
CANADA / JUDGMENT

Tzotzolis v. Wyman

2019 BCSC 2026

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Supreme Court of British Columbia

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2019 BCSC 2026 Tzotzolis v. Wyman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tzotzolis v. Wyman,

2019 BCSC 2026

Date: 20190821

Docket: M175330

Registry: Vancouver

Between:

William Tzotzolis

Plaintiff

And

Keith Orval Wyman

Defendant

Before: The Honourable Mr. Justice A. Saunders

Oral Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

August 12-16, 2019

Place and Date of Reasons:

Vancouver, B.C.

August 21, 2019

- [1] THE COURT: I am giving judgment orally. In the interests of time, I am not going to cite various cases supporting some of the propositions of law that I will deal with, nor will I quote from case law extensively. The cases stating the principles that apply to the assessment of damages in tort claims and in personal injury in particular - decisions such as *Stapley v. Hejslet*, 2006 BCCA 34; *Brown v. Golaiy*, [1985] B.C.J. No. 31 (B.C.S.C.), and any number of decisions of our Court of Appeal on the assessment of earning capacity claims - are well-known. The principles are not controversial, and their application to the facts of the present case are not complicated. In the event a transcript of these reasons is ordered, I am reserving without limitation my right to edit, including by way of amplification and elaboration.
- [2] This is an assessment of damages arising out of a May 12, 2016 motor vehicle accident, a rear-end collision. Liability is admitted. The plaintiff, Mr. Tzotzolis, was then 45 years old, a husband and father of a young boy who is now age eight. Mr. Tzotzolis sustained soft tissue injuries to his left wrist, neck and shoulder and upper back, all of which have resolved. He has also since the accident had significant lower back pain that has persisted to this day, leading to restrictions in his employment and recreational activities, impacts on his personal relationships and depressed mood.
- [3] Mr. Tzotzolis was in good health prior to the accident. He had been in a previous motor vehicle accident in 2010 injuring his neck, shoulders and back. Those injuries, he testified, had fully resolved by the time of the subject accident, and he had no restrictions in his personal and work life and no back pain. He was physically active, playing tennis in good weather and squash in winter months, as well as occasional games of golf. He was also active in the gym. He enjoyed using his carpentry skills to assist friends and family with renovation projects, and he was known in Vancouver's Greek community as someone who would willingly lend a hand with such projects. He and his wife had an active social life, attending or hosting dinners and barbecues with friends, as well as social activities such as board game or poker nights.

- [4] X-rays taken two weeks after the subject accident did show advanced arthritis of the facet joints at L5-S1 with early osteophytes at the L3, 4 and L4-5 level. I will say more about the arthritis later.
- [5] Mr. Tzotzolis was employed as an insurance broker at the beginning of his working life. Discovering a love of carpentry when he was in his early 30s, he switched to doing construction and contracting work. In 2011, he became a building manager, responsible at one point for maintaining 20 to 25 properties owned by his employer. This was physically demanding work. In addition to the administrative side of the job, dealing with tenants, leasing and suite preparation and driving between locations, he would do landscaping, move appliances, salt and shovel in the winter, repair plumbing, patch drywall and hang closet doors. He testified that he would often be exhausted at the end of the day.
- [6] By 2014, his annual earnings from this job were in the range of \$63,500. He left that position in 2015, as he found that the driving he was having to do between the many properties he was responsible for was making his work days too long. Within a couple of months, Mr. Tzotzolis found a building manager's position with another company called Austeville Properties Ltd. ("Austeville"), where he was still employed at the time of the accident. This was full-time work, initially at one building of 21 units, and then he became part of a four-person team managing two large buildings at UBC. He worked eight hours a day, Monday to Friday. The job offered benefits, a bonus package and three weeks' vacation a year.
- [7] Mr. Tzotzolis did not miss any days of work immediately following the accident, but he found that attempting the physical aspects of the job would aggravate his low back pain. On the advice of his GP, Dr. Faraday, he underwent some physiotherapy, 16 sessions between July and November 2016, and also massage therapy, just three sessions in the same time span. He discontinued physiotherapy when he experienced heart palpitations after undergoing treatment with a TENS machine. He did not speak to the physiotherapist or his GP about this incident. However, there is no evidence that his discontinuation of physiotherapy made any difference to his outcome in terms of his recovery. Mr. Tzotzolis continued to exercise in the gym in his building and did the types of stretching exercises that had been prescribed following his 2010 MVA. He continued to hope that he would improve.
- [8] Mr. Tzotzolis continued working for Austeville for nearly a year until late April 2017. He enjoyed working in this position, and he aspired to advance into a more senior supervisory position as a property manager where building managers would be reporting to him. He earned a total of \$55,624 from Austeville in 2016 including bonuses. He had received a raise in his base salary to \$52,000 effective December 5, 2016.
- [9] However, his mid and lower back in particular were still painful, and this, he testified, was taking a toll. He found he had to plan his days carefully to manage the physical aspects of the workload. He avoided doing some of the heavier tasks altogether and for others, he had

to arrange to get help from a co-worker. His pain level was "fairly constant" and would be exacerbated when having to undertake a physical task such as stooping under a sink to change a faucet. His sleep was disrupted. He began to experience some anxiety and low mood. His back pain continued, and eventually he reached the point where he felt the job was "unsustainable". He was "overwhelmed". He decided to resign and concentrate on his recovery, doing his stretches and strengthening exercises, and hope for his symptoms to "calm down". His last day with Austeville was April 24, 2017.

- [10] Over the next few months, Mr. Tzotzolis experienced some improvement in his symptoms. He felt stretching and exercising helped. He was still constantly in pain but was sleeping better. Mr. Tzotzolis began looking for work in a building manager's position that did not have so many physical aspects to it. He interviewed for a position in June, but his impression was that the job would have entailed too many physical demands, and so he withdrew his name from consideration, making up an excuse that a family matter had come up that would have necessitated time off.
- [11] The defence called Ms. Fassbender, the property manager who interviewed Mr. Tzotzolis for that position. She testified that her employer is very conscious of WorkSafeBC regulations and the risk of work-related injury, as a result of which injury avoidance practices - such as two workers together lifting a heavy load or moving heavy objects with a dolly - are to be followed. Ms. Fassbender testified that a worker would be allowed to refuse a task if they were medically or physically unable to perform it, but she clarified that this policy would be for an acute injury or disability. She was unable to say that her employer would have hired someone with chronic limitations. I did not find Ms. Fassbender's evidence established a failure on Mr. Tzotzolis' part to mitigate, nor that it raised a doubt as to credibility or contradicted his position that he genuinely felt the job that he had interviewed for was beyond his capabilities.
- [12] In October 2017, Mr. Tzotzolis found part-time work as a building manager for a company known as EMV Holdings, that had fewer physical demands. He earned \$36,365 from that employer in 2018. In November 2018, Mr. Tzotzolis took on an additional part-time job as a building manager with a company known as First Service. This has allowed him to supplement his income, with earnings of a further \$9,300 approximately in the first six months of 2019.
- [13] Beginning in December 2017 and up to July 2018, the plaintiff undertook kinesiologist-guided active rehabilitation, attending 19 sessions in total at a cost of approximately \$600. The total amount is included in the special damages which have been agreed to. Initially he had some benefit from these sessions, but then he felt he plateaued.
- [14] Mr. Tzotzolis described the wearing effect of living with chronic back pain. As confirmed by testimony from his wife, he has become irritable and withdrawn. His mood is affected by his limitations and his inability to participate in recreational events and, due to fatigue and pain, loss of enjoyment at participation in social activities. He feels he and his wife argue

more frequently. Their intimacy has declined, throwing a cloud over their hope for a second child. He also feels his mood and his pain level and restrictions have affected his relationship with his young son.

- [15] Ms. Tzotzolis testified that her husband, formerly a big-hearted, active, fun and upbeat person, is now constantly in a bad mood and irritable with low energy. Their activities have been curtailed drastically. Communicating with him, she said, is a struggle. He isolates himself from her and their son, going to his room to sleep or nap, even during the day. She said it is as if he has to recuperate every day. Friends of Mr. Tzotzolis, Mr. Nikas and Mr. Lilquist, also attested to Mr. Tzotzolis' negative affect and decreased participation in social and recreational activities.
- [16] Mr. Tzotzolis sought assistance from Dr. Faraday in February 2019 as to his low mood. Despite the delay between the accident and his report of this condition, I have no hesitation in finding it was caused by the chronic pain - the cumulative effect of the chronic pain resulting from the accident. Dr. Faraday referred Mr. Tzotzolis to counselling, which he has undertaken. He feels it has done some good, and he would like to continue with it.
- [17] Much of the defence closing argument consisted of a sustained attack on Mr. Tzotzolis' credibility and the reliability of his evidence. There were some inconsistencies in Mr. Tzotzolis' testimony, but for the most part I find they are accounted for as normal failures in memory of details which one could not reasonably expect to be perfect after a lapse of two or three years. Other points of confusion in Mr. Tzotzolis' testimony arose when he misunderstood what was being asked, with the result that he and counsel were sometimes at cross-purposes.
- [18] Defence counsel spent a great deal of time in cross-examination pinning Mr. Tzotzolis' down as to how frequently he played golf, went to the driving range and played other sports prior to the accident. Mr. Nikas, who testified on behalf of the plaintiff, later gave evidence that he and Mr. Tzotzolis had really only golfed together when they were in their 20's and 30's. Defence counsel submitted that this was inconsistent with the plaintiff's testimony that he had golfed with Mr. Nikas often in the two years leading up to the accident, and this supposed inconsistency was cited in closing submissions as an example of why the Court should find Mr. Tzotzolis' testimony unreliable generally. However, when being cross-examined, Mr. Tzotzolis was asked how frequently he golfed prior to the accident, and he responded, "With Mr. Nikas or in general?" Defence counsel replied, "In general". I took the testimony that followed to be on the subject of his activity level generally and not, as suggested by the defence, with Mr. Nikas in particular. There was no inconsistency.
- [19] The defence also submitted that I could and should disbelieve Mr. Tzotzolis' evidence that his back pain had been asymptomatic in the two years leading up to the accident. I reject this submission entirely. There is simply no basis in the evidence for such a finding of fact.

- [20] Mr. Tzotzolis certainly was not so lacking in credibility as to lead me to find that his evidence is entirely untrustworthy and his claims therefore unproven. To the contrary, I found Mr. Tzotzolis entirely believable and sympathetic. He showed no overt signs of dissembling or exaggeration. His answers were frank and responsive.
- [21] Mr. Tzotzolis' use of medication for pain control has been modest. He currently only takes one to three ibuprofen a week. I have considered whether I can, on this evidence, fairly draw an inference that Mr. Tzotzolis' back pain is not as severe as he would lead us to believe. I do not draw that inference. The plaintiff was not challenged on cross-examination as to his medication use, either as to the frequency, dosage or type of medication he uses, and so I have no evidence to go on as to whether he has found or would find an increase in his medication helpful in addressing his chronic pain. Dr. Badii was not cross-examined as to whether this limited use of over-the-counter medication was inappropriate. To the contrary, Dr. Badii's opinion stated that Mr. Tzotzolis should use over-the-counter anti-inflammatories "as needed".
- [22] The defence expert witness, Dr. Wong, volunteered in cross-examination the opinion that all that should be needed for Mr. Tzotzolis' chronic pain to be successfully controlled - as he put it, "to treat the root cause" - was a course of anti-inflammatories, because arthritis is an anti-inflammatory process, with Tylenol to be used for pain control. I give no weight to that opinion. It was not set out in Dr. Wong's report, and it seemed to me more of an afterthought than a sound conclusion based on a solid record of clinical experience.
- [23] Therefore, I draw no conclusions from Mr. Tzotzolis' medication regime, such as it is, in respect of the severity of his subjective pain, his duty to mitigate, his prognosis, or in particular whether he has reached the point of maximal medical recovery.
- [24] I find that Mr. Tzotzolis suffers from significant back pain. I accept that it has impacted and continues to impact his employment, his mood, his sleep and his relationships with his wife and son. It has resulted in a loss of stamina and sleep disturbance and in him having to nap during the day. It has also led to him gaining weight, as his ability to exercise and play sports has been severely curtailed. And it has impaired his enjoyment of social contacts.
- [25] The plaintiff relies on the opinion evidence of Mr. Tzotzolis' family physician, Dr. Faraday, and the other expert I mentioned, the rheumatologist, Dr. Badii, who performed an independent medical examination in May 2018. Dr. Faraday's diagnosis was that the accident resulted in aggravation of a previously asymptomatic pre-existing lumbar spine degenerative condition with ongoing mechanical low back pain, ongoing depressive symptoms, now-resolved musculoskeletal injuries to the neck and upper back and a left wrist sprain. He opined that Mr. Tzotzolis' prognosis for a full recovery was "guarded" and that Mr. Tzotzolis would likely have ongoing lower back symptoms for the foreseeable future.

- [26] Dr. Badii diagnosed Grade 2 whiplash-associated injuries to the soft tissues of the neck and back (now resolved) and chronic soft tissue low back pain with pre-existing but asymptomatic lumbar degenerative changes having become symptomatic because of the motor vehicle accident. His expectation is that Mr. Tzotzolis will always have some degree of discomfort, but that the pain should not cause severe functional limitations and that he expects the impact could be "blunted" if Mr. Tzotzolis were able to lose weight and improve his core strength and physical conditioning.
- [27] I accept that opinion evidence of Dr. Badii. I find there is some hope of improving Mr. Tzotzolis' condition. However, at best this would be more in the nature of, as Dr. Badii says, blunting the impact of the injuries as opposed to, I find, any substantial recovery. The hope for improvement would also be contingent upon Mr. Tzotzolis being able to motivate himself to exercise, notwithstanding his low mood; of him being physically able to tolerate increased exercise; and of being able to lose weight and keep it off, which can be a challenge for even healthy individuals; This possible outcome is best treated as a positive contingency, and I treat it as such in my assessments.
- [28] Mr. Tzotzolis told Dr. Badii, in giving his history, that the defendant's vehicle had been travelling at 40 to 50 kilometres an hour at the time of the collision, and that was one of Dr. Badii's factual assumptions in giving his opinion. Mr. Tzotzolis acknowledged on the witness stand that he did not see the defendant's vehicle beforehand. He also said, and I accept, that he gave this range as an estimate. Apparently, it was simply based on his subjective impression. It is evident from the defendant's testimony that he could not have been travelling nearly so fast. The two vehicles had been stopped at an intersection for Mr. Tzotzolis and the lead vehicle to make a left hand turn, and the defendant accelerated into the rear of the plaintiff's vehicle from a standing start, over what could have been only a short distance. The defendant was unable to say what distance, as he was not paying attention.
- [29] With a factual assumption made by an expert not having been proven, it would be open to me to reject the opinion in its entirety. However, that should only be done if the assumed fact is of obvious importance. It is also open to me to give the opinion less weight or to treat that factual issue as irrelevant. In this case I choose the latter option. Dr. Badii was not cross-examined on his opinion being consistent or inconsistent with a lower-impact speed. Dr. Wong, the defendant's expert, did not say that his opinion was dependent on the force of the collision. It is a myth that low-velocity impacts correlate necessarily with less severe injuries: see *Wahid v. Caporusso*, 2016 BCSC 1743. In any event, it transpired that there was in fact some considerable force to the collision, as it resulted in extensive damage to the defendant's bumper and a significant dent in the hood of his car. I do not find anything turns on the speed of the defendant's vehicle as regards the plaintiff's injuries.

- [30] The defence medical expert was Dr. Joseph Wong, a specialist in physical medicine and rehabilitation. Dr. Wong is based in Toronto. He has lately, as of last November, begun doing independent medical examinations in British Columbia. He is in this province for about one week every month for that purpose. He sees five patients a day over five days. His appointments last an hour. That was the length of his assessment of Mr. Tzotzolis, when Dr. Wong examined him in April of this year.
- [31] There is a minor difference of opinion between Dr. Wong and the plaintiff's experts in respect of the mechanism of pain generation at work, in that Dr. Badii thinks Mr. Tzotzolis' low back pain is due, in part, to ongoing chronic soft tissue damage, whereas Dr. Wong says he could find no signs of soft tissue injury present when he examined the plaintiff. Ultimately, nothing turns on this difference of opinion.
- [32] Dr. Wong's report also expressed the opinion that Mr. Tzotzolis should be able to perform in his "previous", i.e. pre-accident, employment. However, on cross examination it appeared this opinion rested on an incorrect assumption made by Dr. Wong as to what activities Mr. Tzotzolis had been able to perform pain free in his occupation post accident. Dr. Wong agreed with plaintiff's counsel that Mr. Tzotzolis is suffering from chronic low back pain due to osteoarthritis in his lumbar spine and that this has resulted in him becoming partially disabled with respect to his employment, recreational activities and certain activities of daily living.
- [33] Where Dr. Wong chiefly differs from the plaintiff's experts is that he does not believe the plaintiff's pain is as a result of the accident. Dr. Wong's report states that the plaintiff's arthritis is likely pre-existing and therefore not related to the accident. The report did not explicitly state that the accident did not cause the arthritis to become painful, or in other words that it did not cause the previously asymptomatic arthritis to become symptomatic; that conclusion, however, was implied, and Dr. Wong confirmed in cross-examination that this is his view. He regards the accident and the arthritis becoming symptomatic as merely coincidental. His report, however, did not explain why he holds this position. He volunteered in cross-examination that there are "many possible reasons" why this could be so. Plaintiff's counsel, sensibly, did not invite him to elaborate.
- [34] Dr. Wong had been explicitly asked by ICBC in their letter of instruction to opine in relation to any pre-existing condition he found, specifically as to whether the plaintiff would have suffered symptoms complained of regardless of the accident. He was also asked whether the accident accelerated or aggravated the onset or development of symptoms, or whether it aggravated the severity of symptoms Mr. Tzotzolis would have suffered in any event. His report did not provide answers to those questions.
- [35] That the mechanical forces imparted to the spine in a motor vehicle collision may be sufficient to trigger pain in previously asymptomatic degenerative arthritis of the spine is not a novel proposition. There must have been hundreds of decisions in this court over the years based on this scenario. If Dr. Wong meant to contest the possibility or medical

plausibility of such a physiological process, he ought to have said so clearly and explained his logic. If what he meant instead was that in Mr. Tzotzolis' particular circumstances there are more probable explanations, he ought to have said what those explanations were. Instead, his report was simply conclusory.

[36] Rule 11-6(1)(f) requires that an expert witness's written report must set out the expert's reasons for his opinion. Dr. Wong's report was not in compliance with that subrule.

[37] In contrast, Dr. Badii's report stated, at para. 40:

My opinion on causation is based on the close temporal relationship between the accident and the onset of symptoms as well as the medical plausibility of the above injuries occurring during the type of accident in which Mr. Tzotzolis was involved.

Dr. Faraday gave a similar opinion. Neither of the plaintiff's doctors was challenged by defence counsel on cross-examination as to their reasoning. Dr. Wong did not author a rebuttal report.

[38] Without Dr. Wong having stated his reasons for his opinion, it is simply impossible to weigh his opinion against those of the plaintiff's experts. I give Dr. Wong's opinion no weight.

[39] I find that Mr. Tzotzolis' symptoms and all their sequelae, including sleeplessness, irritability, low mood and decrease in his social and recreational activities, were caused by the accident.

[40] Dr. Badii also opined in his report that the degenerative changes Mr. Tzotzolis had at the time of his accident are "common in the asymptomatic general population of Mr. Tzotzolis's age group". In cross-examination, he was asked if the arthritis would have become symptomatic in any event. He replied that he did not think there was any reason to expect that in the absence of trauma. Again, Dr. Wong offered no opinion to the contrary, despite having been asked that very question by the defence counsel. I accept Dr. Badii's opinion, and I make no finding as to there being a real and substantial possibility of Mr. Tzotzolis' back eventually becoming symptomatic in the natural course in any event.

[41] I turn now to the assessment of damages.

[42] First, I deal with Mr. Tzotzolis' non-pecuniary losses; that is to say, compensation for pain, suffering and loss of enjoyment of life.

[43] The defence has suggested a range of \$35,000 to \$40,000. That range, however, seems to have been premised on my accepting the defence submissions as to Mr. Tzotzolis having only suffered soft tissue injuries now fully resolved as a result of the accident and that his back pain that he is now suffering is unconnected with the accident. For the reasons I have stated, I reject that submission. The defence did not provide me with an alternative argument or set of authorities as to damages based on my acceptance of the plaintiff's case as to causation and as to the extent of his injuries.

- [44] The plaintiff submits that the range of non-pecuniary damages is between \$110,000 and \$150,000 and seeks an award at the upper end of that range. The cases cited in favour of this were *De La Garza v. Carson*, 2018 BCSC 1858 [*De La Garza*], \$115,000; *Hanger v. Shin*, 2019 BCSC 99 [*Hanger*], \$120,000; *Bruno v. Diamzon*, 2014 BCSC 1270 [*Bruno*], \$120,000; and *Cumpf v. Barbuta*, 2014 BCSC 1898 [*Cumpf*], \$150,000.
- [45] Assessments of non-pecuniary damages all turn on their facts, and inevitably each case provided as a comparator will have distinguishing features which differentiate the basis for the non-pecuniary damages claim. The assessment of non-pecuniary damages is not a mathematical exercise based on comparing hard numbers such as days of total disability from employment, days of hospitalization, numbers of surgeries or treatment sessions or the number of pills that have been prescribed. The aim is to arrive at an award that holistically captures degrees of disability and impairment of functioning and that is as consistent as possible with similar cases, adjusting for inflation.
- [46] The *De La Garza* decision cited by the plaintiff has some similarity to Mr. Tzotzolis' case in respect of the degree and chronicity of back pain and the resulting improvement of function. However, the injuries initially suffered by the plaintiff in that case were more serious, including headaches, tinnitus and blurred vision, and the overall severity of his injuries were such that he was off work entirely for an extended period.
- [47] In *Hanger*, the plaintiff had to undergo a large number of invasive nerve block procedures and radiofrequency ablation.
- [48] The plaintiff in *Bruno* suffered pain all over his body and panic attacks.
- [49] In *Cumpf*, the plaintiff's injuries were severe enough that she underwent more than 100 therapy treatment sessions, was depressed to the point of suicidal ideation and had a psychiatric diagnosis of adjustment disorder with depressive mood.
- [50] There is good reason to conclude that those decisions cited by the plaintiff, therefore, are rather more extreme cases than Mr. Tzotzolis'.
- [51] In addition to the plaintiff's cases, I have reviewed my own reasons in a case I decided three years ago involving a plaintiff with a not-dissimilar degree of impairment due to chronic low back pain, *Maldonado v. Mooney*, 2016 BCSC 558. I have also reviewed the cases cited by the plaintiff's counsel in that case. I awarded Mr. Maldonado \$110,000. However, that plaintiff, in addition to his back pain, suffered frequently from pounding headaches over the first five years post accident, and at trial, he continued to be unable to undertake even mild forms of exercise. Even going for a short walk was difficult.
- [52] I award Mr. Tzotzolis non-pecuniary damages of \$95,000.
- [53] As to Mr. Tzotzolis' loss of earning capacity claim, it has two aspects to it: the pre-trial and post-trial losses.

- [54] Tort damages are based on putting a victim in the position they would have been in had the accident not occurred. The measure of the losses, therefore, requires assessing the ranges of possible outcomes that are real and substantial, weighing each outcome according to its degree of probability, and determining the difference in value of the cumulative without-accident and with-accident scenarios.
- [55] In the case of the with-accident scenario, the Court has evidence as to what has occurred and proof of past events, therefore it is decided on a balance of probabilities. Proof of facts of future events is to be assessed on the basis of degrees of probability, concerning possibilities that are real and substantial, given the full range established by the evidence, or at least by common experience, of contingencies both positive and negative.
- [56] In the case of the without-accident scenarios, all possible past and future outcomes - that is, all as to which there is a real and substantial possibility - are to be considered, again with positive and negative contingencies applied.
- [57] Assessments are not mathematical exercises, though they must be grounded in the evidence and not simply pulled out of thin air. They must also be fair to both sides.
- [58] The starting point as to Mr. Tzotzolis' past income loss is his with-accident earnings, his actual earnings to date. As I accept the reasonableness of his decision to leave his employ with Austeville, and the reasonableness of his employment choices made since leaving Austeville, his actual earnings represent his past actual capacity. His past loss of capacity claim is therefore assessed against his actual earnings between leaving Austeville and the date of trial.
- [59] For the loss in 2017, the plaintiff proposes two measures. One would be to take Mr. Tzotzolis' 2016 earnings from Austeville, \$55,624, as a proxy for his without-accident 2017 earnings, and then subtract from that his actual earnings from all sources for the year 2017, \$27,046, for a total loss in 2017 of \$28,578. (I note the calculation at para. 184 of the plaintiff's written submissions was incorrect.)
- [60] The plaintiff says this amount would, however, undercompensate him, as it does not reflect the fact that at the date he left Austeville, approximately one-third of the way into the year, near the end of April, he was on pace to earn significantly more than he had in 2016. His earnings from Austeville to April 24, 2017, were \$21,518. In contrast, a third of his 2016 income would have been only \$18,541. The plaintiff submits this is evidence that his income at Austeville was steadily increasing, and that it is therefore appropriate to do a straight-line extrapolation and assess his without-accident income for 2017 at \$64,556. The difference between this and his earnings from all sources in 2017 of \$27,046 is \$37,510. Even that figure, it is submitted, would also not account for Mr. Tzotzolis' annual bonus payable at year-end, and the plaintiff submits that this can appropriately be dealt with as a positive contingency.

- [61] On the basis of that extrapolation, the plaintiff submits that the loss of earnings from 2018 would be \$26,016; and for 2019 to the date of trial, \$11,721. Collectively under this methodology, the gross pre-trial loss for 2017-2019 would amount to \$75,247. It is submitted that this quantification likely under-compensates Mr. Tzotzolis, as it does not reflect the likelihood that he would continue to have base salary increases after 2016, that it does not account for the value of his loss of benefits in his current employment, including RSP contributions, and does not factor in the possibility of him obtaining a promotion to a much more lucrative position as a property manager.
- [62] I note that the defence made no submissions as to the appropriateness of this methodology.
- [63] I do not find it appropriate to base this assessment on a straight-line extrapolation of the plaintiff's 2017 earnings up to the end of April. This increase in earnings, as the plaintiff's counsel put it, may reflect his "pace" at that time, but, using that term, I have no evidence as to whether that pace was sustainable. There is no evidence from the employer to account for or explain the increased pace relative to the base salary. Assuming it may have been due entirely to overtime, I had no evidence from the employer that a similar amount of overtime would have been available throughout the entire year. I also note that I had no expert evidence valuing the loss of benefits.
- [64] I accept that the increased rate of earnings shows some potential to earn at a higher level for the entire year, but I do not have evidence from the employer as to whether further increases in the base salary were likely or even possible. I also have no evidence as to the likelihood of Mr. Tzotzolis' further advancement. These factors have not been proven on the evidence to be real and substantial possibilities. They are, on the evidence, speculative only.
- [65] Recognizing that there was, in fact, some level of increased earning capacity demonstrated through the early 2017 income, I assess the gross losses on the basis of lost earnings at Austeville being one-half the difference between the 2016 earnings and the 2017 straight-line extrapolation. The lost annual income, therefore, I calculate on a basis of a potential of \$60,050. So this is the gross past income loss: for 2017, \$33,004; for 2018, \$21,510; for 2019, \$8,535; for a total of \$63,049 gross. I leave the net calculation after deduction for income tax to counsel, with liberty to apply.
- [66] As to future earning loss, I must determine the present value of both the without-accident and the with-accident capacity. With regard to the without-accident capacity, the plaintiff says there are two paths Mr. Tzotzolis' future could have taken. One is as a building manager to age 65 at the salary level commensurate with what would have been paid by an employer such as Austeville, the multiplier being 14.1313 on a 1.5 percent discount rate over 16 years. The plaintiff says that calculation ought to be based, again, on the extrapolated 2017 earnings. For the purposes of this exercise, the plaintiff concedes what it says is a significant negative contingency of no further salary increases. The plaintiff puts the without-accident present value of this scenario at \$967,848.

- [67] The alternative path put forward in the plaintiff's closing submissions was based on Mr. Tzotzolis obtaining a property manager's position. The resulting valuation or assessment would therefore be based on splitting the difference between the salary earned by the defendant's witness Ms. Fassbender, and a salary figure for a property manager that was disclosed in a job posting Mr. Tzotzolis saw at one point. That differential amounts to a salary for a property manager of \$82,500 annually, with a present value of \$1,165,832. The defendant, again, did not take issue with this methodology.
- [68] I am not satisfied that the evidence of the job posting is admissible for the truth of its content, nor as representative of the salary range for this position in the industry. Likewise, I am unable to find that Ms. Fassbender's salary was in any way representative. Fundamentally, I have no evidence from an employer or from a vocational consultant as to Mr. Tzotzolis' suitability as a property manager, nor as to the likelihood of him being hired.
- [69] I assess the without-accident scenario, for the reasons I have stated, on the basis of an income of \$60,050. To the extent that there may be a real and substantial possibility of an increase in salary not reflected in the inflation contingency embedded in the discount rate, I find that contingency is likely outweighed by standard negative contingencies such as mortality and voluntary withdrawal from the workforce. In the interest of fairness and in the absence of expert evidence, that is the best the Court can do in the present case. The without-accident earning capacity I therefore assess as having a present value of \$60,050 times 14.1313, which is \$848,584.
- [70] Turning to the with-accident future capacity determination, the plaintiff says and I accept that on the evidence, the plaintiff's current income earnings are likely "as good as it gets". I find it highly unlikely, given the impact of his injuries on his energy level and disposition, that Mr. Tzotzolis could now ever attain employment as a property manager or as a full-time building manager, or in his years-ago career in retail insurance sales.
- [71] The plaintiff posits two scenarios, one under which Mr. Tzotzolis will continue to work to age 65 at his current level, where the present value of his extrapolated earnings as a building manager would amount to \$678,514. The other, under which he may have retire as early as age 60 due to reduced stamina - a scenario supported by the expert evidence of Dr. Faraday - where the present value of his expected earnings is \$442,803. Subtracting those two figures from the present value of the without-earning capacity that I have given of \$848,584, yields the following range: a minimum of \$170,070, and a maximum of \$405,781.
- [72] The plaintiff's written submissions properly canvass a range of positive and negative contingencies for the Court to consider applying to these amounts. The positive factors include the hypothetical possibility of Mr. Tzotzolis finding higher-paying part-time-like jobs and the possibility, unlikely though it may be, of his work capacity improving through his symptoms abating somewhat. The negative factors include the possibility of layoff. Again, the plaintiff notes the loss of benefits in the current position, which at a minimum the plaintiff says should propel the Court towards the higher end of the range.

[73] Taking all these factors into account, and weighing them as best I can on the limited evidence, I assess the plaintiff's loss of future earning capacity at \$300,000.

[74] In respect of cost of future care, the plaintiff seeks the following:

- 1) provision for eight sessions of counselling, to which no specific value is attached, as recommended by Dr. Faraday;
- 2) \$1,920 per year for access to a kinesiologist as recommended by Dr. Badii and Dr. Faraday over three to five years for a range of \$5,760 to \$9,600; and
- 3) an allowance for adjunctive treatments, that is massage therapy or physiotherapy, at 12 sessions per year over ten years for \$8,640.

[75] I award \$1,200 for future counselling. I find a claim for three to five years of personal training or kinesiology excessive in the absence of evidence from such a specialist as to what could likely be achieved in what timeframe. I do allow \$3,000 for this future expense. Mr. Tzotzolis has not demonstrated a great need or desire for adjunctive treatments as claimed. I make allowance for one-half the amount claimed, \$4,320. In total, I award \$8,520 for future care.

[76] Special damages have been agreed at \$1,632.95.

[77] So to sum up, my assessment is as following:

- Non-pecuniary damages, \$95,000;
- Past loss of capacity on a gross basis, \$63,049;
- Future loss of capacity, \$300,000;
- Cost of future care, \$8,520; and,
- Special damages, \$1,632.95.

[78] The plaintiff will have judgment on the basis of these amounts after calculation by agreement or further assessment of the net past capacity loss. The plaintiff will also have court order interest as applicable and unless I rule otherwise, costs at Scale B. If there are issues concerning costs that require a further ruling, counsel have liberty to apply.

"A. Saunders J."

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