

CANADA / JUDGMENT

Sidhu v. Hiebert

2023 BCSC 813

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 813 Sidhu v. Hiebert

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sidhu v. Hiebert,

2023 BCSC 813

Date: 20230512

Docket: M082472

Registry: Vancouver

Between:

Arshdeep Singh Sidhu

Plaintiff

And:

Jan Abram Hiebert, Balwinder Kaur Sidhu, Rajvinder Singh Sidhu,

Surinder Singh Rattan, Nissan Canada Inc., Nissan Motor Co., Ltd.,

Nissan North America, Inc., Abbotsford Nissan Ltd.

Defendants

And:

Insurance Corporation of British Columbia, Jan Abram Hiebert,

Balwinder Kaur Sidhu, Rajvinder Singh Sidhu, Surinder Singh Rattan,

Nissan Canada Inc., Nissan Motor Co., Ltd.,

Nissan North America, Inc. and Abbotsford Nissan Ltd.

Third Parties

Before: The Honourable Madam Justice Forth

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

March 22, 23, 27, and 28,

and May 8, 2023

Place and Date of Judgment:

Vancouver, B.C.

May 12, 2023

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Introduction

[1] This is a continuation of a trial to address certain deferred issues (the "Deferred Issues") as described in my trial reasons, indexed at 2022 BCSC 1024 (the "Trial Reasons"). The Deferred Issues being addressed are:

1. The net present value of the future cost of care award, considering the Court's assessment of those damages, and the finding with respect to the plaintiff's life expectancy;

2. The deductibility of benefits from Choices in Supports for Independent Living ("CSIL") and the Provincial Respiratory Outreach Program ("PROP");
 3. The quantum of the plaintiff's loss of future earning capacity award, considering the personal living expense deductions in the "lost years", and the value of the plaintiff's interdependency claim; and
 4. The quantum of the plaintiff's loss of future earning capacity award after considering the plaintiff's entitlement to receive future disability benefits.
- [2] By agreement, entitlement to, and the quantum of income tax gross-up, management fees, and costs, will be addressed at a further continuation of the trial scheduled for May 29, 2023, for five days.
- [3] The plaintiff was nine years old when he was rendered a ventilator-dependent quadriplegic as a result of a motor vehicle collision on March 30, 2008. He has lived with his parents since that collision. The Trial Reasons provide findings on liability and a number of heads of damages.
- [4] Since the Sidhu defendants and ICBC took the same position, I will primarily refer to them as the "defendants" throughout these reasons. Although the Rattan defendant appeared at some of the continuation of the trial, he made no submissions.
- [5] The parties were able to agree on the following matters:
1. The correct valuation date for all heads of damages is June 14, 2021, the date of the commencement of the trial;
 2. The present value of the cost of future care of the items set out in Appendix A of the Trial Reasons totals \$13,098,885;
 3. The plaintiff has received the sum of \$436,990 in CSIL benefits from June 14, 2021 to March 22, 2023. This sum will be taken into account in assessing the plaintiff's cost of future care claim;
 4. The plaintiff currently receives \$20,875 per month from CSIL;
 5. The plaintiff has received the sum of \$31,820 in persons with disability ("PWD") benefits from June 14, 2021 to March 22, 2023. This sum will be taken into account in assessing the plaintiff's loss of future earnings award; and
 6. The plaintiff currently receives the sum of \$1,450.50 per month in PWD benefits.
- [6] There was some confusion as to whether my Trial Reasons had left open the plaintiff's loss of future earning capacity award assessment. The Trial Reasons set out the plaintiff's loss of future earning capacity at \$2,212,229, assuming a normal life expectancy: Trial Reasons at para. 800. That is the amount to be used, and it is not open to being revisited at the continuation of the trial.

Issues

[7] I will address the following issues in these reasons:

1. What is the nature of the CSIL benefits, and will they continue in the future after the plaintiff has received monies from this judgment?
2. What is the nature of the PROP benefits, and will they continue in the future after the plaintiff has received monies from this judgment?
3. Will the PWD benefits continue in the future after the plaintiff has received monies from this judgment?
4. What is the appropriate percentage that should be applied to the "lost years" deduction for personal living expenses?
5. What is the quantum of the claim for loss of interdependency?
6. What is the award for the plaintiff's loss of future earning capacity?

[8] Before addressing each of these issues, it is important to understand some additional background information regarding the plaintiff's use of settlement monies he received from Nissan.

[9] The plaintiff entered into a "BC Ferries" type settlement agreement in July 2020 with the Nissan entities named as defendants in the proceeding (the "Nissan Settlement"). At the time of the Nissan Settlement, the plaintiff disclosed the Minutes of Settlement dated July 28, 2020, and a Schedule "A", entitled Settlement Agreement and Covenant Not to Sue, with the amount of the settlement redacted.

[10] In February 2023, the Sidhu defendants and ICBC applied for disclosure of the settlement amount and all documents relating to the receipt and distribution of the settlement amount. On February 24, 2023, I issued oral reasons, indexed at 2023 BCSC 436, ordering the disclosure of the settlement amount to the parties, and the production of documents requested. I further ordered that the settlement amount not be disclosed to the public. As a result, I will not set out the amount that was paid in the settlement, but will only refer to it as the "Settlement Amount" in these reasons.

[11] The plaintiff entered into a trust agreement dated December 22, 2020 (the "Trust"). The plaintiff was the settlor of the Trust. His brother Balraj Singh Sidhu, and Baldev Singh Gill, were named as trustees. The Trust is a discretionary, irrevocable trust, meaning the plaintiff cannot compel the trustees to pay money to him, or on his behalf: *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at para. 39. On the same day, the plaintiff exercised a Power of Appointment granted to him under the Trust.

- [12] On December 22, 2020, the plaintiff gifted a portion of the Settlement Amount (the "Monies") to the trustees under the Trust. The plaintiff and the trustees under the Trust directed that the Monies be placed in a TD bank account in the name of the Trust.
- [13] The Trust has not disbursed any of the Monies to the plaintiff. The plaintiff advised both CSIL and PWD of the Trust. These entities agreed to continue to pay the monthly benefits to the plaintiff after his receipt of the Settlement Amount. The plaintiff says that he deposited the Monies into the Trust, with no money being distributed from the Trust, until the final judgment on damages had been reached. At issue is whether the benefits currently being received by the plaintiff from CSIL, PROP, and PWD, will continue to be received by the plaintiff after the plaintiff receives the judgment amount.

Issue 1: What is the Nature of the CSIL Benefits and Will They Continue in the Future After the Plaintiff has Received Monies From This Judgment?

Relevant Facts

- [14] The parties agree on the following respecting CSIL, and I quote from paras. 16 to 18 of the Agreed Statement of Facts:

16. The B.C. Government support website for [CSIL] describes the program as follows:

[CSIL] is a self-directed option for eligible home support clients. CSIL clients receive funds directly from their local health authority to purchase their own home support services. Clients become employers who manage all aspects of their home support, from hiring and supervising staff to overseeing how CSIL funds are spent.

Health authorities provide funding for services to the CSIL employer, as outlined in an agreement between the health authority and the CSIL employer, who then directly employs their own care providers. Health authorities determine the amount of funds based on assessment of need and the CSIL Categories of Need Guidelines at a minimum hourly rate

If you receive [CSIL] services, you will pay a daily rate based on your income (and the income of your spouse, if applicable). Your date rate is calculated by multiplying your "remaining annual income" (as defined in the Continuing Care Fees Regulation) by 0.00138889.

17. Eligibility for CSIL is outline in the Ministry of Health, Home and Community Care Policy Manual, Chapter 4, Section 4.C.2:

Intent

To describe health authorities' responsibilities in determining the appropriate CSIL services to meet the client's need.

Policy

Health authorities are responsible for determining eligibility for CSIL and the appropriate funding to meet the client's needs.

Service Needs Determination

Health authorities can approve CSIL for a client who has:

1. been assessed as requiring home support services as part of their care plan;
2. assessed needs that can be met within CSIL, within available resources;
3. been assessed as having interRAI HC ADL Long Form score of six or greater and a MAPLe score of three or greater, and requests CSIL service;
4. been assessed as having high physical care needs (HPCN), a physical disability, and is medically stable;
5. agreed to pay the assessed client rate (see Policy 7.B.2, Client Rates for Specific Services);
6. can safely coordinate and manage CSIL services or has a client support group or a CSIL representative acting as a CSIL employer;
7. cognitive impairment that does not preclude CSIL eligibility, if the individual also presents with at least one of the above factors that comprises HPCNs and meets the eligibility requirements for CSIL; and
8. in most CSIL cases, it is likely that the physical disability is permanent, non-treatable or minimally treatable, and progressive. Diagnosis by itself does not constitute a disability, rather the definition is tied to functionality.

Exceptions

Health Authorities can approve CSIL for a client who does not meet defined eligibility criteria in exceptional circumstances, as per CSIL Eligibility Exception Criteria Guidelines.

A copy of the Ministry of Health, Home and Community Care Policy Manual, Chapter 4, Section 4.C.2. is attached at Appendix "G".

18. The Fraser Health Authority advised the plaintiff in a letter dated 24 July 2020 that "a CSIL client would remain eligible for CSIL funding until they are able to directly or indirectly access the funds in their settlement/award/trust and use it for care costs. At that time, we would calculate their entitlement to partial CSIL funding based on what is available to them monthly." A copy of an email dated 24 July 2020 from Tasha Coulter (senior legal counsel at Fraser Health Authority) to plaintiff's counsel is attached at Appendix "H".

[15] Section 2.B of the Ministry of Health, Home and Community Care Policy Manual [the "Manual"] provides:

Third Party Liability

Where the health condition necessitating home and community care services is due to an illness or injury for which a third party, such as the Insurance Corporation of British Columbia or WorkSafeBC, has been found to be liable through a legal proceeding, the individual is not eligible to receive home and community care services (see Policy 7.B.1, Assessment of Client Rates).

It is the responsibility of the individual to inform the health authority of the existence of, or possibility of, a third party liability claim. The individual should be referred to the third party to establish responsibility for funding of services.

Where the individual has been declined by the third party, the individual must provide written documentation from the agency indicating their reasons for refusal of the claim.

If the need for service becomes urgent or critical and the individual is otherwise eligible for home and community care services, the health authority may provide the necessary service on an interim basis until liability has been established and a liability settlement or award has been made.

Once the funds for future care costs received in the settlement or award have been fully exhausted, the individual may apply for home and community care services.

[16] Section 7.B.1 of the Manual applies to help set a client's rate for health care services. It provides:

Third Party Liability

When an individual who has expended their future care costs originating from a third party liability (negligence) award or settlement is applying for services, health authorities must consider any funding remaining that was awarded for damages other than future care, such as wage loss or for pain and suffering, as income for purposes of calculating the client rate. Unlike future care funding, this source of income does not have to be exhausted before the client is eligible for services (see Policy 2.B, Eligibility).

[17] Plaintiff's counsel, Mr. Slater, K.C., and the Fraser Health Authority ("FHA"), the health authority within which the plaintiff resides, engaged in communications prior to the plaintiff entering into the Nissan Settlement, in order to determine what would happen to the CSIL payments if a settlement was reached with one of the defendants. On April 9, 2020, Mr. Slater emailed Kelly Millar of the FHA and proposed three options for the Province to consider. The third option notes:

3. My alternative proposal that if we settle with Nissan (the "Settling Defendant"), CSIL will continue the present payments until the litigation is finally concluded against the other defendants (the "Remaining Defendants") on the basis that the Province confirms the settlement funds received from the Settling Defendant are not "monies received" under the legislation. This would allow us to consider settling with Nissan and continuing the litigation

against the Remaining Defendants, including Mr. and Mrs. Sidhu. The litigation would be concluded when all proceedings, including execution proceedings on the judgment against the Remaining Defendants, was finally concluded. The advantage of this option in this case is that Arshdeep would continue to receive the current CSIL payments. He could use the settlement funds to provide more care than is presently funded by CSIL. The CSIL payments would continue until such time as the litigation against the Remaining Defendants was finally concluded.

- [18] On the morning of July 24, 2020, Tasha Coulter, FHA Senior Legal Counsel, circulated a memorandum to Mr. Slater and Nissan's counsel setting out the FHA's position on the CSIL program and third-party liability settlements (the "Memorandum"). The salient portions of the Memorandum provide:

The Ministry Policy seeks to ensure 100% of third party funding for future care be exhausted, prior to public funds being made available. However, if strictly interpreted, this could result in an individual with a monthly settlement lower than their assessed needs becoming ineligible for CSIL benefits. This is because they have additional funds coming each month, and so have not "fully exhausted" their entire settlement. In order to stay true to the presumed intent of the policy while dealing with the reality of monthly settlements, Fraser Health CSIL program will implement the following approach, effective immediately:

1. Client eligibility and the calculation of the monthly CSIL entitlement will be calculated in accordance with the Ministry Policy and normal Fraser Health practice.
2. Once the amount of monthly CSIL entitlement has been determined, the amount will be reduced by the amount of any settlement of future care costs available to the client per month.
3. Clients who have monthly settlement amounts lower than their calculated CSIL monthly entitlement will remain eligible for partial CSIL funding to top them up to the assessed CSIL entitlement.
4. Clients who have settlement amounts higher than their calculated CSIL monthly entitlement will not be eligible for CSIL funding.
5. The amount of partial CSIL funding will be calculated based on 100% of the client's monthly settlement. Clients must still fully exhaust their settlement amount on a monthly basis.

As with all CSIL clients, in order to be eligible for partial CSIL payments, the client must abide by all requirements of the CSIL program, including providing:

- All necessary documentation as requested by Fraser Health, in order to establish CSIL entitlement and funding level, including their monthly cost of future care settlement amount.

· Timely notification and documentation on any changes to the client's circumstances that could affect eligibility for the CSIL Program, including changes to the monthly amount of the structured settlement. Fraser Health will re-assess eligibility for CSIL funding in light of any changes. The client will participate in a funding review at least annually and more often if necessary as determined by Fraser Health.

[19] On July 24, 2020, after the Memorandum was circulated, Mr. Slater emailed Ms. Coulter asking: "What about a discretionary trust? And what if we settled with Nissan and placed the funds in trust until the litigation was concluded against the remaining defendants?"

[20] Ms. Coulter provided two emails on July 24, 2020, responding to Mr. Slater's questions. The first email at 1:27 p.m. includes:

If your client receives money from a third party liability award/settlement for future care costs (regardless of how the financial instrument is structured ie: structured settlement, discretionary trust), the monthly amount available to your client for future care costs would be subtracted from the CSIL entitlement that would have been available if there was no third party settlement, 100% of the monthly amount available to the client from the future care costs portion of the settlement/award/trust must be used before partial CSIL funding would be available. (This is set out in greater detail in the attached Memo. If there is any inconsistency in what I have stated above and the Memo, the Memo takes precedence).

[21] In the next email of July 24, 2020 at 3:47 p.m., Ms. Coulter states:

I understand from Kelly that you have basically one remaining question, which is how the Health Authority would handle a situation where one defendant settles, and the funds are held in trust pending resolution of the litigation against the remaining defendants.

I have spoke to Rod and confirm that, as contemplated by the Ministry's Home and Community Care Manual Policy (Section 2.B, p.5 of 5), a CSIL client would remain eligible for CSIL funding until they are able to directly or indirectly access the funds in their settlement/award/trust and use it for care costs. At that point, we would calculate their entitlement to partial CSIL funding based on what is available to them monthly.

I'm hoping this is straightforward for your settlement discussions now: If the client has money available from a third party for future care costs, CSIL payments will be reduced by a commensurate amount. This can be calculated monthly for clients who receive a monthly amount.

[22] During the trial, Roderick MacDonald, the regional manager in the FHA responsible for CSIL, testified. At the time of trial, none of the defendants were aware that a portion of the Settlement Amount had been placed in a discretionary trust. In the course of Mr. MacDonald's testimony, the issue of the preparation of a memorandum dated August 20, 2020, came up. This memorandum is identical to the Memorandum, except for the addition of the following paragraph:

In some cases, there is an interim period when third party funds for future care costs have been paid into trust with a lawyer, but have not yet been distributed to a client (such that the client is unable to access the funds to use for care costs). As contemplated by the Ministry's Home and Community Care Manual Policy (Section 2.B, p.5 of 5), a CSIL client would remain eligible for CSIL funding until they are able to access (directly or indirectly) the funds in their settlement/award/trust and use it for care costs. At that point, we would calculate their entitlement as per above.

- [23] CSIL is a Ministry of Health program offered through the Home and Community Care program, which is funded by the BC government. The Province has enacted legislation, the Continuing Care Act, R.S.B.C. 1996, c. 70, to provide publicly funded benefits for the personal care of individuals with disabilities. It exists in all of the health authorities. At the time of trial, FHA was funding about 220 to 250 individuals through CSIL.
- [24] As Mr. MacDonald described, CSIL is not a 24/7 program, in that it does not provide hourly funding for 24 hours a day. The upper limit of funding is left to the health authorities to interpret.
- [25] When the plaintiff started in the program, when he turned 19, he received funding based on 420 hours per month, which was the Ministry of Health guideline in place at the time. As a result of advocacy by the Sidhu family, the hours were increased to 545 hours per month. At the time of trial, the plaintiff was receiving funding of 611 hours per month. The time spent by Mr. Sidhu, the plaintiff's father, in caring for the plaintiff, is not covered by the CSIL program.
- [26] Mr. MacDonald testified to his understanding of what would happen if a client has received a settlement, or a court award, of damages. He referenced section 2.B. of the Manual. He understood that if a client was involved in an ongoing court case, the CSIL funding would remain the responsibility of the health authority until a settlement was finalized, and the actual amount of cost of future care available to the client was known.
- [27] Mr. MacDonald agreed that if someone received an award of a settlement for cost of future care and "burn[ed] through it over time", the client would be fully eligible for CSIL funding again.
- [28] Mr. MacDonald testified that the rationale for the Memorandum was that the policy in the Manual did not address structured settlements, only lump sum amounts. The Memorandum was based on the presumed intention that the CSIL policy is to ensure that eligibility for CSIL is equitable and reasonable. Mr. MacDonald gave the example that if a CSIL client's care needs are \$10,000 per month, and they receive \$5,000 from their settlement, the client will still need \$5,000 worth of care in order to be safely and appropriately cared for in the community. As a result, CSIL will top up care costs by funding another \$5,000. He explained that the person is to use up their cost of future care first, and then CSIL will augment that.

[29] Mr. MacDonald testified that the critical point is when the future care settlement becomes available to the client. He explained that he cannot assess a client's needs until he knows exactly what dollar amounts are available to the client.

[30] During the cross-examination of Mr. MacDonald, the following exchanges took place:

Q I'm looking at the fourth paragraph on that page, and it's the line that reads:

the health authority may provide the necessary service on an interim basis until liability has been established and a liability settlement or award has been made.

Now, can you tell the Court how the Fraser Health Authority interprets and applies those words from the policy?

A The way I interpret it is that we will continue to provide services and that the individual, the client, is eligible - fully eligible for services until the settlement is finalized and an award is made available to the client.

Q Have you given any thought to the possibility that a client may deliberately shelter all or a portion of a settlement in an annuity or a trust so that they can maintain public funding for their personal care services?

A Have I given it thought. I haven't a full understanding of how those things work. My presumption is that the parties are acting in good faith and the policy is clear that costs of future care settlements, that they have to be exhausted. I didn't - I don't have any knowledge of how, you know, some kind of legal haven would be available to someone.

A We don't tell the person what to do with their cost of future care settlement. The fact that it is a cost of future care settlement I assume means that it must go to cost - it must go to future care. That the person is not free to use it for other things. But that is my layman's understanding of that process.

A I don't believe - I don't believe we have jurisdiction over the annuity in any way to my knowledge. We do have a right to know about whatever is deemed as cost of future care.

Q So what I think you're saying is that the health authority and the Ministry will not compel a client to ensure that a certain sum of money is generated from the trust or the annuity to pay that person's cost of care?

A I cannot speak for the Ministry of Health. But no, I would not impose per se. I would - assuming that all players are acting in good faith, that the result would be a cost of future care settlement that is transparent and that we would work with that. That is my guiding assumption.

A I would insist on knowing about all aspects of the settlement that are relevant to eligibility of CSIL funding, the CSIL program, whether that be the client per diem or the amount of monthly funding.

Legal Principles

- [31] The Supreme Court of Canada, in *M.B. v. British Columbia*, 2003 SCC 53, addressed the issue of when public welfare benefits are treated as a deduction from a tort award. Chief Justice McLachlin reasoned that because social assistance is based on need and comes out of public funds, and given that taxpayers contribute to those funds in the belief they will be used for legitimate purposes, such as relieving genuine need, it would be unfair to allow the plaintiff to obtain public funding and then receive a duplicate payment from a tort award: at para. 33. The Court cited public policy rationale in other jurisdictions in favour of the deductibility of social assistance, on the basis that allowing an injured person to have the same need met twice at the expense of both taxpayers and insurers, is both inequitable and wasteful: at paras. 40-43.
- [32] If there exists the risk of a loss of a governmental program, that can be dealt with by way of a contingency, as described in *Gilbert v. Bottle*, 2011 BCSC 1389:
- [252] Where future care costs will be fully met by a social security program they are not recoverable through an award of damages. This is so because they are not reasonably required to restore the plaintiff to his or her pre-accident state. The risk that access to public funds may be lost in future is, however, a proper consideration with respect to contingency adjustment. In this regard, the court must assess the possibility that anticipated future care costs may turn out to be more or less than presently contemplated and adjust the award accordingly: *Krangle (Guardian ad litem of); Boren v. Vancouver Resource Society for the Physically Disabled*, 2003 BCCA 388; *Morrison (Committee of) v. Cormier Vegetation Control Ltd.*, [1998] B.C.J. No. 3279 (S.C.).
- [33] The Court of Appeal in *Fullerton (Guardian ad litem of) v. Delair*, 2006 BCCA 339 [Fullerton CA] dealt with the provision of a discretionary government benefit scheme known as the At Home Program for a catastrophically injured plaintiff. The Court of Appeal overturned the trial judge's decision that the defendants did not have to pay for the services the government makes available to plaintiffs, as they are not costs the plaintiffs must bear: Fullerton CA at para. 3. In examining the At Home Program, the Court noted:
- [6] It is my opinion that, on a proper understanding of the At Home Program, the government benefit is only available to the plaintiffs if no compensation is given for the cost of the services in question. So entitlement to the benefit depends on what the court does in the tort action. Denial of compensation effectively shifts the burden from the wrongdoers to the public on the basis chosen by the judge, and, because the program has limited funding and a significant waiting list, it deprives other families of state assisted care.
- [34] The Court of Appeal explained why the costs of the At Home Program should not be factored in:

- [28] The At Home Program is not mandated by legislation, unlike the GAIN welfare scheme. It is discretionary in nature and subject to competing budget allocations. As such, it is my opinion that it should be for the government, not the court, to decide who gets the benefit. By denying recovery for costs of the care provided by the At Home Program, the judge effectively created the condition for continued dependence on the program.
- [29] I think it is too glib for the defendants to say that the plaintiffs have suffered no loss. It ignores the deeper question as to how the tort system should interact with government welfare schemes like the At Home Program. Which should come first in the analysis: tort assessment or availability of the program? The solution to this chicken and egg conundrum lies, I think, in appreciating the separate roles of the court and government.
- [30] On one hand, the court determines on negligence principles whether the wrongful acts caused the plaintiff to need the care in question, and, in the ordinary course, the cost of care is quantified and an award follows.
- [31] On the other hand, the government establishes various schemes to relieve the suffering of needy members of society and sets rules for entitlement. Where, as here, the government designs the scheme for the benefit of those who do not have access to tort compensation, or who, like the plaintiffs, are awaiting the outcome of litigation, the court should respect the rules and make an award for costs in the ordinary way.
- [32] Such an outcome puts the burden of the loss on the wrongdoers and avoids depriving families on the waiting list who have no tort claim.
- [33] In the result, I would set aside the award for cost of future care and refer the matter to the Supreme Court for reassessment in accordance with these reasons.
- [35] In 2018, the Court of Appeal arrived at the conclusion that a plaintiff who became a paraplegic in a motor vehicle accident, and was receiving home support care from the Alberta Health Services ("AHS"), should have her benefits deducted from her award for future care costs: *Warick v. Diwell*, 2018 BCCA 53. The trial judge applied a 60 percent discount on the award of future care costs for the increases in care that she would likely receive from AHS as the plaintiff's needs increased: *Warick* at para. 62. The Court of Appeal found that the benefits were not discretionary and there was no evidence that tort compensation to the plaintiff would affect her eligibility or entitlement to receive the home care services provided by AHS: *Warick* at paras. 67-68. As such, it was found that the trial judge made no error: *Warick* at para. 74
- [36] There are conflicting authorities on the issue of whose onus it is to show whether a benefit will or will not continue.
- [37] In general, the plaintiff bears the onus of proving their damages: *Jackson v. Mongrain*, 2010 BCSC 1866 at para. 4; *Gill v. Lai*, 2019 BCCA 103 at para. 11.

- [38] In *Strachan v. Reynolds et al*, 2006 BCSC 362, Justice Hood commented on the onus of the parties to adduce evidence on the receipt of government benefits:
- [24] In my Reasons for Judgment I had the following to say about the availability of government funding:
- [636] At the present time Travis' nursing care is provided through government funding. Both Ms. Landy and Ms. Mageau said that such funding would cease if Travis had other resources provided by judgment of the Court. Ms. Mageau's recommendation was therefore made on the basis that government benefits would not continue.
- [643] I need not deal with the At Home Program issue. I am satisfied that there is no guarantee that the government may not terminate or cut back public funds. In this regard I agree with Mr. Smith that it is for the defendants to establish that in effect the public funds are guarantees. It is not for the plaintiffs to "prove the negative". In any event, the Court simply cannot assume the funds are available.
- ...
- [650] The onus is on the defendants to satisfy me that even after Judgment comes down, Travis will be entitled to funds through the At Home Program, the Palliative Care Program and through Canuck Place, and over his estimated ten year life span. The defendants have not been able to satisfy me that this is the case. Canuck Place provides free services within their discretion. Travis is not eligible under the Palliative Care Program, and under the Home Program, accordingly to Ms. Landy, Travis will not be entitled to any benefits in light of his award, and according to Ms. Mageau, it is a policy decision. Both are probably giving hearsay evidence.
- [651] It is never easy to assess damages in cases where the injuries are so catastrophic, where the injured party's condition will deteriorate so that his condition one month may be dramatically different from his condition on the next month, when there are so many variables to consider, some of which may not be predictable or capable of precise determination, while others are controlled entirely by third parties. In this case, Mr. Samtani's double recovery argument is simply a matter of evidence. The defendants have not established that the funds will always be available and that there, in fact, will be double recovery.
- [Emphasis in original].
- [39] Justice Hood was dealing with an application to re-open both the evidence and argument in respect to the issue of cost of future care, including an argument to reduce the plaintiff's future care costs to account for the past and future benefits provided by the Ministry for Children and Family Development. Justice Hood allowed the application for the past benefits to be made, but rejected any re-opening for future benefits.

- [40] I note that when this decision was pronounced, the trial decision in Fullerton, which allowed the deduction for the At Home Program costs, had not yet been successfully appealed. Justice Hood commented on that issue:
- [36] As Ms. Harper pointed out, there are now two possible scenarios dealing with the costs of future care and government benefits in these cases. In the first scenario, the evidence is that the government will probably continue to fund the care and benefits. In that case the judge makes no award on the assumption that the government will provide the care and benefits. Fullerton is an example. In the second scenario, which I viewed as the better one, the Court awards all of the future care costs against the tortfeasor. The effect of the second scenario is that the government funding will terminate, leaving badly needed funds available to other children and their families who do not have a Judgment to rely on. This is MCFD's policy and practise. If MCFD continued to pay benefits in the present circumstance, there would be no advantage to the Plaintiffs because of the doctrine of double recovery.
- [37] I concluded also that the only way that the payment of the funds required by Travis could be guaranteed, or secured, was to order the tortfeasor to pay them. It is easy to conclude that government funding will always be there in good times; but it is not so in hard times; witness the drastic and unforeseen cuts to our healthcare system, which one can only appreciate by experiencing the impact of those cuts. This issue seems to have been resolved by the Supreme Court of Canada in Krangle, (*infra*), where it was held that the possibility that government funding may not always be available may be met with a contingency allowance.
- [41] In *Shongu v. Jing*, 2016 BCSC 901, the plaintiff became eligible and began to receive a disability pension from the province of BC. The Court noted at para. 198: "it is settled law that the amounts received by Mr. Shongu must be deducted from any claim he has for loss of earning capacity, past or future": citing *M.B. v. British Columbia*, 2003 SCC 53. The Court went on to state:
- [202] In this case, Mr. Shongu is currently entitled to the benefits. In my view, he has the onus of proving that he will no longer be entitled to the benefits after receipt of the damages awarded to him. However, I have concluded that he has met that onus.
- [42] The plaintiff submits the reasoning of the onus of the deductibility of Part 7 benefits, payable under the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, should also be applied in these circumstances. In *Jurczak v. Mauro*, 2013 BCSC 1370, Justice Silverman held:
- [17] The defendant bears the onus of proving that a deduction should be made. Uncertainty as to whether benefits will be paid must be resolved in favour of the plaintiff: *Lynn v. Pearson*, 1998 CanLII 5518 (BC CA) at para. 18.
- [43] Recently in *Abkari v. Trac*, 2023 BCSC 397, Justice Lamb held, at para. 13, that the defendant bears the burden of proving that the plaintiff is entitled to receive Part 7 benefits which they seek to deduct.

Position of the Parties

Position of the Plaintiff

- [44] The plaintiff's position is that his entitlement for funding under the CSIL program will cease once this Court pronounces judgment quantifying the present value of his future cost of care. He argues that the policy set out in the Manual supports a two-step process:
- a) once an order finding liability for damages has been pronounced by the Court, the individual becomes ineligible to receive home and community care services;
 - b) The health authority has the discretion to continue to provide necessary home and community care services on an interim basis until an award for damages is made.
- [45] The plaintiff submits that his continuing to receive funding after the Nissan Settlement, was on an interim discretionary basis, contingent on a final determination of damages. Once an award for damages is pronounced, this interim funding will cease.
- [46] The plaintiff argues that the reasoning behind the principle that the Court will make a deduction only when absolutely certain a benefit will continue, is three-fold:
- the Court will not risk undercompensating the plaintiff by speculating merely because the defendant raises the specter of double recovery;
 - the Court will not usurp the government's discretion to decide who is entitled to receive benefits; and
 - the Court will not make a deduction where funding is uncertain, thereby forcing the plaintiff into continued dependence on the very uncertain government or charitable funding in question.
- [47] The plaintiff's position is that where the funding is discretionary or may cease, the onus is on the defendant that seeks deductions related to that funding, to prove that the funding will continue after the award of damages.

Position of the Defendants

- [48] The defendants' position is that the plaintiff could structure their award in a way that intentionally continues eligibility for CSIL, resulting in double recovery. There is nothing that prevents the plaintiff from making similar trust arrangements, like the Trust, with any further monies the plaintiff receives following the finalization of the judgment award. The plaintiff is free to do with the fruits of his judgment what he wishes, including placing it in a discretionary trust. In the absence of any evidence of an intention to do anything other than what he did with the Nissan Settlement, the Court can be satisfied that the plaintiff will continue to receive public funding from CSIL in the future. In the words of the defendants, the "past predicts the future" and the most likely scenario is that the plaintiff, on receipt of the judgement award, will utilize a similar trust structure to preserve the public funding he currently receives and for which he remains eligible.

- [49] In order to uphold the rule against double recovery, the Court should reduce the award for the future costs of care by the past and future values of the CSIL benefits. The defendants submit that the value of the past CSIL benefits, received between the start of trial and the hearing of this continuation, are \$436,990, and the present value of the future CSIL benefits, from the date of the continuation onwards, is \$4,789,560, based on the current monthly amount of \$20,875. They seek to have the total sum of these amounts, which total \$5,226,550, deducted from the present value award for the future cost of care.
- [50] The defendants argue that since the plaintiff is currently eligible and continues to receive CSIL benefits, the onus is on him to show he will stop receiving benefits under this program after the Court's judgment is awarded.

Analysis

[51] I will consider three issues:

- Are the CSIL benefits discretionary or mandatory?
- Whose onus is it to establish whether the CSIL benefits will continue?
- What impact does the fact that the plaintiff established a discretionary trust after the receipt of the Nissan Settlement have on the future continuance of the CSIL benefits?

Are the CSIL benefits discretionary or mandatory?

- [52] I am persuaded that the decision to provide CSIL funding is a discretionary one, and not one that is mandated by legislation. The Manual uses discretionary language, such as "can approve", in section 4.C.2, and the decision is a discretionary one of the health authorities. In addition, the Manual specifically states that funding will end once a third party has been found liable in a legal proceeding, and a client is no longer eligible for CSIL benefits until the funds for future care costs received by a third party have been fully exhausted. This is consistent with Mr. MacDonald's testimony at trial.
- [53] It is also consistent with the statement of Ms. Coulter, in which she states: "100 percent of the monthly amount available to the client from the future care costs portion of the settlement/award/trust must be used before partial CSIL funding would be available".
- [54] I accept that the evidence supports that CSIL is only funding the plaintiff on an interim basis at their discretion. Mr. MacDonald provided no evidence that CSIL funding is universal or mandatory.
- [55] I agree with the plaintiff's submission, as supported by the Court of Appeal's comments in Fullerton CA, that the defendants should not be able to reduce their liability by "leaning" on social assistance programs intended to help those individuals in financial need who may not have any access to tort compensation: see Fullerton CA at para. 31.

- [56] I note that portions of the Manual were considered in *Woo v. Crème De La Crumb Bakeshop & Catering Ltd.*, 2020 BCSC 1595, by Justice Skolrood, as he then was, in a case involving a plaintiff who was receiving subsidized care at a residential care facility. The plaintiff argued that he no longer met the definition of client since a finding of third party liability had been made: at para. 30. The defendant submitted that the plaintiff, despite the finding of third party liability, had not been re-assessed for his eligibility for long-term care or a different rate. The crux of the parties' arguments were:
- [41] In the present case, the plaintiff submits that his ongoing long-term residential care is not a universal benefit because he will be charged based upon the third party liability finding. In response, the defendant submits that the benefit is universal because the plaintiff remains eligible for the care.
- [57] The Court concluded that the circumstances here were similar to *Fullerton CA*, and that the plaintiff was entitled to an award of damages in relation to his future care costs: at para. 43. In my view, this decision supports that the language in the Manual does not suggest that the care provided is a universal benefit, and that the FHA has the discretion to discontinue the benefits to the extent they are provided for in the judgment and monies are received by the plaintiff.

Whose onus is it to establish whether the CSIL benefits will continue?

- [58] This is an area where clarification from the Court of Appeal could be helpful. I am of the view that the onus should be on the defendants to prove that the CSIL benefits will continue after the receipt of monies, by the plaintiff, from the judgment.
- [59] The plaintiff has met his onus of proving his damages and the quantum of said damages. As I see it, the plaintiff is not required to prove his ineligibility for each possible discretionary benefit raised by the defendants. As explained by Hood J., "[i]t is not for the plaintiff to 'prove the negative': Strachan at para. 24. Requiring the plaintiff to do so implies that the plaintiff has not actually suffered the loss, and as stated in *Fullerton CA* at para. 28, I think it is "too glib" for the defendants to say so.
- [60] Placing the onus on the defendants to prove that a discretionary benefit will continue, aligns with the onus in other areas in which a defendant may seek to lower a plaintiff's award of damages. For example, the caselaw is clear that in determining whether Part 7 benefits under the Insurance (Vehicle) Act should be deducted, the defendant bears the onus to prove entitlement to ongoing benefits, and uncertainty must be resolved in favour of the plaintiff: *Lynn v. Pearson* (1998), 55 B.C.L.R. (3d) 401 at para. 18 (C.A.); *Jurczak* at para. 17. Similarly, in assessing the duty to mitigate, the defendant bears the burden of proving the plaintiff could have, or should, have mitigated their losses: *Gill* at para. 11. If the defendants wish to argue for a reduction of the established damages, then the onus should be on them to do so.

[61] In light of my finding that the CSIL benefits are discretionary, I find that the onus is on the defendants to prove that the funding will continue. If I am wrong at law, and the onus remains on the plaintiff, I am satisfied on the evidence before me that the plaintiff has met that onus.

What impact does the fact that the plaintiff established a discretionary trust after the receipt of the Nissan Settlement have on the future continuance of the CSIL benefits?

[62] The real issue is whether the plaintiff will take steps to place the judgment award in a discretionary trust, where the funds are not in his direct or indirect control, and will argue he has no control of receiving funds to pay for his care needs. The defendants argue the past is a good indicator of the future, and since the plaintiff put a portion of the Nissan Settlement into a discretionary trust to allow for the continuance of the CSIL benefits, he is likely to do the same thing again.

[63] The present value of the future care costs itemized in the Trial Reasons is over \$13 million. A very large component of this award relates to the hiring of attendants to provide care to the plaintiff. The plaintiff currently receives \$20,875 per month from CSIL, which is used to hire care aides to assist him. This amount is not enough to fund the plaintiff's attendant care needs. As I found in the Trial Reasons, and all parties agreed, the plaintiff's family should not have to continue to act as caregivers for the plaintiff: Trial Reasons at para. 835.

[64] There are two future options. The first option is for the plaintiff, upon receipt of the judgment amount, to begin using the funds to pay for his future care costs from the judgment funds. If he does this, then the evidence supports that CSIL will stop providing funds to the plaintiff until he has used up the funds from the judgment amount that were attributed to his care costs. Once that has occurred, then CSIL will revisit the plaintiff's eligibility for funding.

[65] The second option is for the plaintiff, upon receipt of the judgment amount, to immediately pay the monies into a discretionary trust, like he did with a portion of the Nissan Settlement. If he does this, the plaintiff can then take the position with the FHA that he has no control over the funds at all and, as such, the CSIL funding should continue at the same level.

[66] It is this second option that concerns the defendants, since, if that option becomes a reality, the plaintiff will not only receive funds that were allocated by the judgment for future care costs, but he will also receive full CSIL funding. If that occurs, the plaintiff will have been over-compensated. He will continue to rely on public funding, while keeping the full judgment amount awarded for future care costs. The decision to do this would squarely rest on the plaintiff's shoulders. He would be doing this, in my view, with the clear intent to preserve the CSIL funding, while at the same time keeping the trial judgment in a discretionary trust.

- [67] This second option, in my view, goes contrary to the policy of CSIL and the plaintiff acting in good faith with the FHA, and to the doctrine of double recovery, as reflected in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 962-963, and *Bedard v. Amin*, 2010 ABCA 3 at para. 11. I am not persuaded that the plaintiff, on the totality of the evidence I heard, would follow this option. As the plaintiff submits:
77. There is no evidence that the plaintiff intends to put his net damages recovery into a discretionary trust. Rather, the evidence at trial supports that he intends to use the fund on his care and well-being.
- [68] The plaintiff further explains in his reply submissions that, "[t]he initial rationale for placing the settlement monies in trust, to preserve the plaintiff's entitlement to CSIL funding while the litigation was ongoing, will no longer apply after a final award of damages is made." If the plaintiff did place the funds in a discretionary trust, I am of the view that the FHA could take the position that the plaintiff should be looking to the trustees of the Trust, or any other trust he established, to fund his attendant care, and not the publicly funded program. The FHA would have that discretion to do so on the basis that the plaintiff deliberately took steps to give up control over the award for future costs of care with the intent of "forcing" the continuance of the public funding.
- [69] This is not a case in which the FHA is unaware of what has transpired. The FHA has been actively involved in the plaintiff's case and, in particular, the plans that were put in place upon the receipt of the Nissan Settlement. There has been complete transparency by the plaintiff in his dealings with the FHA, as is expected by the FHA. I am persuaded that this transparency will continue.
- [70] The intent of the policy is clear, that if an individual is able to secure funding for future care costs through a claim against a negligent tortfeasor, then upon the receipt of the funding, it is to be used to pay for the future care costs, instead of the public funding. The triggering event is that the plaintiff has received funds.
- [71] It is my view that this plaintiff will have received the funds when the liable defendants arrange for payment of the judgment amount to the plaintiff's lawyer's trust account. When the judgment funds are received by the plaintiff's lawyer, the plaintiff is able to direct what will happen with the funds. It is at this time that CSIL should be advised that funds have been received, and the issue of how much monies the plaintiff will receive from CSIL to pay for his future care costs, or whether he will receive any monies at all, should be assessed.
- [72] The future care award for the plaintiff's attendant care needs, provided in the Trial Reasons, was based on the plaintiff being entitled to funding for 34 hours per 24-hour period, for two care providers, with one having an LPN level of training, and the second attendant a care aide, paid at agency rates. This results in a very large monthly amount for personal care aides: Trial Reasons at para. 939. According to Appendix A of the Trial Reasons, the monthly amount for attendant care is equivalent to \$554,000 annually. This vastly exceeds the current funding the plaintiff is receiving from CSIL, which is at \$250,500 annually.

- [73] It is on the basis of my understanding of the policy as set out in the Manual, that this plaintiff, upon receiving the judgment funds, should be, and will be, cut off from any ongoing CSIL funding until the amount that is received, which has been allocated to future care costs, has been depleted. As I have indicated, it is my view that the plaintiff will be in receipt of the judgment funds immediately upon payment of them into his lawyer's trust account.
- [74] I am not persuaded that what has happened to the Settlement Amount will happen to the judgment amount. The plaintiff and his counsel explained to the FHA what the plan was, to attempt to settle with one of the defendants, and to set up the Trust, for the purpose of having the CSIL funding continue until a determination of liability had been made, and an assessment of damages had been completed. Both of these events have now occurred, with liability being decided in the Trial Reasons, and the final determination of the present value of the future care costs being provided in these reasons.
- [75] As the plaintiff states at paras. 85 and 87 of his closing submissions:
85. Further, the discretionary trust was only contemplated as a stop-gap measure until the trial on liability could be concluded. The mutual understanding of the plaintiff and the Ministry is that a settlement could be placed into a discretionary trust and the cessation of CSIL funding would be deferred to the conclusion of the litigation rather than at the time of the settlement.
87. The plaintiff has a good faith obligation to declare an award for damages to CSIL, and that if the plaintiff receives an award for damages CSIL policy will result in the termination of any portion of the award attributable to future cost of care until such time as that portion of the award is exhausted.
- [76] I accept that these statements, along with the emails that have been produced at the continuation of the trial, support that it is not the intention of the plaintiff to attempt to achieve double recovery by receiving the award of future care costs and seeking to arrange his affairs to deprive himself of control of the monies he receives from the judgment. If the plaintiff follows through on his declared intentions, then no question of double recovery arises in the circumstances.
- [77] I acknowledge that it is not for the Court to direct what the plaintiff does with his damages award: *Townsend v. Kroppmanns*, 2004 SCC 10 at paras. 20-21. The plaintiff still retains the right to decide what he does with the judgment amount, although I anticipate that without the CSIL monthly funding, he will be forced to use some of the future care costs to provide for his attendant care needs.

Conclusion

- [78] In all of the circumstances, I am not prepared to deduct the \$4,789,560, being the present value of the future CSIL benefits, from the award of future care costs.

- [79] The parties have agreed that the amount of \$436,990, for CSIL benefits paid from the commencement of the trial to March 22, 2023, should be deducted. As discussed with the parties, if there are further payments made by CSIL pending the final resolution of this matter, then those amounts should also be deducted. This is to ensure that the plaintiff does not receive any double recovery.
- [80] The present value award of future care costs is reduced to \$12,661,895 (\$13,098,885 - \$436,990).

Issue 2: What is the Nature of the PROP Benefits, and will they continue in the Future after the Plaintiff has Received Monies from this Judgment?

- [81] The issue of PROP was a challenging one to consider from an evidentiary perspective. There was very little information provided during the trial on the nature of the program. At the conclusion of the March trial continuation, I invited the parties to consider tendering additional evidence on the issue, which the parties agreed to do.
- [82] A half-day further continuation was heard on May 8, 2023. The plaintiff tendered the affidavit of Ruth Marzetti, Executive Director of Technology for Living, the organization that manages and administers PROP, sworn March 30, 2023. The Sidhu defendants tendered the affidavit evidence from Maria Hammell, paralegal, sworn May 2, 2023, appending a 2009 independent review of PROP titled "An External Review of the Provincial Respiratory Outreach Program" (the "PROP Report"). The parties agreed this evidence could be tendered without the affiants attending for cross-examination. The parties also produced materials from their economists expanding upon the PROP issues.
- [83] The parties agree that based on the nature of PROP, the plaintiff will continue to receive certain equipment, services, and supplies from PROP (the "PROP Benefits") after receiving this judgement. The issue is what amount should be deducted from the plaintiff's future care costs for the PROP Benefits.

Relevant Facts

Overview of PROP

- [84] PROP is a contracted provincial program providing essential respiratory therapy and respiratory equipment to residents in BC who are ventilator dependent. The PROP Report describes PROP as:

a client-initiated, client-focused, cost effective service which adeptly provides the clinical care and equipment to keep [ventilator assisted individuals] out of hospital and in the community where quality of life is optimized.

- [85] PROP provides services free of charge, rather than funding. Specifically, PROP provides an equipment loan program, respiratory therapy services, biomedical engineering services, peer support, home ventilator training, and respiratory supplies. The program provides

equipment for ventilators and tracheostomies; annual reviews by a respiratory therapist, who provides information to the client's respirologist; and maintenance for the equipment. PROP has a respiratory therapist on call 24-hours per day and provides support and services to ventilator-dependent individuals. Equipment is loaned to individuals, not given, and all equipment must be returned for essential services and maintenance.

- [86] PROP is not means tested, and individuals who meet PROP's eligibility criteria continue to receive PROP services, regardless of their financial circumstances. The Agreed Statement of Facts provides that the following are PROP's eligibility criteria:

Medical Criteria:

- Candidates should be stable and optimally managed for any reversible component of their associated pulmonary disease
- Candidates are required to be under the care of a Respirologist on discharge
- Individuals with neuromuscular disorders or chest wall restrictions that have documented hypercapnia (PCO₂ at rest on room air >45mmHg)
- Individuals who have neuromuscular disorders or chest wall restrictions that have normal PaCO₂'s (in the range of 40-45 mmHg) may be considered eligible if any of the following other criteria are present:
 - o Cor Pulmonale
 - o Nocturnal hypoventilation (as documented by elevation in nocturnal CO₂ (TCCO₂) levels and associated morning symptoms)
 - o Severe supine dyspnea i.e., Diaphragmatic paralysis
 - o Symptoms of alveolar hypoventilation
- Individuals with normal neuromuscular function but who have documented central alveolar hypoventilation secondary to abnormal ventilatory control may qualify i.e., Primary Alveolar Hypoventilation or Obesity Hypoventilation Syndrome
- Individuals who use a tracheostomy with re-usable (whenever possible) inner cannula. Uncuffed tracheostomy tubes are preferred; potential members requiring a cuffed tracheostomy tube will be assessed for program eligibility on an individual basis. Speaking valves used with uncuffed tracheostomy tubes will be considered when they are situated in-line with documented evidence of being well tolerated and within accepted risk parameters
- Individuals who are not PEEP dependent
- Individuals whose secretions can be safely managed without the use of in-line suction

Non-Medical Criteria

- Must be 19 years of age or older
- Must be a BC citizen and registered with the BC medical Services Plan
- Candidates must be capable of self-directing their therapy so that they have control over their choices and decisions when it comes to their own respiratory care and therapy or have current and appropriate Representation Agreement in place
- Candidates who reside in assisted living/transitional care facilities are eligible if they can direct their own respiratory care and therapy (via themselves or through a Representation Agreement) and no other service provider (other than their physician/Respirologist) is involved in directing PROP clinicians in care
- Candidates are strongly encouraged to have a current Representation Agreement in place prior to application being made

[87] The PROP Report explains that prior to the creation of PROP, the Pearson Hospital Respirator Program was the sole program assisting individuals in the community who required ventilator assistance. In 1998, service users were informed that the program was slated for closure. These service users came together and successfully advocated to put the closure on hold. In 2000, the Ministry of Health announced \$1.25 million of annual funding through Vancouver Coastal Health ("VCH") to provide for a provincial respiratory outreach program, which later became PROP.

[88] At the time of the PROP Report, in January 2009, PROP's client base had grown significantly, but its funding had not. The PROP Report states:

In spite of the value of such services which are recognized throughout the Western world, PROP remains under funded. The original base funding of \$1.25 M in 2001 has increased very little in spite of a significant increase in the numbers of clients served. The base funding has increased to only \$1.365 M whereas the operational budget was \$1.691 M for an anticipated client load of 407 individuals. The budget enhancement has been less than 10% for an increase of more than 42% in the numbers of clients that PROP is serving and maintaining in the community of acute care.

[89] Despite economic pressures, PROP continued to operate through a series of "one time only" annual grants issued by VCH and the Ministry of Health. The plaintiff did not submit any evidence as to PROP's funding and capacity since 2009.

[90] Ms. Marzetti, in her affidavit, explains that PROP's contract and funding is managed by VCH. PROP enters into four-year contracts with VCH, which VCH has the discretion to renew. PROP and VCH are currently in their third year of a four-year contract. Renewal is not guaranteed; however, Ms. Hammel explains renewal is expected.

The Plaintiff's PROP Benefits

[91] The plaintiff is a service user of PROP. The plaintiff's ventilator and suction equipment are on loan from PROP, and he receives regular equipment and tracheostomy supplies through the program. The plaintiff understands that he will continue to use the ventilators on loan to him from PROP.

[92] In Ms. Marzetti's affidavit, she explains that she reviewed Appendix A of the Trial Reasons, which set out the plaintiff's future care costs, and identified the medical supplies and services listed that are provided by PROP. The loaned medical equipment provided to the plaintiff by PROP, which are to be returned to PROP at a later date, are:

- a. PB 560 Ventilator;
- b. Ventilator 24-hour battery;
- c. Legendair Backpack (for wheelchair ventilator only);
- d. Vacuaide Home Care Suction Unit.

[93] The medical supplies provided by PROP to the plaintiff, without charge, are:

- a. Portable on wheelchair - in-line heat moisture exchanger (HME);
- b. Humidifier water chambers (reusable);
- c. Legendair Single Branche Disposable Circuit (reusable);
- d. Water trap for Legendair Circuit;
- e. 24" flexible tubing;
- f. 36" flexible tubing;
- g. 5 ½" silicone flex tubing;
- h. Adult self-inflating resuscitation bag (reusable);
- i. Tracheostomy Tubes;
- j. Sponge - Tracheostomy 5cm x 5cm Sterile 200/Package;
- k. Catheter Suction 10FR With 20cc Mucus Trap Delee With Vacuum;
- l. Catheter Suction 12FR Whistler Tip Peel Pouch;
- m. Tape Ties Cotton Twill ½" X 100 Meters Roll White;
- n. Ties Tracheostomy Foam Posey Adult Medium;
- o. Tube Connecting Suction 1/4" X 72";
- p. Sodium Chloride Solution 0.9% 5ml 100/Box B&F;

- q. Yankauer Suction Fine Capacity Flexible Type Sterile Argyle;
- r. Filter Bacteria for Devilbiss Suction Pump #7350pd;
- s. Filter Heat/Moisture Exchange Portex 50 / box;
- t. Suction Canister 800cc Disposable #Smdv7305d-602 for Devilbiss.

[94] Ms. Marzetti further notes that ventilator maintenance would be covered at no cost to the service user, and while PROP has not issued humidifiers or battery packs to the plaintiff, PROP does generally provide these items to service users. Ms. Marzetti also deposes that incontinence care supplies are not funded by PROP.

Position of the Parties

Position of the Plaintiff

- [95] The plaintiff accepts that he will continue to receive the PROP Benefits after he receives monies from this judgment, and therefore these costs should be reduced from his future cost of care award. However, the plaintiff submits that the historic underfunding of PROP, and the discretionary nature of its funding from VCH, supports a 33 percent contingency award to account for the risk that the program will be eliminated, or funding will be dramatically reduced in the future.
- [96] The plaintiff submits that the present value of the PROP Benefits received from June 14, 2021 to March 22, 2023 is \$46,181. The plaintiff submits the present value of the PROP Benefits from March 23, 2023 onward is \$272,337; however, applying a 33 percent contingency award, being \$89,871 (33 percent of \$272,337), brings this deduction down to \$182,466. All together, this would result in a deduction of \$228,647 (\$46,181 + \$182,466) from the plaintiff's future cost of care award for PROP Benefits.

Position of the Defendants

- [97] The defendants submit that the cost of future care award should be reduced by the present value of the PROP Benefits. The defendants submit that the present value of the PROP Benefits received from June 14, 2021 to March 22, 2023 is \$50,159. They submit that the present value for PROP Benefits from March 23, 2023 onwards is \$277,984.
- [98] The defendants further submit that if the Court decides to provide a contingency award, a five percent contingency award would be appropriate, citing for authority *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 43 [Krangle]. In support of this amount, the defendants say that services similar to PROP existed prior to 1998, that PROP was formalized and funded by the Ministry of Health in 2000, and has since serviced ventilator-assisted individuals living in the community in BC. The combination of PROP's history, continued funding from the Ministry of Health, the results of the 2009 PROP Report, and the essential nature of the equipment and services PROP provides, favours a finding that funding from the program will continue.

Analysis

[99] As discussed above in regards to CSIL, to uphold the rule against double recovery, the Court should reduce the award for future cost of care by the value of the PROP Benefits the plaintiff has received since the start of trial, and will receive going forward. To make this deduction, I must first determine the value of the PROP Benefits. Second, I must determine whether it is appropriate to apply a contingency award based on the possibility of the plaintiff's PROP benefits being eliminated or substantially reduced.

Value of PROP Services

[100] While the plaintiff initially testified that his incontinence care was paid for by PROP, Ms. Marzetti says that PROP does not provide incontinence care equipment or services. The parties now agree that PROP does not pay for these costs. There was no evidence before me as to who pays for the plaintiff's incontinence care equipment or services, so I will not remove these costs from the plaintiff's cost of future care award.

[101] I note that there are differences between the defendants' and the plaintiff's calculations. These differences are mainly due to the inclusion or exclusion of certain PROP Benefits. For example, Ms. Marzetti indicated that PROP had not provided the plaintiff with humidifiers or battery packs, but that this equipment was commonly offered to PROP service users. The plaintiff left these supplies out of his initial calculations, whereas the defendants included these. Further, the parties agree that ventilator maintenance should have been included. I accept that while PROP has not yet provided humidifiers or battery packs to the plaintiff, this equipment is available to him through PROP. It is clear, and conceded by the parties, that the cost of ventilator maintenance should be included.

[102] Thomas Steigervald of Columbia Pacific Consulting Ltd., economist, prepared various reports on behalf of the Sidhu defendants and testified at the continuation of the trial. Mr. Steigervald prepared a table entitled "Projected Future Cost of Care by Component (Average of Cost Range)", which calculates the present value of the future care costs set out in the Trial Reasons. Based on Ms. Marzetti's evidence of the PROP Benefits the plaintiff receives; the addition of the humidifiers, battery packs, and ventilator maintenance; and the calculations provided by Mr. Steigervald, I accept the present value of PROP Benefits that the plaintiff receives are:

PB 560 Ventilator (Two)

\$92,712

Ventilator 24-hour Battery (Two)

\$16,195

Legendair Backpack (For Wheelchair Ventilator)

\$1,450	
Powerpack for PB 560 Ventilator (with Battery)	
\$10,249	
Humidifiers (Two)	
\$16,346	
Humidifier Water Chambers (Two)	
\$8,322	
Legendair Single Branche Disposable Circuit	
\$8,655	
Water Trap for Legendair Circuit	
\$1,308	
24" Flexible Tubing	
\$2,302	
36" Flexible Tubing	
\$325	
5 1/2" Silicone Flex Tubing	
\$13,470	
Humidifier Mounting Bracket	
\$94	
Ventilator Maintenance	
\$9,808	
Adult Self-Inflating Resuscitation Bag	
\$2,229	
Tracheostomy Tubes	
\$2,987	
Sponge - Tracheostomy	
\$184	
Catheter Suction 10 FR with 20cc Mucus Trap Delee With Vacuum (for Trach)	

\$1,662

Catheter Suction 12 FR Whistler Tip Peel Pouch (for Trach)

\$31,768

Tape Ties Cotton Twill ½' X 100m

\$10,182

Ties Tracheostomy Foal Posey Adult Medium

\$7,470

Tube Connective Suction 1/4' x 72'

\$2,400

Sodium Chloride Solution 0.9% 5ml 100/Box B&F

\$34,478

Yankauer Suction Fine Capacity Flexible Type Sterile Supply

\$9,273

Vacuaide Home Care Suction Unit

\$8,288

Filter Bacteria for Devilbiss Suction Pump

\$3,034

Filter Heat/Moisture Exchange Portex 50/Box

\$29,295

Suction Canister 800cc Disposable #Smdc7305d-602 for Devilbiss

\$3,657

TOTAL

\$328,143

[103] In total, the present value of the plaintiff's PROP Benefits from the first day of trial is \$328,143.

[104] This total includes the PROP Benefits that were provided to the plaintiff between June 14, 2021 and March 22, 2023. The plaintiff's and the defendants' calculations of this amount again vary due to the inclusion and exclusion of certain expenses. I accept that the correct amount of PROP Benefits that the plaintiff received during this time is \$50,159, and that this amount should be deducted from the plaintiff's award for future cost of care.

Contingency

- [105] The remaining present value of the future PROP Benefits is \$277,984 (\$328,143 - \$50,159). I must next determine whether this amount should be deducted from the plaintiff's future cost of care award in its entirety, or whether I should apply a contingency award.
- [106] Assessing damages for future care is not a precise accounting exercise, but an assessment: Krangle at para. 21. The risk that access to public funds may be lost in the future can form the proper basis for a contingency award: *Boren v. Vancouver Resource Society for the Physically Disabled*, 2003 BCCA 388 at para. 25.
- [107] In Krangle, the Supreme Court of Canada approved a trial judge's five percent contingency award based on the possibility that provincial social welfare benefits may change and no longer cover a plaintiff's group home costs. The Court found:
- [43] Of course there remains a possibility that the law will again be changed, this time in a way that makes the Krangles responsible in whole or in part for Mervyn's adult care. There is no reason, however, to suppose that this possibility is greater than the 5 percent determined by the trial judge. The provision of care for adult disabled persons by the state appears to be a constant feature of Canadian social Policy; certainly this is so in British Columbia. The contingency award made by the trial judge provides adequate security against the possibility of change.
- [108] I accept that there is some possibility that PROP funding could be eliminated or dramatically reduced in the future; however, I do not agree with the plaintiff's submission that a 33 percent contingency award accurately reflects this probability.
- [109] While the PROP Report identifies the risk of inadequate funding, the plaintiff submits no evidence to demonstrate whether funding is still a pressing risk, nearly 15 years after publication of the PROP Report. Rather, the PROP Report shows that PROP is a valuable service with international recognition; that VCH has provided a provincial respiratory outreach program for 22 years; and that similar services were offered prior to 2001. The services that PROP provides are described as essential, and, as articulated in Krangle, care for persons with disabilities "appears to be a constant feature of Canadian social policy": at para. 43.
- [110] However, PROP funding is discretionary. The benefits offered by PROP are contingent on the decision of VCH to renew their contract with PROP, and services similar to PROP were once on the verge of elimination. Though Ms. Marzetti expects VCH to renew PROP's contract, as it appears to have done since 2001, this is not guaranteed. The possibility of PROP benefits being eliminated or reduced is arguably greater than the legislated welfare benefits contemplated in Krangle.

[111] No one knows the future, and contingency adjustments account for the fact that "the future may differ from what the evidence at trial indicates": Krangle at para. 21. Balancing the possibilities contemplated above, I find a 20 percent contingency award is appropriate and accurately reflects the possibility that the plaintiff's PROP Benefits could be eliminated or reduced in the future. The amount of this contingency award is \$55,596.80 (20 percent of \$277,984).

Conclusion

[112] I conclude that the following deductions should be made to the plaintiff's future cost of care award to reflect the plaintiff's PROP Benefits:

- a. \$50,159, being the value of the plaintiff's PROP Benefits between June 14, 2021 and March 22, 2023; and
- b. \$277,984, being the remaining present value of the plaintiff's PROP Benefits from March 23, 2023.

[113] This totals a deduction of \$328,143, bringing the present value of the plaintiff's future cost of care award to \$12,333,752 (\$12,661,895 - 328,143).

[114] The contingency award of \$55,596 is to be added back into the award, bringing the present value of the future cost of care award to \$12,389,348 (\$12,333,752 + \$55,596).

Issue 3: Will the PWD Benefits Continue in the Future after the Plaintiff has Received Monies From this Judgment?

Relevant Facts

[115] The Agreed Statement of Facts provides that:

12. Eligibility for disability assistance for a person with a disability ("PWD") is subject to the following conditions:
 - a. Income is deducted from the calculation of disability assistance, except for exempt income;
 - b. To be eligible for disability assistance, a person must be 18 years old, have a severe mental or physical impairment expected to continue for more than two years, be significantly restricted in daily-living activities, and require assistance in daily-living activities from another person / an assistive device / an assistance animal;
 - c. To be eligible for disability assistance, a person must not have assets in excess of \$100,000 for a single person, a couple, or a family;
 - d. With respect to a discretionary trust where the person has no control over the assets in the trust and cannot collapse the trust, payments made from the trust for disability-related costs are considered exempt income;

- e. With respect to a non-discretionary trust where the person has some or total control over the trust, any contribution amount to the trust over \$200,000 will not be exempt unless special approval is obtained from the Minister of Social Development and Poverty Reduction.

[116] On March 2, 2021, the Ministry of Social Development and Poverty Reduction acknowledged that the Monies had been placed in a discretionary trust and would not affect the plaintiff's eligibility for PWD benefits. The letter noted that the plaintiff must advise the Ministry of any additional monies, any assets placed in the Trust, and/or any changes to the Trust.

Position of the Parties

Position of the Plaintiff

[117] The plaintiff's position is that PWD funding will not continue once the final judgment has been pronounced since the plaintiff will no longer come under the asset threshold of \$100,000 to qualify for disability assistance. As a result, the defendants should not be granted a reduction in their liability to pay damages based on the existence of discretionary public funding.

Position of the Defendants

[118] The defendants' position is that the plaintiff will continue to receive PWD benefits and, as such, not only should the past benefits of \$31,820 be deducted, but also the loss of future earnings should be reduced by \$318,425 to account for the future PWD benefits that will be paid. The defendants argue that the onus is on the plaintiff to show that these benefits will not continue in the future and that onus has not been made out.

[119] The defendants distinguish the facts in Shongu on the basis that it does not appear that the plaintiff in Shongu had established a discretionary trust for any settlement of the trial award in order to ensure the availability of ongoing funding from PWD.

Analysis

[120] In Shongu, the Court dealt with the issue of a plaintiff receiving PWD benefits, and concluded that once the plaintiff received damages in excess of \$200,000, he would no longer be eligible to receive disability benefits: Shongu at para. 204. The reference to \$200,000 is a reference to the regulation that permits payment of benefits to a disabled person who is the beneficiary of a non-discretionary trust of no more than \$200,000: Shongu at para. 203.

[121] The evidence supports that if the plaintiff has assets in excess of \$100,000 he will no longer be eligible for disability assistance. It is clear that upon receipt of the judgment amount the plaintiff will exceed this threshold.

- [122] The same analysis applies to the issue relating to CSIL respecting whether there is evidence to support that the plaintiff will immediately transfer the judgment amount he receives into a discretionary trust, thereby having it be considered as exempt income.
- [123] I have already considered the issue of whether the plaintiff would place the judgment award into a discretionary trust in Issue 1. I am not persuaded on the evidence before me that this plaintiff will take that step as a means of keeping the PWD benefits flowing and at the same time the benefits of a judgment on a loss of earning capacity that fully compensates him for his loss of future earnings. If he did so, that would be contrary to the principle of double recovery.
- [124] As such, I find that there is no deduction made for the future PWD benefits from the award of loss of future earnings. There will be deductions made for the past PWD benefits paid of \$31,820. As with CSIL and PROP, any further PWD payments made, until the date of receipt of the judgment amount, should also be deducted so as to ensure that the plaintiff does not receive double recovery.

Issue 4: What is the Appropriate Percentage that Should be Applied to the "Lost Years" Deduction for Personal Living Expenses?

- [125] In the Trial Reasons at para. 800, I determined that the plaintiff's loss of future earnings would be based on the plaintiff obtaining a Bachelor's degree and applying the average labour market forces, amounting to \$2,212,229, assuming a normal life expectancy. However, this amount is subject to deductions. One such deduction is for the "lost years".
- [126] The lost years deduction requires the Court to deduct personal living expenses for what would otherwise represent the award for loss of earning capacity during the plaintiff's "lost years", being the years between the plaintiff's reduced life expectancy and their former anticipated age of retirement. As explained by Justice McLachlin, as she then was, in *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 126-127 [Toneguzzo-Norvell SCC]:

There can be no capacity to earn without a life. The maintenance of that life requires expenditure for personal living expenses. Hence the earnings which the award represents are conditional on personal living expenses having been incurred. It follows that such expenses may appropriately be deducted from the award.

- [127] The issue is not whether these expenses should be deducted, but the proper amount to deduct.
- [128] During submissions, counsel advised that in many cases involving a lost years deduction, there was very little analysis done on the rationale for the correct amount to deduct. To assist me in better assessing the deduction, I will do a historical review of the cases that counsel cited.

Legal Principles

- [129] In September 1991, the Court of Appeal in *Committee of Gordon Semenoff v. Kokan* (1991), 59 B.C.L.R. (2d) 195 (C.A.) [Semenoff CA], assessed future loss of earning capacity for a 29-year-old plaintiff who had sustained a severe brain injury and spinal cord injury as a result of a negligent medical procedure. He had little awareness of his surroundings and was expected to live the remaining of his shortened life in hospital. The trial judge made no deduction for the lost years, although there was a report on family expenditures from Columbia Pacific Group before him. The trial judge found that since he did not award the plaintiff basic living expenses in the cost of future care, there was no risk of double recovery: *Semenoff v. Kokan* (1989), 42 B.C.L.R. (2d) 6 at 16.
- [130] On appeal, the defendants sought a deduction of 60 percent and the plaintiff, a deduction that should not exceed 25 percent. The trial judge had set the plaintiff's life expectancy at a further five-year period, which the Court of Appeal varied to eight years.
- [131] The Court of Appeal found that a suitable deduction for the total sum that Mr. Semenoff would have been likely to spend on himself during the lost years had to be made: *Semenoff CA* at para. 17. The Court of Appeal accepted that Mr. Semenoff would have had at least two children: *Semenoff CA* at para. 19.
- [132] The Court of Appeal rejected the table of family expenditures that was in the report of Columbia Pacific Group, on the basis that the table of family expenditures did not take into account the benefits the wife would expect to receive for herself and the two children: *Semenoff CA* at para. 20.
- [133] Reference was made to the English Court of Appeal decision in *Harris v. Empress Motors Ltd.*, [1983] 3 All E.R. 561 at 575, [1984] 1 W.L.R. 212, where it was settled that the measure for deduction should be based on the amount expended for personal expenses, together with a proportion of the general family expenditure, as set out by the following principles
1. The ingredients that go to make up 'living expenses' are the same whether the victim be young or old, single or married, with or without dependents.
 2. The sum to be deducted as living expenses is the proportion of the victim's net earnings that he spends to maintain himself at the standard of life appropriate to his case.
 3. Any sum expended to maintain or benefit others do not form part of the victim's living expenses and are not to be deducted from the net earnings.
- [134] The Court of Appeal in *Semenoff CA* quotes from the authors of *Kemp and Kemp on The Quantum of Damages*, Vol. 1, at p. 6026 which supported a deduction for living expenses of 33 percent. The Court of Appeal noted that, in the absence of precise figures for living expenses, it accepted what was described as the "conventional deduction of 33 percent discussed in *Harris*": at para. 23. In October 1991, *Semenoff CA* was applied by this Court in *Sigouin (Guardian ad litem of) v. Wong* (1991), 30 A.C.W.S. (3d) 273, [1991] B.C.J. No. 3269

(S.C.), a case involving an infant born significantly impaired. The trial judge accepted the guidance in *Semenoff CA* of a 33 percent deduction from the total future income loss: at para. 111.

[135] Ten months after *Semenoff CA*, the Court of Appeal pronounced *Toneguzzo-Norvell v. Savein* (1992), 73 B.C.L.R. (2d) 116 (C.A.) [*Toneguzzo CA*], involving an infant who was injured at birth. The trial judge found the plaintiff had a 25-year life expectancy, which the Court of Appeal reduced to 18 years. The trial judge refused to take off any deduction from the future income loss for personal expenditures. The Court of Appeal noted that the trial judge's refusal to do so reflected an approach which had been disapproved, citing *Semenoff CA*. At trial, Mr. Carson testified for the plaintiff and agreed in evidence that an individual would likely spend between 50 percent to 75 percent of their income on "necessities", depending on their income. The Court of Appeal, relying on Mr. Carson's evidence, found that the conventional deduction of 33 percent was too low, and found a deduction of 50 percent was appropriate.

[136] On appeal, the Supreme Court of Canada maintained the Court of Appeal's 50 percent deduction, from the award for loss of earning: *Toneguzzo-Norvell SCC*. The Court explained the rationale for the lost years deduction at 126-127:

A number of considerations suggest that a deduction for personal living expenses should be made from the award for lost earning capacity during the "lost years". The first is the fact that the projected earnings could not have been earned except on the supposition that the plaintiff would have been alive to earn them. There can be no capacity to earn without a life. The maintenance of that life requires expenditure for personal living expenses. Hence the earnings which the award represents are conditional on personal living expenses having been incurred. It follows that such expenses may appropriately be deducted from the award. Against this, it is argued that if Jessica had been born a millionaire, her personal living expenses during the "lost years" would have been met from other sources. But this does not negate the fact that in order to earn income one must live and incur the attendant expenses.

It can be argued that not to make a deduction for personal living expenses is to introduce into the award for lost earning capacity for the "lost years" a measure of overcompensation akin to the duplication which the law avoids in the case of an award for lost earnings during the plaintiff's actual lifespan. This deduction has been justified for the years before the plaintiff's actual projected death, on the ground that it avoids duplication between the award for cost of care and the award for lost earning capacity. But in fact, the "lived years" and the "lost years" cannot be so easily distinguished. The same reasoning applies to both: had the plaintiff been in a position to earn the monies represented by the award for lost earning capacity, she would have had to spend a portion of them for living expenses. Not to recognize this is to introduce an element of duplication and to put the plaintiff in a better position than she would have been in had she actually earned the monies in question.

- [137] In January 1999, this Court's decision in *Brimacombe v. Matthews*, 1999 CanLII 6144, was rendered. It involved a plaintiff who had been handicapped since birth. His life expectancy was an additional 30 years. The Court made the following finding respecting the lost years:
- [52] The average for the lost years, based on a life expectancy of 30 years, is set at \$377,125.00 in Exhibit 20. From this I would again take a 20% contingency and round the figure to \$300,000.00. What portion of this could it be said would be saved and what would be consumed by personal expenses? I would estimate that a one-third two-thirds division would be appropriate, and award the sum of \$100,000.00 under this head of damage.
- [138] The majority of the Court of Appeal allowed the appeal and ordered a new trial based on issues relating to liability, but agreed with Justice Hall's dissent on the appeal on damages: *Brimacombe v. Dr. Mathews*, 2001 BCCA 206 at 92. In his dissent, Hall J.A. made the following comments on the "lost years" award:
- [244] Conceptually, "lost years" is an extension of compensation for earnings lost by the injured person. In *Andrews*, *supra*, the Supreme Court of Canada held that such compensation is for the loss of a capital asset destroyed by the accident, not simply to replace the plaintiff's earnings or provide a stream of income while the plaintiff survives. As Professor Jamie Cassels notes in his text *Remedies: The Law of Damages* (Toronto, Irwin Law Inc., 2000) at 133 "[m]oreover, had the plaintiff died in an accident, dependants would have a claim at least to a portion of the plaintiff's lost income." As a result of his injury, the plaintiff in this case has suffered a reduced life expectancy. Thus, the consequences of the injury have shortened the plaintiff's life. In these circumstances, if the injury had not occurred, the plaintiff would have continued to earn money during his pre-accident life expectancy. The question arises, should the defendant compensate the plaintiff for income that the plaintiff would have earned but for the injury?"
- [245] Compensation for "lost years" is limited to the income earning years that the plaintiff would have enjoyed but for the injury. Compensation, therefore, would not extend beyond the plaintiff's normal retirement date.
- [246] A leading case in this area is *Toneguzzo*, *supra*, where the Supreme Court of Canada confirmed that compensation was appropriately awarded to a plaintiff for income that could have been earned during the lost years. The court affirmed the deduction by this court of 50% of an award made by the trial judge to reflect the reality that a plaintiff will obviously not retain all sums earned because of expenses, taxes and the like.
- [247] Concerning the award made for income loss during the lost years, I confess that I find this sort of award to be somewhat anomalous in that it appears to be an award to build up an estate, a type of award that one would think more consonant with the principles usually applied in wrongful death cases. However, unless and until it is abolished either by statute or by a decision of the Supreme Court of Canada, this head of damages is available in circumstances like the case at bar. Trial judges will be required to deal with the "lost years" earnings issue in individual cases based on the state of the evidence before them.

- [248] There seems to be a lack of unanimity in the authorities as to whether the "savings" approach or the "personal living expenses" approach is to be preferred when making awards in individual cases. There was conflicting expert evidence before the trial judge about the appropriate amount to be awarded to this plaintiff under this head of damages. As the respondent points out, the trial judge took account of significant contingencies and deductions in arriving at his assessment of the notional loss in this case. It seems to me that courts should be conservative in making an award under this head of damages because of the great number of variables and contingencies that enter into any assessment of earnings so far into the future, often as here, with a plaintiff who has not and in all probability will not have a proven work history. In my view, the award made here, while perhaps more than I might have thought appropriate if I had been the trial judge, was within a range open to the trial judge. Although, I recognize the force of the appellant's argument on this issue, bearing in mind the limits of appellate review, I am not of the view that this court should make any alteration of this award.
- [139] The Alberta Court of Appeal in *Duncan Estate v. Baddeley* (2000), 192 D.L.R. (4th) 53 [Duncan], considered the appropriate damages for the loss of future earning capacity in a wrongful death claim under Alberta's Survival of Actions Act, R.S.A. 1980, c. S-30. It offers insight into the mathematical calculation of the reduction for lost years, based on the principles set out earlier by the Alberta Court of Appeal in *Duncan Estate v. Baddeley* (1997), 145 D.L.R. (4th) 708 (C.A.) [Duncan Estate]. In the earlier case, *Duncan Estate*, the Court considered three approaches to calculating living expenses in the lost years analysis: (1) the poverty-line approach; (2) the lost savings approach; and (3) the available surplus approach. A concise summary of these approaches appears in the later case, *Duncan*, at paras. 12-17.
- [140] The poverty-line approach is said to calculate the deceased's living expenses based on the most basic needs. The Court in *Duncan Estate* rejected this approach for not realistically assessing the expenses that a particular person, at a particular income level, would spend in order to live: *Duncan Estate* at 720-721; *Duncan* at para. 12.
- [141] The lost savings approach is said to deduct the deceased's total foreseeable expenditure. The Court in *Duncan Estate* rejected this approach because it did not differentiate between expenses incurred in order to earn income, and discretionary spending, essentially resulting in a calculation of what an heir might inherit, which deviated from the victim-centred approach required: *Duncan Estate* at 719; *Duncan* at paras. 12-13. Further, by taking into account deductions for future expenditures that did not directly relate to earning income, the Court could be seen as dictating the deceased's future spending decisions: *Duncan Estate* at 714.

[142] The Court in *Duncan Estate*, as well as *Duncan*, ultimately accepted the available surplus approach, enunciated by the English Court of Appeal in *Harris*, discussed above, and accepted the three principles it outlined: *Duncan Estate* at 721; *Duncan* at para. 14. The Court noted that *Semenoff CA* and *Toneguzzo SCC* both followed this approach in the context of shortened life expectancy, and that they should apply equally to cases involving wrongful death.

[143] The Court of Appeal in *Duncan* summarized its findings and its review of *Duncan Estate* as follows:

[24] To avoid over-compensation, the projected personal living expenses which the deceased would have incurred to earn his living must be deducted from a damage award for loss of future earnings. In accordance with the principles set out in *Duncan Estate*, the amount deducted must reflect a realistic assessment of the expenses the individual, at that income level, would have spent in order to live. Only the deceased's proportionate share of joint family living expenses should be deducted, because a victim-centered approach precludes deduction of amounts spent for the benefit of others..

[144] The first detailed analysis of the underlying approach in BC was conducted by Justice Boyd in *Guerineau v. Dr. Seger et al.*, 2001 BCSC 291, a case again involving an infant who was catastrophically injured during birth. The plaintiff was found to have a life expectancy of 23 years. In considering the plaintiff's lost years deduction, the plaintiff submitted a deduction of approximately 50 percent, representing the proportion of the plaintiff's income he would have spent on personal expenses, had he been capable of working these years. Justice Boyd set out the approach from the plaintiff's expert:

[171] In the Taunton report, the lost years deduction is calculated by multiplying the average BC male's labour market contingencies adjusted income by the percentage of that income which is spent by the average male on food, shelter, clothing, personal and health care and half of private and public transportation. The share of these expenses is then "grossed-up" by the average tax expense incurred by members of the cohort. The difference between the plaintiff's survival rate and the survival rate for BC males with normal life expectancy is multiplied by the total annual expenditure on personal living expenses and taxes. The present value of the lost years deduction is roughly 50% of the total lost income award.

[145] The defence relied on Doug Hildebrand of Columbia Pacific Consulting who provided the following evidence:

[172] The defence submits that the plaintiff should be awarded only that proportion of income which would have been saved in the lost years. In Table 7 of his report, Mr. Hildebrand of Columbia Pacific Consulting sets out the after-tax expenditure allocation for one person households, organized by income quintile. According to his data, the majority of such households save none of their income. Only those in the highest income quintile allocate any of their after tax income-an average of 15.8% - to savings. While the lost years deduction ought to be at least 85%, for the purposes of this case, the defence submits that a

more conservative lost years deduction of 75% would be appropriate.

- [146] Justice Boyd agreed with the lost years deduction approach taken by the plaintiff: at para. 173. She described the defence position as a "savings approach" and noted that the "drastic deductions seemingly mandated by the 'savings approach' have not been made from most damage awards." She references the Duncan Estate decision in support where the Court accepted the "available surplus approach" in which "the amount deducted must reflect a realistic assessment of the expenses the individual, at that income level, would have spent in order to live": at para. 174.
- [147] Justice Boyd found that, since *Toneguzzo SCC*, the standard deduction has been approximately 50 percent and this Court will deviate from this standard where the evidence indicates that more of the plaintiff's income would have been spent on personal expenses, as it did in *Brimacombe*: at para. 175.
- [148] In *Guerineau*, Boyd J. concluded:
- [176] In this case, I am satisfied that the facts support a 50% deduction. The Taunton report estimate of pre-tax spending for personal living expenses include the costs of food, shelter, clothing, health care and half the transportation costs. Although the categorization of living expenses is somewhat arbitrary, the overall approach appears reasonable. No significant non-discretionary costs appear to have been excluded from the calculations. Taunton's estimation of expenses is supported by the after-tax allocation chart (Table 7) contained in the Hildebrand report. According to that Table, a one person household spends an average of 49% to 66.7% (depending on their quintile) of their after-tax income on the necessities identified in that report. Given that Mr. Taunton has based his calculations on pre-tax income, I am satisfied that the Taunton and Hildebrand estimate of the percentage of income spent on personal living expenses are comparable.
- [149] In 2005, this Court in *Fullerton (Guardian ad litem of) v. Delair et al.*, 2005 BCSC 204, used a 75 percent figure. This case involved another baby who suffered a catastrophic brain injury at birth. The baby's anticipated life expectancy was 20 additional years. The Court accepted the defence's position that a 75 percent deduction was appropriate, as opposed to the plaintiff's proposed 50 percent deduction: at paras. 259-260. Both parties filed reports in support of their respective positions, but no explanation of the reports was provided in the judgment. On appeal, *Fullerton (Guardian ad litem of) v. Delair*, 2006 BCCA 339, the issue of the lost years deduction was not addressed.
- [150] In 2009, *Ediger v. Johnston*, 2009 BCSC 386, involved another baby born with severe brain damage whose life expectancy was found to be significantly shortened to age 38. Justice Holmes, as she then was, had a report from Mr. Carson which applied a 50 percent reduction. The Court used a deduction of 80 percent, on the basis that this was the appropriate reduction: at paras. 345 and 347(c).
- [151] In *Ediger*, Holmes J. discussed the three methods of calculation:

[340] Professors Cassels and Adjin-Tettey discuss as follows the various approaches that courts have followed in calculating the amount of the deduction:

Three possible methods of calculation have been identified: the basic-necessities or poverty-line approach, the standard-of-living or available surplus approach, and the lost-savings approach. The basic-necessities approach calculates the deduction on an absolute standard of personal expense depending upon factors such as marital status and family size. The standard-of-living approach bases the deduction on the plaintiff's potential standard of living relevant to income-earning capacity, and the award for lost years is determined based on the available surplus after deductions for the reasonable amount that the plaintiff would have spent to maintain herself. The lost-savings approach suggests that the only available income is what remains after a plaintiff's standard of living has been maintained and may require deductions for all conceivable expenses. The poverty-line approach has been rejected as not being a realistic reflection of what a person would spend to maintain herself.

It is evident that courts are currently determining the personal living expense deduction on a case-by-case basis and it is sometimes unclear which approach they are using. Deductions have ranged as high as 85 percent on the lost-savings approach. Other cases have rejected this approach, preferring instead the "conventional deduction" of one-third, often without explanation. Thus far, no consistency in either the amount of the personal living expense deduction or the method of calculation has emerged in the common law.

[Remedies: The Law of Damages, at 141-42]

[152] *Steinebach v. Fraser Health Authority*, 2010 BCSC 832, var'd on other grounds 2011 BCCA 302 [Steinebach SC] involved another plaintiff catastrophically injured at birth. The plaintiff was found to have a life expectancy of 20 years: at para. 146. There is no reference in the judgment to any expert economic evidence on the issue of the assessment of the personal living expenses during the lost years, although I note that Mr. Carson for the plaintiff, and Mr. Hildebrand for one of the defendants, were economists involved: at para. 164. Justice Pitfield noted on the issue of the lost years deduction:

[181] As I have mentioned, the final determination required in relation to the assessment of damages for loss of earning capacity and the loss of inter-dependency is a reduction in the portion of the value attributable to the lost years, being those included in the calculation of normal life expectancy during which it is anticipated that Mirella will not be alive. The reduction accounts for the fact that the expenditures that would have been required to sustain her life in those years will not be incurred.

[182] While there are differences in approach, including an estimate of personal and living expenses and an estimate of the present value of savings to be accumulated over one's working career given a normal life expectancy, the application of the two approaches should lead to a similar result. In practice, the solution which has been adopted by the court for purposes of assessing damages, as opposed to attempting to engage in a mathematical calculation, is to attribute a percentage value to the lost years' deduction. The

deduction has ranged from a low of 50% to a high of 80%.

- [183] It may be argued that a reduction of 80%, rather than a higher number, is unrealistic because life-time savings may well be less than, or at the very least not exceed, 10-15% of annual earnings. The present value of a savings approach to the assessment of value might therefore justify a greater deduction in respect of the lost years.
- [184] In my opinion, the appropriate deduction, having regard for the fact that I have declined to proceed on the assumption that female earnings will not equate to male earnings without providing for any transition to equality, is 80% in respect of the lost years' portion of the combined value of value of earning capacity and inter-dependency.
- [185] It falls to the economists, Mr. Carson and Mr. Hildebrand, to consider how, in the context of a normal life expectancy and my finding with respect to her life expectancy or remaining years of life, the value of the capital asset that is earning capacity of \$890,000, and the value of inter-dependency which is \$175,000, should be allocated between the remaining years of Mirella's life and the lost years to which the reduction of 80% should be applied. In the event of an inability to agree, the parties may apply to a registrar of the court for directions.
- [153] During the course of submissions, I asked counsel whether there had been any other decisions since 2010 that addressed the issue of the appropriate deduction for the lost years. Counsel cited the following two decisions as the only other decisions they could locate:
- *Huang v. Canadian National Railway Company*, 2018 BCSC 1235, in which no deduction for lost years was made since the plaintiff's life expectancy was to age 80: at paras. 517-518; and
 - *Ward v. Thomas*, 2022 BCSC 1147, in which no deduction was made since the plaintiff's life expectancy was to age 72, being beyond her expected age of retirement, and as such no lost years deduction was awarded: at para. 70.
- [154] The following additional BC case was located:
- *Simpson v. Teichrieb*, 2021 BCSC 210, in which a plaintiff suffered catastrophic injuries and had their life expectancy reduced to 61.7 years, leaving 3.3 lost years. Justice Dley appears to make nearly a 100 percent deduction for the lost years.
- [155] In 2016, the Manitoba Queen's Bench, as it then was, considered the issue of the appropriate deduction in *Campbell et al v. Jones et al*, 2016 MBQB 10, in which the plaintiff's life expectancy was between 23.2 to 24.1 years: at para. 478. The Court acknowledged the 50 percent reduction used in *Toneguzzo SCC*, but noted that the Supreme Court of Canada did not endorse the 50 percent figure being used in all cases: at para. 494. The economist for the plaintiff used a 50 percent deduction, at the request of counsel; however, he acknowledged on cross-examination that living expenses in the case of a minimum wage worker could be much greater than 50 percent, and as high as 90 percent: at para. 496. The defendant's economist estimated a 75 percent deduction: at 335. The Court accepted that a 75 percent deduction would be "both fair and reasonable" in the circumstances, noting that

admission of the plaintiff's expert on cross-examination: at paras. 496-497.

[156] During the trial I was concerned that I did not have the evidentiary basis to decide the proper percentage that should be applied for the deduction of personal living expenses during the "lost years". As such, the parties agreed that the matter would form part of the Deferred Issues and further economic evidence would be obtained.

Expert Evidence

[157] Robert Carson of Associated Economic Consultants (2017) Ltd., economist, prepared a report dated February 27, 2023 (the "Carson Report") at the request of the plaintiff, and testified at the continuation of the trial. Mr. Carson also prepared a rebuttal report dated March 15, 2023, in response to the economist report of the Sidhu defendants. In the Carson Report, Mr. Carson sets out the following:

1.1 Cost of Necessities

If the objective of a lost years reduction is to deduct only the amount spent on necessities, leaving the injured plaintiff with the funds that would otherwise have been devoted to enjoyment of life, then adding amounts normally spent by Canadian households on items like food, clothing, transportation and accommodation will overstate the deduction at the level of necessity.

[158] Mr. Carson finds support for the costs of the necessities from the Market Basket Measure ("MBM") which was adopted in 2018 by the federal government as Canada's official poverty line. Mr. Carson testified that while "normal living expenses" might vary by education, social position, and employment, the "necessities" based on a poverty-line calculation would remain relatively stable for any member of society. In applying the MBM, Mr. Carson concludes that the percentage range for deducting costs of necessities is in the range of 25 percent to 35 percent. Mr. Carson excluded income taxes as necessary expenses and, if included, the ratios increase to 45 percent to 55 percent.

[159] Mr. Carson's rationale for excluding income taxes on the lost years calculation was since taxes are not taken into account when looking at future income loss, his view is that if you take the taxes off at this stage, then you will be adding them back in for the tax gross-up calculation.

[160] Mr. Steigervald, the Sidhu defendants' economist, prepared a report dated March 9, 2023 (the "Steigervald Report") and testified at the continuation of the trial. Mr. Steigervald commented on the use of the MBM as the appropriate measure. He pointed out that the MBM is described by Statistics Canada as "a basket of goods and services representing a modest, basic standard of living in Canada".

[161] In order to assist the Court, Mr. Steigervald provided a list of living expenses from the 2009 Survey of Household Spending by Statistics Canada. He had increased the income and expenditures to reflect the increases in income and expenditures since 2009. He removed the expenses relating to insurance and pension, as they are not consumed. He further adjusted the shelter expenditure since it included costs for both owner-occupied (including mortgage interest and principal repayment) and rental costs.

Position of the Parties

Position of the Plaintiff

[162] The plaintiff argues that Mr. Carson's report should be preferred since it gives a more accurate and nuanced lost years calculation, in line with economic principles, and a methodology supported by objective metrics for the costs of necessary living expenses. He submits that Mr. Steigervald provided various numbers without any substantive economic rationale or analysis to assist the Court. During cross-examination, Mr. Steigervald admitted that he was not offering a methodology to assess a "lost years" deduction.

[163] The plaintiff submits that the appropriate deduction should be in the range of 25 percent to 35 percent. The plaintiff submits that by using a deduction of 33 percent, the award for future loss of earning capacity, net of lost years deduction, would be \$1,939,648.

Position of the Defendants

[164] The defendants submit that the appropriate deduction for personal living expenses should be 80 percent.

[165] The defendants argue that the use of MBM by Mr. Carson should be rejected, since the deduction is for personal living expenses and not bare necessities of life, which is what is represented by the poverty line.

[166] The defendants argue that the poverty-line approach of Mr. Carson does not appear to have been followed in any BC jurisprudence.

Analysis

[167] The two issues that arise from the expert economic reports are:

- What is the correct measure to use for personal expenses?
- Should taxes be included in the expenditures of personal expenses?

What is the correct measure to use for personal expenses?

[168] The period of time being considered is after the plaintiff's anticipated death at the age of 50. It is my view, when considering the individual aspects of this case, that it is during this period of time that the plaintiff would likely be earning the highest in his career with his Bachelor's degree.

- [169] I disagree with Mr. Carson's use of the MBM, and his view that the same poverty-line based reduction should be applied to everyone, regardless of education, social position, income, and employment. That would be contrary to the goal of assessing the loss that this particular plaintiff has suffered, not "any member of society", and I am not persuaded that the plaintiff's expenditures on personal living expenses would have been at the poverty consumption level. As was found in *Duncan Estate*, the poverty-line approach fails to capture the realistic expenses that a particular person at a particular income level would spend in order to earn that income. Further, it is in direct conflict with *Toneguzzo SCC* and the BC decisions thereafter.
- [170] I am similarly hesitant to use the lost savings approach. *Toneguzzo SCC* specifically calls for the deduction of personal living expenses, based on the fact that "had the plaintiff been in a position to earn the monies represented by the award for lost earning capacity, she would have had to spend a portion of them for living expenses": at 126-127. The focus of the analysis is the requirement of expenses in order to obtain income. The lost savings approach instead includes every expense a plaintiff may make, including unnecessary and discretionary spending, and leaves only the small portion of income they are expected not to spend. I am also concerned that this approach views the plaintiff's loss from the perspective of a potential heir, rather than as the actual loss the plaintiff has suffered, being their loss of their earning capacity. While the percentage deduction for living expenses has increased overtime in decisions of this Court, the starting point of the analysis appears to always be expenses, not savings.
- [171] To determine what expenses the plaintiff would have likely incurred in order to earn at his Bachelor degree-level employment, I turn now to the other evidence I have before me.
- [172] Mr. Steigervald sets out a table that provides information from the 2009 Survey of Household Spending by Statistics Canada. He has adjusted the figures for income and expenditures to reflect 2021 dollars. This is the type of evidence the Court should have in order to assist in determining what the appropriate personal expenditure level should be. I have reviewed the various living expenses listed for a one-person household and have attached Table 3 of Mr. Steigervald's report as Appendix A to these reasons, to set out the various household expenditures listed. I note that in Table 3 Mr. Steigervald further deducted the expenses relating to insurance and pensions, and a portion of the expenses relating to the mortgage expenditure. Mr. Steigervald explained that the insurance and pension are excluded since they are not consumed. He explained that shelter included both owner-occupied, including mortgage interest and principal repayment, and rental costs. As a result, he made an adjustment to the shelter to reflect the potential for the mortgage payments to the principal to not reflect consumption.

[173] Mr. Steigervald's opinion is that he would have assessed the plaintiff's income at between Quintile 4 and Quintile 5. This provides a range of percentages of expenditure that are between 90.2 percent and 77.9 percent of income. I note that these expenditures include taxes, which I will address below.

[174] The majority of the expenses listed in Table 3 of Mr. Steigervald's report appear rational, and are clearly personal living expenses the plaintiff would have been expected to incur over the lost years. I also agree that the plaintiff's income must be taken into consideration in determining his expenditures and, with a Bachelor's degree, his income would have fallen between Quintile 4 and Quintile 5. However, I disagree that the following categories of expenses should be included in assessing the deduction: Tobacco and Alcohol; Gifts of Money, Contributions and Support Payments; and Games of Chance. Removing these categories provides a range of percentages for Quintile 4 and Quintile 5 of between 81 percent and 70 percent.

Should taxes be included in the expenditure of personal expenses?

[175] In Professor S.M. Waddams *The Law of Damages* Looseleaf (Toronto: Canada Law Book Inc. 2021) at 3:15 he states:

"Personal living expenses" are to be deducted from gross income in calculating the amount recoverable in respect of the lost years. But the phrase leaves some room for doubt. In a sense all expenditures are part of the "cost of living" - a cost which, therefore, will not be incurred during the "lost years". The costs of food, clothing, housing, and everything the plaintiff would have spent on pleasure ought to be deducted. So should costs of earning income, such as transport to work, or tools, or work clothes, for these will not have to be incurred. A strong argument can be made for the deduction of taxation, municipal, provincial and national, on the ground that this represents an expense of the living that will not be incurred.

[176] I note this same quote was referenced in Ediger at para. 342 from the 2001 loose-leaf edition of *The Law of Damages*.

[177] As noted, the Court of Appeal in *Brimacombe* at para. 246: "affirmed the deduction by this court of 50% of an award made by the trial judge to reflect the reality that a plaintiff will obviously not retain all sums earned because of expenses, taxes and the like." [emphasis added].

[178] I cannot come up with a good reason to not deduct the taxes that the plaintiff would have incurred in the lost years. Mr. Carson's explanation is that they should be included, since the taxes will just be added back in as a gross-up calculation. I am not persuaded that this is an argument that supports ignoring the tax consequences at the stage of assessing the lost years deduction. The issue of tax gross-up is for a separate assessment and determination.

[179] I conclude that income taxes should be included when considering the lost years deduction.

Conclusion

[180] I am persuaded, in doing a case-specific review of the evidence presented, that the appropriate deduction for the lost years is 75 percent. Using Mr. Steigervald's calculations, a 75 percent reduction equates to \$619,480, rounded up to \$620,000. The reduction is in line with the personal expenses the plaintiff would have likely incurred in order to earn a living, as well as being in line with the caselaw in BC.

Issue 5: What is the Quantum of the Claim for the Loss of Interdependency?

[181] I described this type of award in the Trial Reasons at para. 803:

[803] Claims of loss of interdependency were once referred to as claims for "loss of marriageability". In essence, it is a claim that a plaintiff is unlikely or less likely to enjoy the economic benefits of an interdependent relationship. The principles were described in *Grewal v. Brar et al*, 2004 BCSC 1157:

[156] This type of award has been described by the Court of Appeal in *Reekie v. Messervey* (1989), 36 B.C.L.R. (2d) 316, 59 D.L.R. (4th) 481 (C.A.), varied on another point [1990] 1 S.C.R. 219, 43 B.C.L.R. (2d) 145, where Mr. Justice Lambert stated at 330-331:

This aspect of the damage award was called "loss of opportunity to marry" by counsel and by the trial judge. But marriage itself is not the significant point. The significance lies in the loss of an opportunity to form a permanent interdependency relationship which may be expected to produce financial benefits in the form of shared family income. Such an interdependency might have been formed with a close friend of either sex or with a person with whom a plaintiff might have lived as husband and wife, but without any marriage having taken place. Permanent financial interdependency, not marriage, is the gist of the claim. For the sake of simplicity and consistency, I will now usually call this head of loss: "lost opportunity of family income".

[157] Lambert J.A. described the head of damages as including three different aspects: (1) loss of the benefit of increased income (especially for female plaintiffs who typically earn less than male partners); (2) loss of the benefit of shared expenses; and (3) loss of the benefit of shared homemaking.

[182] The Court should be making one assessment covering the whole of the income side of the plaintiff's future loss, including the claim for loss of interdependency: *Reekie v. Messervey* (1989), 36 B.C.L.R. (2d) 316 at 334 (C.A.); *Anderson v. Lancaster*, 1999 BCCA 1 at para. 23; Trial Reasons at para. 820.

[183] In the Trial Reasons at para. 821, I requested that the parties obtain a report from an economist with the following assumptions:

- a) the plaintiff would have obtained a four-year bachelor's degree absent the Collision;
- b) the plaintiff's life expectancy is an additional 27 years to age 50;

- c) the plaintiff's hypothetical partner's earnings would be based on two scenarios with the partner achieving: (i) a one or two year diploma and (ii) a four-year bachelor's degree;
- d) the calculation of the hypothetical partner's earnings would be based on two scenarios using: (i) the statistics for females and (ii) the statistics for males; and
- e) the calculation be made assuming: (i) no children; (ii) one child; and (iii) two children.

[184] I found that the plaintiff had a 66 percent chance of establishing a relationship absent the Collision, and, as such, a negative contingency of 34 percent applies: Trial Reasons at para. 822.

Expert Evidence

[185] There were several differences in the approaches taken by Mr. Carson and Mr. Steigervald on the issue of interdependency loss. One key difference was whether having children increases or decreases the interdependency gain. Another was whether pre-tax income projections ought to be used.

[186] In the Carson Report, the various calculations for each of the assumptions were provided. In the "with children" scenarios, Mr. Carson treated the costs incurred by parents for child raising as expenditures made on shared or public goods. As he explained: "child raising is taken as an activity in which parents choose to engage, in preference to other ways of spending their time or income".

[187] Mr. Carson uses the economic concept of utility, which he explains as:

If the potential for gain contemplated by prospective parents who are considering raising children are absent from adults' "utility functions", there can be no basis in economic analysis for the decisions which adults make with regard to allocation of time and money to child raising, or to paid time, or own compensation.

[188] As he puts it: "If child raising costs were taken by economists as costs which diminish parents' own consumption, then economics would have nothing to say about why people have children."

[189] I understand Mr. Carson's view to be that when two people decide to have a child, they choose to direct portions of their income to the raising of that child, which would otherwise have gone towards other consumption or savings; having a child redirects patterns of spending and saving, and results in, what Mr. Carson calls, the parents' "shared or public goods": the child. Viewed this way, each parent redirects a portion of their consumption to child raising expenses, which is a benefit to both parents. Therefore, having children should not change the interdependency gain, as opposed to not having children, because an expense is simply a redirection of income.

[190] Mr. Steigervald disagrees with Mr. Carson's approach of not factoring anything for the cost of child raising. I understand Mr. Steigervald's critique to be that it places value on having a child under the interdependency analysis, when it might be better understood as a non-pecuniary loss. As Mr. Steigervald explains:

42. It is not clear that this approach of valuing expenditure on a child as an additional loss is appropriate where the objective is to estimate the financial losses the Plaintiff has suffered by virtue of having a reduced chance of forming interdependent relationships. Mr. Carson's approach (where children represent an additional loss) is more akin to valuing the loss of the ability to have children, assuming that spending on children is a measure of the value of having children.

[191] Mr. Steigervald instead approaches the issue on the basis that the presence of children necessarily reduces a parent's financial consumption. The income directed to child raising detracts from both the parents' personal consumption and economic well-being, leaving them with less money to spend on themselves. As such, the presence of children should result in a decrease in interdependency gains.

Position of the Parties

Position of the Plaintiff

[192] The plaintiff argues that Mr. Carson's approach is consistent with general economic principles regarding expenditures by choice and should be preferred by the Court. The plaintiff submits that the most likely scenario would be the average for the scenarios with one or two children, which amounts to a loss of interdependency of \$469,607.

Position of the Defendants

[193] The position of the defendants is that only a modest amount should be awarded, given the number of uncertainties and assumptions associated with the quantification of such claims. They suggest the sum not exceed \$125,000, being the average of the 12 interdependency hypothetical scenarios in the Steigervald Report.

[194] The defendants also point out that Mr. Carson used pre-tax numbers, assumed a bare necessities deduction for the lost years of approximately 25 percent to 30 percent, and did not account for the costs of children.

Analysis

[195] In my view, it is reasonable to take into account both male and female statistics when considering the plaintiff's hypothetical partner. In 2021, the Court of appeal, in *McColl v. Sullivan*, 2021 BCCA 181, notes that "gender-specific statistics guide rather than determine damages", but that it would be an error for male statistics to be considered the default position for everyone: at paras. 43, 47-48. As such, it is my view that using the average of the male and female statistics is appropriate to most accurately reflect the future loss of the

hypothetical partner's income.

- [196] As noted above, the significant differences arise in the approach of the economists on whether the costs of children should be factored in as an expense, and on whether the calculation should be done on after-tax income.
- [197] On the tax issue, I will adopt the same approach that I did in calculating the lost years deduction by using after-tax income to value the benefits. Mr. Carson estimates the benefits from an interdependent relationship based on pre-tax income. I have used the numbers in the Steigervald Report at Table B. As Mr. Steigervald notes:
39. Use of after-tax income to value benefits from interdependency values would yield lower values of benefits from interdependency, all other things being equal. Also, I note that use of after-tax values in such a calculation may require the resulting values of benefits from interdependency to be "grossed up" to offset income taxes that may be paid on investment income generated by the future award (if it will be invested in income-generating assets like stocks or bonds).
- [198] If some adjustment has to be made for tax gross-up, that can be factored in when that issue is considered by the Court at the further continuation of this trial.
- [199] In considering whether the costs of having children should be included, the cases have taken differing approaches. In *Ediger*, Holmes J. accepted Mr. Carson's approach of viewing the presence of children as an increase in interdependency gains and noted:
- [332] A significant portion of the difference between Mr. Carson's and Mr. Hildebrand's projections arises from their different approaches, in projecting the value of an interdependent relationship, to the costs of raising children in such a relationship. I agree with Mr. Carson that, in this context, mercenary though this may sound, expenditures on children are a consumption choice that do not reduce the value of the earnings from which those expenditures would have been made. Mr. Hildebrand follows an approach better suited to other legal contexts which seeks to value financial loss to a plaintiff resulting from the loss of a child. The task here is not to compensate Cassidy for the loss of the ability to raise a child: it is to arrive at an accurate and fair assessment of her lost earnings, no matter how she may have chosen to spend them. I therefore agree with Mr. Carson that the value to Cassidy of an interdependent financial relationship would have increased, and not decreased as Mr. Hildebrand suggests, had she had children in the relationship.
- [200] In *Steinebach SC*, Pitfield J. appeared to accept the calculations made by Mr. Hildebrand of Columbia Pacific Consulting, in which the presence of children decreased interdependency gains. Justice Pitfield noted:

- [177] Mr. Carson attributes value in terms of inter-dependency to the cost of raising children and therefore excludes that cost from his calculations. Mr. Hildebrand, on the other hand, is of the view that raising children is a disbursement of income much as any other personal or living expense is a disbursement of income, so that value should not be attributed to child-rearing costs for purposes of assessing the value of inter-dependency.
- [178] Mr. Hildebrand values the inter-dependent relationship, after taking into account probabilities that no such relation will be established, for a person with post-secondary non-university education and no children at \$210,877; for such a person with one child in the relationship, \$185,121; and for such person where there are two children of the relationship, \$159,121. Mr. Carson's estimate of value, without reference to the number of children because of the approach he considers appropriate, is \$315,800.
- [179] In all of the circumstances, I am satisfied that the appropriate assessment of the value of the inter-dependency relationship in the circumstances of this case is \$175,000, reflecting a family size in the range of 1.5 to two children per family.
- [201] On appeal, the award of future loss of earning capacity was set aside, not on the inclusion of the costs of raising children on the interdependency claim, but on the basis the that trial judge decided to eliminate the gap between projected female and male earnings: *Steinebach v. O'Brien*, 2011 BCCA 302 at para. 43. There was no adverse commentary on how the loss of interdependency claim was calculated.
- [202] I am not persuaded that Mr. Carson's economic principal of "utility" applies to this assessment, nor to other assessments of pecuniary damages. It may well be a valid economic notion, but when assessing the costs associated with having children, I do not accept that those costs should be discounted for this economic theory. If the plaintiff were to have children, a large portion of his and his potential spouse's income would be directed towards child raising expenses. While this would have surely provided some value to the plaintiff, it would be an economic disadvantage in that financially, the plaintiff and his spouse would have less to spend on themselves. To me, this would result in a decrease in the interdependency gain in the relationship.
- [203] Mr. Carson might be right on economic literature that out-of-pocket costs and loss of opportunity costs are treated to reflect the household adults' preferences; however, I am not persuaded that such an economic theory should be applied to the reality of the out-of-pocket costs that parents incur when raising children, when considering the expenses that a plaintiff will incur in the lost years. The additional shelter costs, food, and educational expenses that come with child raising are not accounted for in the lost years reduction, and are ones that should not be ignored when assessing a plaintiff's future earning capacity. If this plaintiff had decided to have one or two children, those expenses would have been incurred.

- [204] As such, I accept the approach of Mr. Steigervald that the costs attributed to child raising are a personal expense and should be reflected in the expense when considering the loss of interdependency claim.
- [205] I do note that this approach differs from the one taken by Justice Sharma in *Wilhelmson v. Dumma*, 2017 BCSC 616, where a 21-year-old plaintiff, with no reduced life expectancy, was awarded between \$325,000 and \$350,000 based on the evidence of Mr. Carson, as the plaintiff's expert economist: paras. 307, 349. Mr. Carson was the only economist that provided a report and testified at trial. It appears that Sharma J. accepted the approach advocated for by Mr. Carson on the impact of children on his calculations: see para. 341. In this case, I have differing evidence from two expert witnesses before me. However, in my view, this is an area that should be clarified by the Court of Appeal.
- [206] I have used the approach of averaging the 12 scenarios that I asked the economists to consider. This best addressed the very speculative nature of the exercise. In testimony, Mr. Steigervald did the necessary calculations for the 12 different scenarios and testified that the amount of the loss of interdependent benefits would be approximately \$125,000. I accept that calculation.

Issue 6: What is the Award for Loss of Future Earning Capacity?

- [207] In the Trial Reasons, I determined the basis for the plaintiff's loss of future earning capacity is \$2,212,229. The findings I have made that impact the future loss of earning capacity award at para. 800 in the Trial Reasons are:
- the amount to be deducted for the lost years is \$620,000;
 - the amount to be added for the loss of interdependency claim is \$125,000; and
 - the amount to be deducted for the past PWD payments is \$31,820.
- [208] The amount awarded for loss of future earning capacity is therefore \$1,685,409.

Conclusion

- [209] I will adjust the table at para. 1113 of the Trial Reasons to provide the following damages award:

a.

Non-pecuniary damages:

\$403,000

b.

Past net wage loss:

none

c.

Future loss of earning capacity:

\$1,685,409

e.

Cost of future care:

\$12,389,348 (subject to para. 211)

f.

In-trust claim for Mr. Sidhu:

\$950,000

g.

In-trust claim for Balraj Sidhu:

\$25,000

h.

Special damages:

\$8,560.83

i.

Management fees and tax

gross-up:

TBD

TOTAL

\$TBD

[210] Instead of providing a separate award for loss of interdependency, I have factored in that issue, along with the deduction for lost years, in the award for loss of future earning capacity. If the plaintiff receives further PWD payments up to the conclusion of this matter, those payments should be deducted from the loss of future earning capacity award.

[211] The cost of future care award may need to be adjusted, depending on whether any further CSIL payments or PROP benefits have been received since the calculation was completed in the Revised Further Agreed Statement of Facts, and up to the conclusion of this proceeding.

[212] The parties have leave to appear before me to address any issues with regards to calculations of the damages award.

[213] The award for management fees and tax gross-up remains to be determined at the continuation of the trial set for May 29, 2023.

"Forth J."

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