30, the Court said that the treatments giving rise to the cost of future care should be "reasonably necessary" to preserve or promote a plaintiff's health.

- [56] The Plaintiff estimates his chiropractic therapy costs, discounted, to age 70 will be \$14,000. Massage therapy on his jaw to age 70 is estimated at a discounted cost of \$21,000. Botox injections to relieve pain, to age 70, are estimated to cost between \$128,000 and \$213,000.
- [57] Mr. Richmond explains his claim being only \$40,000 at para. 139 of his counsel's argument: Given the Plaintiff's guarded prognosis that he will experience chronic pain indefinitely and considering the contingency that Mr. Richmond will reduce the frequency of these treatments, the Plaintiff submits that a global assessment of \$40,000 is appropriate.
- [58] The Defendant's position of \$11,280 includes three components: active rehabilitation, costed at \$480, Botox at \$7,200, and chiropractic therapy at \$3,600.
- [59] I am awarding the Plaintiff \$25,000 for the cost of future care. His orthodontist is of the opinion that, "Mr. Richmond's prognosis from an orthodontic standpoint is fair to good". The physiatrist called by Mr. Richmond to give opinion evidence said that Mr. Richmond will, "likely continue to experience chronic pain to some degree long term" in his upper back and neck area. Mr. Richmond's own testimony leads me to conclude that most of his pain and related debilitation have been from the injury to his jaw area, where, as noted above, the prognosis, at least from an orthodontic standpoint, is fair to good.
- [60] For chiropractic therapy, Mr. Richmond will receive \$6,000. For massage therapy for his jaw, he will receive \$4,000. For Botox injections, he will receive \$15,000. Loss of Handyman Capacity
- [61] Mr. Richmond claims \$15,000 under this heading. The case law recognizes this head of damages. It is akin to a claim for loss of housekeeping capacity. See, for example, *Palangio v. Tso*, 2017 BCSC 1573 at paras. 315-316. Claims under both of those headings can instead be addressed in the award for nonpecuniary damages. See *Harris v. Zabaras*, 2010 BCSC 97 at para. 122, where the Court held that when loss of homemaking capacity cannot be easily quantified, it may be preferable to take such a claim into account in the nonpecuniary damages award.
- [62] Mr. Richmond's claim under this heading is based on the fact that he needed to hire workers to build, or help build, a retaining wall, to renovate a deck, and to paint the house. No particulars of the labour costs were tendered. Since the accident, the Richmonds have had a second son. Their boys now are about eight and four. Mr. Richmond, who is now 40, continues to work very long hours. To the extent his aches and pains from the accident, rather than his children and his work, have necessitated hiring others to help with projects around the home, I am taking (I have taken) this handyman claim into account in determining the nonpecuniary damages award. A separate claim under this heading is not allowed. Special Expenses
- [63] These have been agreed at \$4,381. Summary

[64] Mr. Richmond is entitled to damages as follows: Nonpecuniary damages \$88,000 Past lost earning capacity \$100,000 Future lost earning capacity \$330,000 Cost of future care \$25,000 Loss of handyman capacity \$0 Special expenses (agreed) \$4,381

[65] Costs can be spoken to if necessary.

[66] I thank counsel from both sides for their helpful and capable submissions. "Macintosh J."

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