

CANADA / JUDGMENT

Uy v. Dhillon

2020 BCSC 1302

COURT

Supreme Court of British Columbia

DECIDED

2 September 2020

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2020 BCSC 1302 Uy v. Dhillon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Uy v. Dhillon,

2020 BCSC 1302

Date: 20200902

Docket: M158435

Registry: Vancouver

Between:

Johnberlyn Uy, by his litigation guardian, Elvis Amurao

Plaintiff

And

Daljit Singh Dhillon and Day & Ross Inc.

Defendants

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

June 29 and 30, 2020;

July 2-3, 6-8, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 2, 2020

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Introduction

- [1] The plaintiff, Johnberlyn Uy, was injured in an accident that occurred on January 31, 2014, on the Coquihalla Highway (the "Accident"). Mr. Uy's vehicle, which he was driving, collided with a tractor trailer driven by the defendant Daljit Singh Dhillon and owned by the defendant Day & Ross Inc.
- [2] The defendants originally denied liability for the Accident, however, in reasons for judgment issued on June 14, 2019, Madam Justice Marzari found the defendants 100% liable (2019 BCSC 1136). That finding was confirmed by the Court of Appeal (2020 BCCA 163).
- [3] Accordingly, the trial before me was limited to the issue of damages. While all heads of damage are in issue to some degree, the central issue in dispute is Mr. Uy's cost of future care claim.

Background

- [4] As will be discussed in greater detail below, Mr. Uy suffered a serious brain injury in the Accident that has resulted in a significant degree of cognitive impairment. Mr. Uy testified briefly at trial but he has minimal recollection of the Accident or his previous life.
- [5] The parties presented the Court with a detailed agreed statement of facts ("ASF"), which I have relied upon, along with the evidence of other lay witnesses, in setting out the general background facts.
- [6] I do not intend to canvass the facts in great detail as, for the most part, they are not contested. In this regard, it is useful to note at the outset that the defendants called no evidence at trial.

The Plaintiff

- [7] Mr. Uy was born in the Philippines in 1974 and he became ordinarily resident in Canada in 2008. He was 39 at the time of the Accident and 45 at the time of this trial.
- [8] He was previously married and has one child, a daughter born in 1998. Mr. Uy and his former wife divorced in 2010.
- [9] Prior to the Accident, Mr. Uy worked as a painter. He had his own painting business called Kaleidoscope World Painting. Mr. Uy worked on both commercial and residential projects. In the years preceding the Accident, he reported income on his income tax return as follows:

- a) 2010 \$17,218
- b) 2011 \$6,372
- c) 2012 \$18,929
- d) 2013 \$18,576

[10] For the years 2011-2013, the amounts listed were reported as net business income.

[11] There was not a great deal of evidence about Mr. Uy's pre-Accident life. John Varga is a painting contractor with whom Mr. Uy had worked on a few projects. He described Mr. Uy as a skilled painter and a hard worker who was intelligent and a pleasure to work with.

[12] Ms. Cezza De Leon met Mr. Uy in September of 2013, although they had previously corresponded online. They began dating in October or November 2013. At the time, Ms. De Leon lived and worked in Kelowna while Mr. Uy was located in Vancouver. According to Ms. De Leon, they spoke daily by phone and saw each other two or three times per month. She described Mr. Uy as fun, outgoing, caring and generous. She said he was planning on moving to Kelowna to live with her and had done some preliminary investigation of work opportunities in and around Kelowna. Ms. De Leon was in the vehicle with Mr. Uy when the Accident occurred.

[13] Elvis Amurao is Mr. Uy's cousin. Mr. Amurao knew Mr. Uy when Mr. Uy was a child in the Philippines. Mr. Amurao was a licenced doctor in the Philippines before he immigrated to Canada in 1998. He requalified here as a registered nurse and has worked in that capacity since 2007. At the time of trial, he was off work on disability due to a workplace injury.

[14] Mr. Amurao and Mr. Uy reconnected when Mr. Uy moved to Canada in 2008. Mr. Uy would come to dinner at the Amuraos' home from time to time and he would help out with things like painting and repairs. Mr. Amurao described Mr. Uy as quiet, generous and respectful.

[15] Gertrudes Amurao, Elvis' wife, described Mr. Uy in similar terms. In addition to Mr. Uy visiting their home on social occasions, Mrs. Amurao met with Mr. Uy periodically to do his taxes and to assist him with his business.

The Accident

[16] The Accident is described in the ASF as follows:

In the early morning hours of January 31, 2014, at approximately 2:30 a.m., the plaintiff, Johnberlyn Uy, the driver of a 2003 Honda Element, was in a collision with the defendants' commercial transport vehicle . The plaintiff's vehicle's driver's side was impacted resulting in significant compartment intrusion.

[17] The evidence at trial established that the defendants' tractor trailer moved into Mr. Uy's lane suddenly and without warning, causing Mr. Uy to take evasive action, lose control of his vehicle and strike the rear of the tractor trailer.

Injuries, Treatment and Current Condition

[18] The following facts are taken from the ASF:

12. BC Emergency Health Services paramedics arrived on scene at 3:32 a.m.
 - (a) Paramedics assessed the plaintiff at 3/15 on the Glasgow Coma Scale.
 - (b) Paramedics observed and documented a large laceration to the plaintiff's left temple, a large hematoma to the left eye (left orbital injury) and multiple superficial facial lacerations.
 - (c) Paramedics intubated the plaintiff.
 - (d) Paramedics transported the plaintiff to Chilliwack General Hospital, arriving there at 4:44 a.m.
13. The plaintiff was further transported by paramedics, escorted by a registered nurse and a respiratory therapist, departing Chilliwack General Hospital at 5:43 a.m., arriving at Royal Columbian Hospital [RCH] at 6:31 a.m.
14. Following his arrival at [RCH], the plaintiff was assessed by emergency medicine physician Dr. Joseph G. Haegert, who listed the following:
 - (a) A severe closed head injury with subarachnoid blood, shear hemorrhages.
 - (b) A left frontal skull fracture with a large left periorbital ecchymosis.
 - (c) A left scalp laceration.
18. The plaintiff was maintained in RCH's ICU and progressed to the High Acuity Unit (HAU) on or around February 10, 2014.
29. The plaintiff was discharged from RCH and transferred/admitted to Surrey Memorial Hospital (SMH) Acute Care on March 12, 2014,
30. On March 13, 2014, the plaintiff underwent evaluation by occupational therapy, scoring 2 / 30 on the Montreal Cognitive Assessment testing:
 - (a) The plaintiff was able to correctly identify his birthday but could not identify his address or phone number.
 - (b) The plaintiff was not fully oriented.
 - (c) The plaintiff was easily distractible.
 - (d) The plaintiff demonstrated poor recall.
 - (e) The plaintiff demonstrated significant cognitive deficits.
 - (f) The plaintiff demonstrated decreased speed of information processing.

33. On or about April 3, 2014, the plaintiff was transferred for high-intensity rehabilitation at Laurel Place, a rehab unit adjacent to SMH,
34. On April 4, 2014, occupational therapy performed a functional independence measure concluding as follows:
- (a) Supervision was recommended for the plaintiff while eating, since he required cueing.
 - (b) The plaintiff required cueing and set up for grooming.
 - (c) The plaintiff required steadying assistance and cueing for tub transfer and bathing.
 - (d) The plaintiff required assistance with buttons.
 - (e) The plaintiff required assistance and cueing with lower body dressing, including donning of a diaper for incontinence.
 - (f) The plaintiff required steadying assistance and cueing for toilet transfers.
 - (g) The plaintiff required significant cueing over all, demonstrating poor problem-solving skills.
 - (h) The plaintiff demonstrated poor memory. He was unable to recall the occupational therapist's name despite frequent reminders.
 - (i) The plaintiff was oriented to person but not place or time.
38. On May 7, 2014, Elvis Amurao was granted committee of the plaintiff by reason of the plaintiff's mental infirmity rendering him incapable of managing himself and his affairs.
39. On May 15, 2014, the plaintiff was discharged to his cousin Elvis Amurao's home
- [19] In addition to what is set out in paras. 30 and 34 above, the ASF provides details of other observations made by various health care professionals during Mr. Uy's hospitalisation.
- [20] The ASF also includes the following:
42. Between June 11, 2014 and December 20, 2016, a total of \$149,951.45 was incurred for the plaintiff's treatment and rehabilitation benefits. This included, inter alia:
- (a) Occupational Therapy with OT Works;
 - (b) Semiahmoo House Society disability services and supports;
 - (c) Comfort Keepers companionship services;
 - (d) Attendant services (via WJ Stelmaschuk);
 - (e) Homemaking services (via WJ Stelmaschuk);
 - (f) Physiotherapy provided by Hazelwood Physiotherapy; and
 - (g) Vocational counselling and coaching with Bob Webber of Centrix Disability.

- [21] The benefits and services described above were funded by the Insurance Corporation of British Columbia ("ICBC") pursuant to Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83. It is common ground that the maximum amount available to fund such benefits is \$150,000 and that this funding expired in August 2016, when that cap was met.
- [22] The occupational therapy referred to in the ASF was provided in large part by Susan Schincariol, who worked with Mr. Uy from approximately April of 2014 until September of 2016, which was around the time the Part 7 benefits ran out. As part of her work, Ms. Schincariol prepared a series of reports to ICBC that she reviewed at trial. I will not review her work with Mr. Uy or her reports in great detail, but will highlight some of the key points:
- a) Ms. Schincariol described Mr. Uy as more complex than many of her clients given that he had physical, emotional and cognitive issues;
 - b) Mr. Uy often displayed a lack of insight about his condition and his limitations;
 - c) Transportation was a challenge. He needed to be supervised when taking transit as, for example, he could not remember the bus number for a regular route;
 - d) When travelling by HandiDart, Mr. Uy was classified as a "Code 99", meaning that he was required to have someone hand him off to the HandiDart driver and someone to receive him at the other end;
 - e) Ms. Schincariol tested Mr. Uy's ability to cross the street by himself and concluded that he was not safe to do so;
 - f) Ms. Schincariol arranged a job for Mr. Uy at Boston Pizza and she also arranged for him to take the necessary foodsafe course, which he completed. He had some shifts at Boston Pizza but the job did not work out;
 - g) Ms. Schincariol's work with Mr. Uy led her to the opinion that he requires 24-hour supervision. She identified one of the key strengths of his current situation as the care and support provided by Mr. and Mrs. Amurao; and,
 - h) In June 2020, shortly before trial, Ms. Schincariol visited Mr. Uy. This was the first time she had seen him since about September of 2016. Mr. Uy did not remember her. According to Ms. Schincariol, she did not observe any improvements in Mr. Uy's physical or cognitive condition since the last time she had seen him.
- [23] In his current living arrangement, Mr. Uy is principally cared for by Mr. and Mrs. Amurao. Both testified about the care provided to Mr. Uy and about their observations of his abilities and limitations.
- [24] Mr. and Mrs. Amurao learned of the Accident when they were contacted by the police. They went and visited Mr. Uy at Royal Columbian Hospital. Throughout his stay there, when he was moved to Surrey Memorial Hospital, and then at Laurel Place, Mr. Amurao visited Mr. Uy almost every day.

- [25] On May 15, 2014, Mr. Uy was discharged from Laurel Place into Mr. Amurao's care, after Mr. Amurao was appointed as Mr. Uy's committee. Mr. Uy moved into a suite in the Amuraos' home. Mr. Amurao had some experience in housing and caring for brain injured individuals as he had taken in at least two home stay clients prior to Mr. Uy. In fact, he continued to have one client living in the home when Mr. Uy arrived who stayed until 2016.
- [26] When Mr. Uy first came to stay at the Amuraos' home, he needed more intensive care. Mr. Uy was still in a wheelchair and needed considerable physical assistance.
- [27] While there has been some improvement, Mr. Uy still requires constant supervision.
- [28] According to Mr. Amurao, when he gets up in the morning, he checks on Mr. Uy to make sure he is awake. If he doesn't, Mr. Uy will often stay in bed. Mr. Amurao will then make Mr. Uy breakfast. He said Mr. Uy is capable of making a cup of instant coffee and perhaps spreading peanut butter on bread, but not much else.
- [29] Mr. Amurao will then remind Mr. Uy to shower. According to Mr. Amurao, Mr. Uy needs constant cuing for his various activities of daily living. Mr. Uy can dress himself but has problems with buttons due to his ongoing left hand difficulties.
- [30] During the day, Mr. Amurao will take Mr. Uy on outings, for example shopping for groceries or going to Home Depot. The Amuraos also involve Mr. Uy in family events.
- [31] If there are no outings planned for a particular day, Mr. Uy often stays in his room watching television. Mr. Amurao often has to assist him in turning the television on and off.
- [32] Mr. Amurao encourages Mr. Uy to exercise. There is a stationary bike in Mr. Uy's room and Mr. Amurao encourages him to walk around the yard as well, although Mr. Amurao is often worried that he will leave the property and not be able to find his way home. He described an incident recently in which Mr. Uy did leave the property and managed to go to the bank and to purchase groceries. Mr. Uy told him he had asked a stranger for help.
- [33] Mr. Amurao testified that Mr. Uy has outbursts of anger and frustration. He often yells and bangs his door, particularly when left alone. On one occasion, Mr. Uy had a bout of hallucinations for which Mr. Amurao took him to the hospital where he was prescribed anti-psychotic medication.
- [34] Mr. Amurao said that at times he has felt burnt out as a result of caring for Mr. Uy and there was a time when he felt it would be best if Mr. Uy moved into some form of community care. However, he has changed his views and believes that Mr. Uy would be best cared for if he continues to live with the Amuraos, provided they can get some assistance.
- [35] Mrs. Amurao gave similar evidence. When Mr. Uy first arrived, he needed help with virtually everything, including feeding, walking and washing. Mrs. Amurao said that since he came to live with them, he has improved physically but he still has problems with his left side, including his left arm and hand.

- [36] Like Mr. Amurao, Mrs. Amurao said that Mr. Uy needs to be cued for most things and that he won't do anything unless told. He has a poor memory and often changes his mind.
- [37] Mrs. Amurao described his angry outbursts when he shouts and bangs on the door. This has been happening more recently since they have been unable to go out much due to the Covid-19 pandemic. Mr. Uy usually calms down when he hears Mrs. Amurao's voice.
- [38] Mrs. Amurao said that she and her husband had considered moving Mr. Uy into an institution but they decided they "could not give up on him". Mrs. Amurao considers Mr. Uy to be like a son and she wants him to stay with them as long as they can manage. She said, however, that they need assistance, for example to take Mr. Uy on outings, particularly when Mr. Amurao returns to work from being on disability.
- [39] Ms. De Leon continued to see Mr. Uy after the Accident. While she returned to Kelowna, she visited him regularly while he was in the hospital and when he moved to the Amuraos' home. When she visited, she helped with his care.
- [40] The relationship ultimately broke down due to his temper and the fact that he often verbally abused her. She said this was a dramatic change from how Mr. Uy had been prior to the Accident.

Expert Evidence

- [41] Mr. Uy relies upon the opinion evidence of four expert witnesses:
- a) Dr. Andrew Travlos - Expert in physical medicine and rehabilitation (physiatrist);
 - b) Dr. Soma Ganesan - Psychiatrist;
 - c) Ms. Simone Szarkiewicz - Occupational therapist; and,
 - d) Mr. Robert Carson - Economist.
- [42] The defendants adduced no expert opinion evidence.
- [43] I will summarize the key elements of each expert's opinion then will address the evidence in greater detail as needed when considering Mr. Uy's various claims.
- [44] Dr. Travlos assessed Mr. Uy on October 18, 2018, and prepared a report of the same date. Mr. Amurao attended the assessment alongside Mr. Uy.
- [45] It was Dr. Travlos's opinion that Mr. Uy sustained a severe brain injury as a result of the Accident. He noted that although mood disorders and depression are common in brain injured patients, that did not appear to be the case with Mr. Uy. Dr. Travlos stated that Mr. Uy's cognition was relatively poor and that he has "zero" capacity to live independently. Dr. Travlos stated further that Mr. Uy "requires and will continue to require a supervised living environment over his lifetime." It was Dr. Travlos's opinion that Mr. Uy's condition at the time he assessed him, both physiologically and functionally, had plateaued and that "[w]hat he has now is what he will remain with." Dr. Travlos considered that Mr. Uy is not

competitively employable.

- [46] Dr. Ganesan assessed Mr. Uy on January 23, 2019, and he prepared a report dated February 5, 2019, as well as two addendum reports. In his initial report, Dr. Ganesan opined that Mr. Uy suffered from a major neurocognitive disorder due to a traumatic brain injury. It was his view that Mr. Uy's cognitive function had plateaued and there was unlikely to be any further meaningful improvement. It was also his view that Mr. Uy will require care and supervision for the rest of his life and that he is incapable of returning to any meaningful employment. Dr. Ganesan noted that Mr. Uy is only comfortable in the care of Mr. Amurao and his family and that any changes to his living environment might bring on significant emotional difficulties.
- [47] In his two addendum reports, Dr. Ganesan noted that Mr. Uy maintains an interest in having a sexual relationship but that his disability represents barriers. Dr. Ganesan suggests an assessment be done of Mr. Uy, as well as possible counselling.
- [48] Ms. Szarkiewicz assessed Mr. Uy at his home on January 31, 2019, and she prepared a cost of future care report dated March 8, 2019, as well as two addendum reports. I will set out her principal observations and opinions here and then will deal with her cost of future care projections in greater detail below. Ms. Szarkiewicz stated in her principal report that Mr. Uy presents as someone who has sustained a serious brain injury and who has permanent cognitive deficits. It is her opinion that Mr. Uy requires 24-hour support and supervision and that it is not safe for him to live in a situation where he cannot receive those supports.
- [49] It is useful to note that in her initial report, Ms. Szarkiewicz provided two cost estimates: one for care aide support while Mr. Uy remains at the Amuraos' home, and another for a transition into community living, with either some degree of public funding and/or private funding. She testified that at the time she wrote her first report, she understood that Mr. Amurao and his family were of the view that they could not continue to care for Mr. Uy. However, as reflected in my summary of Mr. and Mrs. Amurao's evidence, those views changed and they wish to keep Mr. Uy at their home, with appropriate support. By the time of trial, it had also become apparent that no public funding would be available given the determination of the defendants' liability. Thus, as discussed below, the model of care and related funding sought by Mr. Uy involves him remaining with Mr. and Mrs. Amurao or in another residential setting for the rest of his life.
- [50] Mr. Carson also testified at trial and I will deal with his economic opinion evidence below.
- [51] Dr. Abedom Tekle also testified. He is Mr. Uy's family doctor. He was not qualified as an expert and did not prepare a medical-legal report, but testified about the care he has provided Mr. Uy and his observations of Mr. Uy. He spoke of the obvious care and attention that Mr. Uy receives from Mr. and Mrs. Amurao. He also supported the view that Mr. Uy requires 24-hour supervision.

Findings of Fact

- [52] The evidence is uniform that as a result of the Accident, Mr. Uy suffered a severe brain injury that has left him with significant and permanent cognitive impairments. He also suffered physical injuries and while there has been some improvement since the Accident, he continues to have difficulties, particularly with the left side of his body. The evidence establishes that Mr. Uy's condition has plateaued and is unlikely to improve further.
- [53] The evidence also establishes that Mr. Uy is not employable and will never return to any form of competitive or remunerative employment.
- [54] The defendants do not take issue with these findings and, as will be seen below, the parties are not far apart on many of the heads of damage. The principal issue in dispute between them is the model of care for Mr. Uy in the future and the cost of that care.
- [55] On this issue, I find that Mr. Uy will require 24-hour care and supervision for the rest of his life. That was the evidence of Drs. Travlos and Ganesan as well as Ms. Szarkiewicz. This evidence was not undermined in cross-examination nor was it countered by other expert opinion evidence. I also find that Mr. Uy should remain in the home of Mr. and Mrs. Amurao as long as that can reasonably be managed. Again, that was the uniform view of the experts.

Damages

Principles Governing the Assessment of Damages

- [56] In *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78-79 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.), Madam Justice McLachlin (as she then was) summarized the principles governing the assessment of damages in personal injury cases. This summary, which continues to be cited in more recent personal injury decisions (e.g. *MacEachern v. Rennie*, 2010 BCSC 625 at para. 679), included the following:
1. The fundamental governing precept is *restitutio in integrum*. The injured person is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money. This is the philosophical justification for damages for loss of earning capacity, cost of future care and special damages.
 2. For those losses which cannot be made good by money, damages are to be awarded on a functional basis to the end of providing substitute pleasures for those which have been lost. This is the philosophical justification for awarding damages for non-pecuniary loss.
 3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff.

8. Deductions must be made as necessary to avoid duplication in the amount awarded for damages for cost of future care (which may include basic living expenses) and that awarded for loss of future earnings (a portion of which would normally be used by the claimant to provide such basic living expenses).

[57] In order to avoid the duplication in compensation identified by Justice McLachlin, two different approaches to assessing damages have been developed: the total lifestyle approach and the incremental approach. The difference between the two approaches was summarized in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 250-251:

It is clear that a plaintiff cannot recover for the expense of providing for basic necessities as part of the cost of future care while still recovering fully for prospective loss of earnings. Without the accident, expenses for such items as food, clothing and accommodation would have been paid for out of earnings. They are not an additional type of expense occasioned by the accident.

When calculating the damage award, however, there are two possible methods of proceeding. One method is to give the injured party an award for future care which makes no deduction in respect of the basic necessities for which he would have had to pay in any event. A deduction must then be made for the cost of such basic necessities when computing the award for loss of prospective earnings: i.e. the award is on the basis of net earnings and not gross earnings. The alternative method is the reverse: i.e. to deduct the cost of basic necessities when computing the award for future care and then to compute the earnings award on the basis of gross earnings.

The trial judge took the first approach, reducing loss of future earnings by 53 per cent. The Appellate Division took the second. In my opinion, the approach of the trial judge is to be preferred. This is in accordance with the principle which I believe should underlie the whole consideration of damages for personal injuries: that proper future care is the paramount goal of such damages. To determine accurately the needs and costs in respect of future care, basic living expenses should be included.

The costs of necessities when in an infirm state may well be different from those when in a state of health. Thus, while the types of expenses would have been incurred in any event, the level of expenses for the victim may be seen as attributable to the accident. In my opinion, the projected cost of necessities should, therefore, be included in calculating the cost of future care, and a percentage attributable to the necessities of a person in a normal state should be reduced from the award for future earnings.

[58] In *Paur v. Providence Health Care*, 2015 BCSC 1695, var'd in part 2017 BCCA 161, Madam Justice Griffin, then of the Supreme Court, observed at para. 419:

The cases illustrate that the total lifestyle approach to damages is preferred in cases of catastrophic injuries; the incremental approach is preferred in cases where the plaintiff will lead basically the same life as before but needs some additional assistance: *Milina*; *Andrews*; *MacEachern*; *Morrison (Committee of) v. Cormier Vegetation Control*, [1998] B.C.J. No. 3279(S.C.) [Morrison].

- [59] The parties both submit that the total lifestyle approach should be used in this case. I agree as this approach best accords with the objective of ensuring a proper and adequate future care award which is of fundamental importance in cases involving catastrophic injuries.
- [60] I would add two introductory observations about the assessment of damages in this case, both of which flow from the fact, as noted, that the defendants did not lead any evidence.
- [61] First, the burden remains on Mr. Uy to prove his case, including establishing his claim to damages under each head. The fact that the defendants did not lead evidence to counter Mr. Uy's claims does not mean that those claims must simply be accepted without any sort of critical analysis.
- [62] Second, the claims can only be decided on the basis of the evidence before the Court. As will be discussed below, given the absence of any evidence from the defendants, certain positions they advance lack a proper evidentiary foundation.

Cost of Future Care

- [63] Consistent with the objective of providing Mr. Uy with proper and adequate care, it is appropriate to deal first with the assessment of Mr. Uy's cost of future care claim. In doing so, it is useful to reiterate my findings, made above at para. 55, that Mr. Uy will require 24-hour care and supervision for the rest of his life and that Mr. Uy should remain in the home of Mr. and Mrs. Amurao for as long as that can reasonably be managed.

24-Hour Home Care

- [64] I will return to the question of duration shortly but first will consider the cost of such 24-hour, seven day per week care. Ms. Szarkiewicz considered two different agencies for providing Mr. Uy with care. She recommends Nurse Next Door as the best option. It has care aides capable of providing Mr. Uy with companionship and assistance with all activities of daily living. In her opinion, the care aides employed by Nurse Next Door are better trained and provide a higher level of care than the other agency considered. Ms. Szarkiewicz estimated the annual cost for 24-hour care provided by Nurse Next Door to be \$350,000.
- [65] The defendants submit that a more reasonable cost estimate is in the range of \$6,000 to \$10,000 per month, or between \$75,600 to \$120,000 per year. However, the defendants have no evidence to support these figures.
- [66] The defendants point to Mr. Amurao's evidence that he previously was paid approximately \$4,000 per month for a home care client. They submit that this figure should provide a benchmark for assessing Mr. Uy's care costs.

[67] I do not agree. There was minimal evidence at best about the former client's condition, about the care and services provided by Mr. Amurao and the details of the financial arrangement. There is no basis upon which the Court could use this as a means of assessing Mr. Uy's future care costs, particularly in the face of the cost of care report prepared by Ms. Szarkiewicz.

[68] I therefore accept Ms. Szarkiewicz's evidence on this point.

[69] The question then becomes how long Mr. Uy will require such care. Mr. Uy advances a claim based upon lifetime care in a residential setting, even beyond the expected lifespan of Mr. and Mrs. Amurao. This position is framed as follows in Mr. Uy's written submission:

The plaintiff asks that funding for a private living arrangement continue beyond the Amurao's anticipated life expectancies, with the hope and expectation that one of the Amurao children or perhaps even Mr. Uy's daughter will agree to a living arrangement that will see as little disruption of [Mr. Uy's] living environment as possible. There is still time for succession planning, but as Mrs. Amurao explained in her evidence, at present her children all have busy careers and young families of their own. But they remain hopeful that one of their children will want to continue to do what they have done for John.

[70] In support of this position, Mr. Uy points to the fact that he did not enjoy being at Laurel Place and has further not enjoyed programs or settings that place him with other disabled individuals. Mr. Uy further relies on Dr. Ganesan's opinion that a change in Mr. Uy's living arrangements would be a major challenge for him and may provoke significant emotional and psychological issues.

[71] This evidence supports Mr. Uy remaining in the Amurao's home for as long as is reasonably possible. However, the claim to enable Mr. Uy to remain in a residential setting beyond when Mr. and Mrs. Amurao are able to care for him lacks an evidentiary foundation.

[72] As reflected in the passage from Mr. Uy's written submission, the idea that one of the Amurao children will in the future assume the care and custody of Mr. Amurao is little more than a speculative hope. The same is true for Mr. Uy's daughter, from whom he is largely estranged. There was no evidence at trial that would permit the Court to conclude that either scenario is likely, or even possible. Further, it is apparent on the evidence that the care and support that Mr. Uy receives in his current living arrangement is due to the efforts of Mr. and Mrs. Amurao specifically, and it is with them that Mr. Uy is most closely connected.

[73] The reality is that this arrangement will not last forever. Mr. Amurao is 62 years old and Mrs. Amurao is 58 years old. Both have health issues. Mr. Amurao has been off work for some time on disability due to a workplace injury. Mr. Amurao's age and health are particularly relevant as it is clear that he does most of the "hands on" work with Mr. Uy.

- [74] It is also relevant that Mr. and Mrs. Amurao have at times felt the effects of caregiver burnout and have considered putting Mr. Uy in an institution. Ms. Szarkiewicz assumed for the purposes of her first report that Mr. Uy would transition into an institutional setting. While the Amuraos subsequently had a change of heart, this history suggests that Mr. Uy's situation with the Amuraos is challenging and will only get more so as they all age, even with the provision of outside support.
- [75] In a supplemental report dated July 3, 2020, Mr. Carson provided present day calculations for Mr. Uy's future care costs under different scenarios whereby Mr. Uy remains in the Amuraos' home for 15 years or 20 years before transitioning to an institution, as well as a cost scenario assuming Mr. Uy remains in the Amuraos' home, or a similar setting, for the rest of his life.
- [76] In my view, the 15 year scenario is the most realistic. By that time, Mr. Amurao will be 77 years old. It is simply not realistic to assume that Mr. and Mrs. Amurao will continue to be able to house and care for Mr. Uy into their 80s. Further, as discussed above, the evidence does not support any realistic possibility that one of the Amuraos' children or Mr. Uy's daughter will take over from the Amuraos.
- [77] Ms. Szarkiewicz considered three possible supported living agencies for if and when Mr. Uy leaves the Amuraos' home: ABIS Residential Supported Living operated by the Fraser Health Authority, Cheshire Homes Society of BC-Langley Programs, and Connect Communities. The first two involve public funding to some degree whereas Connect Communities is a private facility. Since Ms. Szarkiewicz prepared her first report, the liability of the defendants was determined and, as a result, no public funding is available for Mr. Uy's care. As such, the only viable option identified by Ms. Szarkiewicz is Connect Communities. The cost of the facility depends upon the level of care and Ms. Szarkiewicz estimates the annual cost to be in the range of \$109,500 to \$164,250. Given Mr. Uy's requirement for 24-hour care and the possibility that he may further deteriorate, it is reasonable to assess the cost using the high end of the range.
- [78] As noted, in Table 1-B-15 to his July 3, 2020 report, Mr. Carson provided present day calculations for Mr. Uy's future care costs for the scenario in which Mr. Uy remains with the Amuraos for 15 years before transitioning to Connect Communities.
- [79] Included in his calculations, Mr. Carson makes adjustments in keeping with the total lifestyle approach to assessing damages. Specifically, in addition to calculating the cost of 24-hour care, he includes amounts to cover the basic necessities of life. In his June 25, 2020 memo to Mr. Uy's counsel, he describes how he has used Statistics Canada's poverty line amount of \$24,830 annually to reflect what it would cost to provide Mr. Uy with those necessities (i.e. accommodation, food, etc.). When Mr. Uy transitions to Connected Communities, Mr. Carson assumes that basic costs of accommodation, food and other household costs will be covered in the institutional cost, thus he reduces the annual cost for remaining basic necessities to \$7,310. The defendants did not take issue with these

calculations.

- [80] Mr. Carson therefore calculates the cost of 24-hour care for Mr. Uy, while he remains in the Amuraos' home (for 15 years), as \$4,973,336, comprising \$4,437,064 in care costs, \$221,853 in applicable taxes and \$314,419 for basic necessities.
- [81] For the period when Mr. Uy transitions to institutional care (after 15 years), the total costs calculated by Mr. Carson are \$2,158,629, comprising \$2,066,652 for the institutional care costs and \$91,977 for basic necessities.
- [82] The care component for 24-hour care aide support for 15 years followed by institutional care for the balance of Mr. Uy's life therefore totals \$7,131,965.
- [83] I note that in providing his present value calculations, Mr. Carson used a statistically normal life span for Mr. Uy. The defendants submit that some allowance should be made for a reduced life expectancy. They rely on Dr. Travlos's evidence during cross-examination that Mr. Uy's life expectancy, based solely on the general fact that he had suffered a brain injury, may be reduced by two to four years. However, Dr. Travlos was speaking in general terms and there is no direct evidence that Mr. Uy's life expectancy should be shortened. I therefore decline to make the adjustment sought by the defendants.

Additional Care Items

- [84] The defendants do not take issue with Ms. Szarkiewicz's recommendations for occupational therapy, rehabilitation assistance, kinesiology, physiotherapy, health and strength maintenance, home safety accessories, transportation and medication. The present value of these costs are set out in Mr. Carson's Table 1-B-15, inclusive of taxes where applicable:
- a) Occupational Therapy/Case Management \$23,069
 - b) Rehab Assistant/Kinesiologist \$8,639
 - c) Physiotherapy \$4,770
 - d) Home Safety Accessories \$21,595
 - e) Health and Strength Maintenance \$13,041
 - f) Transportation (HandiDART) \$11,618
 - g) Medication \$20,825
- [85] Mr. Carson's Table 1-B-15 includes references to recommended follow up and care with Mr. Uy's family doctor and possibly by a psychiatrist. However, as these are publically funded services, there is no cost included.

- [86] The table also includes items for psychological counselling and for sexual health counselling. With respect to the latter, Ms. Szarkiewicz recommended certain services to assist Mr. Uy, but he is no longer pursuing that claim. With respect to psychological counselling, I agree with the defendants that there is no recommendation for Mr. Uy to obtain counselling at this time and that any future services could likely be obtained through the public system.
- [87] Taking account of the above, I award damages for the cost of future care in the total amount of \$7,235,522.
- [88] Mr. Uy seeks an additional 10% contingency on the basis that Ms. Szarkiewicz's report provides conservative estimates for services. He submits that additional services and related costs may be required if his condition deteriorates.
- [89] In my view, this contingency is well accounted for in the fact that the future care award is based upon the high end of the cost ranges provided by Ms. Szarkiewicz and the fact that no reduction was made for the potential negative contingency of a reduced life expectancy. I decline to add an additional 10%.

Non-Pecuniary Damages

- [90] Andrews continues to be a seminal decision governing the assessment of non-pecuniary damages, particularly in cases involving catastrophic injuries. There, the Supreme Court described the objective of non-pecuniary damages and established the functional approach to assessing such damages. Mr. Justice Dickson, as he then was, said at 261-62:

The "functional" approach attempts to assess the compensation required to provide the injured person "with reasonable solace for his misfortune." "Solace" in this sense is taken to mean physical arrangements which can make his life more endurable rather than "solace" in the sense of sympathy. To my mind, this last approach has much to commend it, as it provides a rationale as to why money is considered compensation for non-pecuniary losses such as loss of amenities, pain and suffering, and loss of expectation of life. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way. As Windeyer J. said in *Skelton v. Collins*, supra, at p. 495:

... he is, I do not doubt, entitled to compensation for what he suffers. Money may be compensation for him if having it can give him pleasure or satisfaction. ... But the money is not then a recompense for a loss of something having a money value. It is given as some consolation or solace for the distress that is the consequence of a loss on which no monetary value can be put.

If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical

arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

[91] In *Lindal v. Lindal*, [1981] 2 S.C.R. 629, the Supreme Court affirmed the functional approach. Justice Dickson said at 637:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders, Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[92] Justice Dickson went on to discuss the rationale underlying the establishment of an upper limit on non-pecuniary damages, at 639-640:

I have already indicated that the social costs of the award cannot be controlling when assessing damages for loss of income and the cost of future care. The plaintiff must be provided with a fund of money which will provide him with adequate, reasonable care for the rest of his life. The social impact of the award must be considered, however, in calculating the damages for non-pecuniary loss. There are a number of reasons for this. First, the claim of a severely injured plaintiff for damages for non-pecuniary loss is virtually limitless. This is particularly so if we adopt the functional approach and award damages according to the use which can be made of the money. There are an infinite number of uses which could be suggested in order to improve the lot of the crippled plaintiff. Moreover, it is difficult to determine the reasonableness of any of these claims. There are no accurate measures available to guide decision in this area.

A second factor that must be considered is that we have already fully compensated the plaintiff for his loss of future earnings. Had he not been injured, a certain portion of these earnings would have been available for amenities. Logically, therefore, even before we award damages under the head of non-pecuniary loss, the plaintiff has certain funds at his disposal which can be used to provide a substitute for lost amenities. This consideration indicates that a moderate award for non-pecuniary damages is justified.

A third factor is that damages for non-pecuniary loss are not really 'compensatory'. The purpose of making the award is to substitute other amenities for those that have been lost, not to compensate for the loss of something with a money value. Since the primary function of the law of damages is compensation, it is reasonable that awards for non-pecuniary loss, which do not fulfil this function, should be moderate.

[93] In BC, the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, set out a non-exhaustive list of factors that will inform the assessment of non-pecuniary damages:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff).

[94] Mr. Uy submits that his injuries have had a profound impact on all aspects of his life and that he should be awarded damages at the upper limit established in *Andrews*, which the parties agree is currently \$388,177 taking account of inflation. Mr. Uy cites the following cases in support of his position:

- a) *Spehar et al. v. Beazley et al.*, 2002 BCSC 1104, aff'd 2004 BCCA 290;
- b) *Van v. Howlett*, 2014 BCSC 1404;
- c) *Paur v. Providence Health Care*;
- d) *McCormick v. Plambeck*, 2020 BCSC 881; and,
- e) *MacEachern v. Rennie*.

[95] The defendants acknowledge that Mr. Uy has suffered a significant brain injury but they submit that he has not lost the ability to enjoy life. They submit further that he continues to be able to carry out many activities of daily life with some degree of independence. They submit that an appropriate award is \$325,000.

[96] The defendants cite the following cases:

- a) Robinson v. Bud's Bar Inc., 2015 BCSC 1767;
- b) Mackey v. British Columbia, 2016 BCSC 1333; and,
- c) Van v. Howlett.

[97] It is never an easy task to compare injuries and their impacts between plaintiffs in different cases and each case must be decided on its own facts. That said, I find the facts in the case cited by Mr. Uy to be more analogous than those relied on by the defendants. For example, in Paur, Madam Justice Griffin described the plaintiff there as being limited in his ability to direct and control his daily living activities (at para. 722) and as requiring close supervision and control (at para. 726). In MacEachern, Mr. Justice Ehrcke found that the plaintiff had little short-term memory, her behavior was disinhibited and she presented much like a young child (at para. 678). Much the same can be said of Mr. Uy.

[98] In contrast, the plaintiffs in Robinson and Mackey were able to achieve a much higher degree of independence. For example, Mr. Robinson attended college after the accident and maintained employment. Mr. Mackey also continued his education, got married and had children. These options are not available to Mr. Uy.

[99] The defendants highlight certain elements of the evidence to suggest that Mr. Uy continues to enjoy some quality of life and a reasonable measure of functional capacity. They submit, for example, that he continues to enjoy singing and dancing, he travels with Mr. Amurao's family and is able to carry out many daily living activities on his own.

[100] The defendants in Paur advanced a similar position, which was rejected by Justice Griffin. Her observations about the plaintiff in that case (at para. 720) apply with equal force to Mr. Uy:

The Hospital Defendants have pointed to small pieces of evidence to suggest that Mr. Paur is not so badly off: that he considers himself lucky that he did not die; that he has no lasting physical injuries; and they point to one test in which his scores for functioning were not at the very bottom of the non-brain-injured population. These pieces of evidence, in my view, do not detract from the severity of Mr. Paur's injury in terms of its impact on his future life, as indicated by the totality of the evidence. Mr. Paur will never be able to function as an independent adult again.

[101] Mr. Uy's life has been profoundly and permanently impacted as a result of the brain injury sustained in the Accident. Taking account of the evidence as a whole, the authorities cited by the parties and the principles set out in cases like Andrews and Stapley, I find that Mr. Uy is entitled to damages in the amount of the rough upper limit, or \$388,177.

Past Loss of Earning Capacity

- [102] There is no issue on the evidence that Mr. Uy was rendered incapable of returning to any form of remunerative employment as a result of the Accident.
- [103] Mr. Uy cites *Piper v. Hassan*, 2012 BCSC 189, where Mr. Justice Pearlman provided a helpful summary of the principles governing the assessment of past income loss claims:
- [153] The assessment of damages for past loss of income is properly characterized as an assessment of damages for loss of past earning capacity: *Lines v. W & D. Logging Co. Ltd.*, 2009 BCCA 106 at para. 153, leave to appeal ref'd [2009] S.C.C.A. No. 197, (S.C.C.).
- [154] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury caused by the defendant's negligence: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141; *M.B. v. British Columbia*, 2003 SCC 53.
- [155] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin* (2003), 9 B.C.L.R. (4th) 324.
- [156] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, at para. 27.
- [104] Mr. Uy advances a claim for past loss of earning capacity in the amount of \$261,673.35. In doing so, he relies on Mr. Carson's evidence about statistical average earnings for construction labourers, painter/decorators and contractor/supervisors as those positions are defined in the National Occupation Classification. The range of average annual earnings for those positions is between \$46,565 and \$58,417. Mr. Uy also points to Mr. Varga's evidence that his painting business generates revenues of at least \$100,000 annually, and sometimes upwards of \$200,000.
- [105] Mr. Uy submits that it is reasonable to use the high end of Mr. Carson's statistical salary range, for contractor/supervisors, given that Mr. Uy functioned as a sole proprietor of his business. That would result in past income loss to trial of \$307,851. Applying a 15% tax rate results in the net claim of \$261,673.35.
- [106] The defendants submit that in the years preceding the Accident, Mr. Uy's reported net business income was in the \$17,000 - \$18,000 range. They submit that it is reasonable to assume that but for the Accident, Mr. Uy would have earned in the range of \$25,000 - \$30,000 net of expenses.

[107] I agree with the defendants. While historical earnings are not determinative of future loss, they are a useful indicator of earning capacity. Moreover, the evidence suggested that Mr. Uy was contemplating moving to Kelowna and restarting his business there. It is fair to assume that it would have taken some time to build the business even to the level that he operated at in Vancouver.

[108] In the circumstances, \$30,000 is a reasonable annual figure to use for assessing Mr. Uy's past loss of earning capacity. That results in a past loss of \$192,534 (gross) and \$172,330 (net), using Mr. Carson's tax rates.

[109] I award \$172,330.

Loss of Future Earning Capacity

[110] The Court of Appeal has discussed the principles governing claims for future loss of earning capacity in numerous cases. In *Morgan v. Galbraith*, 2013 BCCA 305 at para. 53, the Court of Appeal, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, described the approach to be taken by the trial judge as follows:

in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach or the capital asset approach

[Emphasis in original.]

[111] The earnings approach is generally appropriate where the plaintiff has some earnings history and where the court can reasonably estimate what his or her likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43 (C.A.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment, not mere calculation.

[112] The capital asset approach, which is typically used in cases in which the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff:

- i. has been rendered less capable overall of earning income from all types of employment;
- ii. is less marketable or attractive as a potential employee;
- iii. has lost the ability to take advantage of all job opportunities that might otherwise have been open; and,

iv. is less valuable to him or herself as a person capable of earning income in a competitive labour market.

(See *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.); Gilbert at para. 233).

[113] Given that there is evidence of Mr. Uy's earning history as well as some evidence about likely future earnings had the Accident not occurred, I have utilized the earnings approach in assessing loss of future capacity damages.

[114] Mr. Uy seeks an award of damages of \$1,020,557. This again is based upon the high range of Mr. Carson's statistical salaries for contractor/supervisors and it assumes that but for the Accident, Mr. Uy would have worked until age 70.

[115] I am satisfied that the age assumption is reasonable. Mr. Uy had few assets at the time of the Accident, no known savings and no pension. In the circumstances, it is reasonable to assume that he would have stayed in the workforce beyond the "normal" retirement age of 65.

[116] However, for the reasons set out above, I do not accept that Mr. Uy would have earned the approximately \$58,000 identified by Mr. Carson for contractor/supervisors. I have used the figure of \$30,000 to assess Mr. Uy's past income loss. It is fair to infer that he would have continued to earn a similar amount for a period of time and then would have increased his net take home income as he built his business.

[117] Keeping in mind that making an award of damages involves an assessment rather than a calculation, I find that Mr. Uy likely would have earned \$30,000 for another 10 years and then would have increased his earning to \$46,000, the average identified by Mr. Carson for painters/decorators. Using Mr. Carson's multipliers results in the following: $(\$30,000/\$1,000 \times \$9,854) = \$295,620 + (\$46,000/\$1,000 \times \$9,720) = \$447,120$ for a total of \$742,740. I would add 10% to this figure to reflect non-wage benefits, relying on Mr. Carson's opinion for doing so. This results in a figure of \$817,014 which I round to \$820,000.

[118] From this amount, there must be deducted what Mr. Uy would have had to pay for basic necessities. As discussed above, the cost of future care award includes an amount to reflect the cost of basic necessities over and above the cost of care. In order to avoid duplication, the cost of necessities that Mr. Uy would have incurred had he continued to work must be deducted from his projected future earnings.

[119] In *Andrews* at 251, the Court noted that the costs to be added to the future care award may not align directly with the costs to be deducted from the future earnings award (see the quote reproduced at para. 57, above).

[120] Mr. Carson calculates the future cost of necessities, again using Statistics Canada's estimated poverty line of \$24,830 annually, to be \$626,839 and that amount will be deducted from the award for loss of future earning capacity.

Special Damages/In Trust Claim

[121] In *McCormick* at para. 355, Chief Justice Hinkson cited the earlier decision of *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, where Madam Justice D. Smith, then of the Supreme Court, summarized the factors to be considered when making an in-trust award:

- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
- (c) the maximum value of such services is the cost of obtaining the services outside the family;
- (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
- (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[122] Mr. Uy submits that Mr. and Mrs. Amurao have provided services to Mr. Uy that go above and beyond what would be expected in a normal family relationship, keeping in mind that the Amuraos are not in a marital or parental relationship with Mr. Uy. Mr. Uy notes further that the Amuraos have foregone opportunities to earn income as a result of caring for Mr. Uy. For example, they have not taken in further home care clients and Mr. Amurao missed overtime opportunities at work, before he went on disability leave.

[123] Mr. Uy cites *James v. James*, 2018 BCSC 603, where the court used a daily rate approach to calculate the value of services provided by a husband to the plaintiff, who had been rendered a quadriplegic in an accident. In that case, Mr. Justice Betton referred to *Brennan v. Singh*, 1999 CanLII 6932 (B.C.S.C.), where the court took a similar approach. Justice Betton said:

[154] The plaintiff used a daily rate of \$720 in its argument and proposed a 30% reduction of market value following the example in *Brennan*. Since the market value is serving only as a benchmark and no monies were actually expended I am unable to accept that proposition. This is not a situation of selecting a lesser service to save money for the defendant, but rather valuing the services provided by the family member.

- [155] In a general sense I agree with the approach taken by Harvey J. in Brennan. It is my conclusion that the appropriate benchmark to use is \$500 per day and to adjust that by 40% to reflect the very limited opportunity cost and the reality that the defendant was not providing compensable services 24 hrs per day because some of the time he was not providing care beyond that reasonably expected of family members.
- [124] Mr. Uy proposes using a similar daily rate of \$500 but without the 40% discount applied in James. He submits that Mr. Uy requires closer supervision than did the plaintiff in James. Mr. Uy does acknowledge that the claim should be reduced by the \$100 per day that the Amuraos received from ICBC up until August 31, 2016. Making this adjustment for that period and then applying a daily rate of \$500 from September 1, 2016 results in a claim of \$940,000.
- [125] The defendants submit that a figure of \$10,000 per month is a fair and reasonable amount to reflect the services provided by the Amuraos. That amount results in a total of \$730,000, from which must be deducted the amounts received by the Amuraos of \$133,205, resulting in an award of \$596,795.
- [126] As I understand the defendants' position, the \$133,205 they seek to deduct includes the \$835 per month they received for Mr. Uy's room and board. That is not a proper deduction in that this amount is more in the nature of a reimbursement for actual costs incurred. Further, the \$10,000 figure is largely plucked from thin air.
- [127] I agree with Mr. Uy that an approach similar to that taken in James is appropriate in this case. I disagree however that there should be no discount applied. Justice Betton's observations in support of the discount apply with equal force here. Without in any way meaning to diminish the care and support provided to Mr. Uy by the Amuraos, it is not the equivalent to 24-hour care by a care aide. It is apparent on the evidence that the Amuraos have incorporated Mr. Uy into their daily life in that much of what Mr. Uy does is accompany Mr. Amurao on his daily errands. If there are no errands or outings planned, Mr. Uy spends much of the time on his own in his suite.
- [128] That said, given the cognitive issues that Mr. Uy has, he can be challenging to deal with. In the circumstances, I think a 30% discount off the \$500 daily rate is reasonable. Using the figures supplied by Mr. Uy, I therefore assess the in trust claim as follows: 2,205 days x \$500 = \$1,102,500 x 70% = \$771,750 - \$80,800 (808 days at \$100 per day paid to the Amuraos) = \$690,950.
- [129] As discussed, ICBC provided Part 7 benefits to Mr. Uy up until August 31, 2016. The total value of those benefits was \$149,951.45 and the parties agree this amount should be included in the special damages claim.
- [130] Mr. Uy also claims for incidental expenses totaling \$1,472.35, including prescriptions, disability forms, parking, and other miscellaneous expenses. The defendants agreed to pay for all of these except parking expenses incurred by Mr. Amurao when he visited Mr. Uy in

the hospital on the basis of his concern for Mr. Uy. In other words, the defendants did not accept as a reasonable expense Mr. Amurao's parking before he was granted committee ship of Mr. Uy on March 7, 2014. I accept the defendants' position in this regard and I accept that the remaining costs were reasonably incurred in the amount of \$1,339.36. The defendants also agreed that an additional amount, to be determined, for Risperidone and Cipralex prescriptions was reasonable.

[131] The total award for special damages and the in trust claim is therefore \$842,240.81.

Health Care Costs Recovery Claim

[132] Mr. Uy filed a certificate issued on behalf of the Minister of Health pursuant to the Health Care Costs Recovery Act, S.B.C. 2008, c. 27, in the amount of \$245,423.38 (the "HCCR Claim"). Under s. 16 of that statute, the certificate is deemed to be proof of the health care services provided to the plaintiff and the cost thereof.

[133] Judgment is therefore awarded under this head for \$245,423.38.

Tax Gross Up and Management Fee

[134] The parties agreed that consideration of a tax gross up and management fees would be deferred until after the release of these reasons.

Conclusion

[135] In summary, I award the following damages to Mr. Uy:

- a) Non-Pecuniary Damages \$388,177.00
- b) Past Lost Earning Capacity \$172,330.00
- c) Future Lost Earning Capacity \$820,000.00
- (Total Lifestyle Approach) (\$626,839.00)
- d) Cost of Future Care \$7,235,522.00
- e) Special Damages*/In Trust \$842,240.81
- f) HCCR Claim \$245,423.38
- g) Tax Gross Up TBD
- h) Management Fee TBD

Total: \$9,076,854.19

*Amounts for Risperidone and Cipralex prescriptions to be determined.

[136] If the parties are unable to agree on costs, they may make arrangements to speak to the issue.

"Skolrood J."

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Prepared on 29 October 2026 · Esheria