

CANADA / JUDGMENT

Vankoll v. Williamson

2020 BCSC 271

COURT

Supreme Court of British Columbia

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2020 BCSC 271 Vankoll v. Williamson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vankoll v. Williamson,

2020 BCSC 271

Date: 20200228

Docket: M30530

Registry: Chilliwack

Between:

Justin Gerhard Vankoll

Plaintiff

And

Sydney Williamson and Joseph Williamson

Defendants

Before: The Honourable Madam Justice Devlin

Reasons for Judgment

Counsel for the Plaintiff:

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J.C. Legaree

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J. Chow

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Place and Dates of Trial:

New Westminster, B.C.

January 27-30, 2020

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Place and Date of Judgment:

Chilliwack, B.C.

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INTRODUCTION

- [1] The plaintiff, Justin Vankoll, claims damages for injuries sustained in a motor vehicle accident that occurred on March 5, 2014 in Langley, BC. Liability has been admitted.
- [2] Mr. Vankoll's claim is for non-pecuniary damages, loss of future earning capacity and past and future loss of handyman capacity. Mr. Vankoll claims he suffers from chronic low back pain as a result of the accident which impacts all aspects of his life.
- [3] The defendants concede Mr. Vankoll continues to experience some pain and discomfort in his lower back but dispute his injuries cause any significant functional impairment.
- [4] The parties have reached an agreement on the claim for special damages. An Agreed Statement of Facts ("ASF") was filed as an exhibit at trial which details Mr. Vankoll's medical treatment and employment history.

BACKGROUND FACTS

Mr. Vankoll's Position before the Accident

- [5] Mr. Vankoll is 25 years old. At the time of the collision he was a healthy and active 19-year-old. Mr. Vankoll was born and raised in Mission, BC and continues to live with his mother in the family home together with his brother, sister-in-law and their young child. Mr. Vankoll's parents separated when he was a child but he continues to have a good relationship with his father.

- [6] Mr. Vankoll graduated from Heritage Park Secondary School in 2012. He described himself as having been a decent student. Mr. Vankoll worked part-time for Little Caesars when he was a young teenager and then as a line cook with Mission Springs Development Ltd in Mission. After graduating from high school, Mr. Vankoll obtained full-time employment with Pioneer Garage Ltd. ("Pioneer") in Mission B.C. as a lot attendant. He was working with Pioneer at the time of the collision and did not then have any particular future career goals.
- [7] In addition to working full-time, Mr. Vankoll led a very active life with no physical limitations. He engaged in a variety of outdoor activities including hiking, camping, fishing, hunting, 4x4ing, dirt biking, snowmobiling, snowboarding, and playing hockey. All of these activities were physically demanding. He also enjoyed working on vehicles and building things around the family home. Mr. Vankoll often engaged in these activities with his brother, father, or high school friend, Jeremy Regan.
- [8] Mr. Vankoll also performed outdoor and indoor household duties. He was primarily responsible for raking leaves, mowing grass and shovelling snow. Once a year he would power wash the cement around the house. His brother Joshua was more inclined to assist with computers while Mr. Vankoll assumed responsibility for the more labour intensive tasks and maintenance.

The Collision

- [9] On March 5, 2014, Mr. Vankoll was travelling westbound on the Fraser Highway in Langley, BC, driving a 2011 Dodge Durango registered to Pioneer Garage Ltd. when he was hit from behind by the defendant Sydney Williamson, who was driving a 2005 Kia Rio owned by the defendant Joseph Williamson.
- [10] At the time of the collision Mr. Vankoll was delivering the vehicle from the Pioneer Chrysler dealership in Mission to the Pioneer dealership in Langley, BC.
- [11] Mr. Vankoll testified that he had slowed down for the traffic ahead when he was suddenly hit from behind. He said he did not see the car and there was no warning before he was hit. He said he felt a hard impact. Immediately after he was hit, he sat in the car for a few minutes to process what had occurred and then got out of his car and spoke to the driver of the other vehicle. He did not require any immediate medical assistance.
- [12] As a result of the collision the 2005 Kia Rio was declared a total loss and the vehicle Mr. Vankoll was driving sustained damage totalling \$3,164.53.
- [13] Following the collision, a colleague drove Mr. Vankoll back to the Mission dealership.

- [14] Upon returning to the Pioneer dealership Mr. Vankoll left work to see his doctor. Mr. Vankoll explained he wanted to get himself checked-out by his doctor because he was not feeling like himself and was in shock. This was Mr. Vankoll's first car accident. Dr. Johnson, Mr. Vankoll's family physician, was not in the office so he was seen by Dr. Hobson. Dr. Hobson gave him a note to be off work until March 7, 2014.

Mr. Vankoll's Circumstances after the Collision

Post-Accident Medical Treatment

- [15] The following summary of Mr. Vankoll's post-accident medical treatment is derived from the details set out in the ASF, as well as from the testimony of Dr. Johnson and Ms. Warkentin, Mr. Vankoll's treating kinesiologist.
- [16] The day after the accident, Mr. Vankoll testified he started to feel pain in his neck and lower back. He saw Dr. Johnson who ordered an x-ray of the lumbar spine, gave him a note to stay off work until March 10, 2014 and prescribed some Ibuprofen and Tylenol #3.
- [17] On March 6, 2014, Mr. Vankoll had an x-ray of his lumbar spine at the Mission Memorial Hospital and returned to see Dr. Johnson on March 10, 2014. Dr. Johnson noted ongoing pain in Mr. Vankoll's lower back with decreased flexion, extension and rotation. Dr. Johnson referred Mr. Vankoll to Oasis Physiotherapy and also prescribed pain medications, Cyclobenzaprine and Tramadol. Dr. Johnson also provided a note recommending Mr. Vankoll remain off work for a further week.
- [18] Mr. Vankoll attended two sessions of physiotherapy at Cedar Valley Physiotherapy & Pain Clinic ("Cedar Valley") on March 18 and 31, 2014. On March 19, 2014 he had his first of 4 sessions of massage therapy treatment at Cedar Valley. Mr. Vankoll testified that the massage treatment helped somewhat but he could not afford to continue with it.
- [19] On March 19, 2014, Mr. Vankoll saw Dr. Johnson again. At that meeting Dr. Johnson noted Mr. Vankoll reported doing light duties at work and had experienced some increased pain. Dr. Johnson prescribed Naproxen and Tramacet and issued another note stating Mr. Vankoll was unfit for work for 7 days.
- [20] At his March 26, 2014 appointment with Dr. Johnson, Mr. Vankoll reported that the Tramacet made him ill and did not find the Tylenol #3 effective as a pain medication. Dr. Johnson recommended Mr. Vankoll attend physiotherapy at OASIS Physiotherapy ("OASIS") and prescribed Cyclobenzaprine.
- [21] Mr. Vankoll testified that within six months most of his injuries had resolved but he continued to have mid and lower back pain and suffer some sleep issues. He acknowledged that some days were better than others but he experienced daily throbbing, soreness and stiffness in his mid to lower back.

- [22] On October 6, 2014, Mr. Vankoll returned to see Dr. Johnson due to ongoing back pain. Dr. Johnson noted tenderness at the L2-3 with reduced range of flexion motion but otherwise full range of motion with discomfort in the lumbar spine on extreme motions.
- [23] On February 25, 2015, Mr. Vankoll returned to see Dr. Johnson due to ongoing pain. Dr. Johnson referred Mr. Vankoll to an active release rehabilitation program at OASIS and ordered a further X-ray of his lumbar spine. On February 26, 2015, Mr. Vankoll underwent an x-ray of his lumbar spine.
- [24] On April 2, 2015, Mr. Vankoll commenced treatment at OASIS. He attended 12 treatments between April 2 and June 16, 2015. Mr. Vankoll testified the treatment consisted of various strength exercises as well as cardio work on the treadmill. He was also instructed on stretches to do at home. Mr. Vankoll testified the sessions provided some temporary relief but the discomfort would reappear afterwards. He stopped attending due to the cost and because it only provided periodic pain relief.
- [25] On October 2, 2015, Mr. Vankoll reported to Dr. Johnson ongoing complaints of low back pain related to movement. Dr. Johnson noted limited flexion on examination and recommended a referral to a physiatrist.
- [26] On January 7, 2016, Mr. Vankoll was examined by Dr. Shearer who arranged for some rheumatological blood work and a nuclear bone scan which took place on February 4 and 12, 2016. Dr. Shearer met with Mr. Vankoll again on March 10, 2016 and made a referral to another physiatrist, Dr. Dawson, for a second opinion.
- [27] On May 26, 2016, Mr. Vankoll met with Dr. Dawson for the first of three appointments. Dr. Dawson concluded that Mr. Vankoll presented with chronic mechanical low back pain and recommended Mr. Vankoll perform certain exercises. Mr. Vankoll testified that he followed the home work-outs provided by Dr. Dawson.
- [28] On July 18, 2016 Mr. Vankoll returned to see Dr. Johnson due to his ongoing back pain. Dr. Johnson referred Mr. Vankoll for further active rehabilitation. Between July 29, 2016 and July 17, 2017 Mr. Vankoll attended 26 active rehabilitation sessions at Karp Rehabilitation ("Karp"). Mr. Vankoll testified he enjoyed the sessions with his trainer and he would follow an exercise plan at home.
- [29] At his July 29, 2016 session at Karp, Mr. Vankoll was assessed by Dana Warkentin, a kinesiologist who was assigned to his file. Ms. Warkentin was called to testify at trial for the defence. Ms. Warkentin described the various exercises Mr. Vankoll engaged in during their sessions and described Mr. Vankoll as pleasant, motivated, and willing to make a good effort. She noted he had ongoing mobility issues in his lower back area which sometimes improved, sometime worsened throughout the treatment. She was unable to say for certain if Mr. Vankoll's condition improved as a result of the sessions.

- [30] Mr. Vankoll testified he stopped attending these sessions because he felt he was not getting any better and was at a "standstill". Mr. Vankoll also testified he continues to follow the home exercises he learned at Karp and has an exercise ball, foam roller, a 10 pound medicine ball and a set of 10 pound dumbbells.
- [31] On June 22, 2017, Mr. Vankoll was reassessed by Dr. Johnson who noted ongoing limited mobility. At Dr. Johnson's request, Mr. Vankoll underwent a CT scan of the lumbar spine to rule out sacroiliitis on July 28, 2017.
- [32] On March 2, 2018, Mr. Vankoll was seen by Dr. Dawson. Dr. Dawson noted that Mr. Vankoll continued to experience low back pain, agitated by bending and lifting. Dr. Dawson recommended Mr. Vankoll undergo an injection into the iliolumbar region and provided a prescription for Depo-Medrol. On April 5, 2018, Dr. Dawson provided Mr. Vankoll with the injection treatment.
- [33] Mr. Vankoll testified he wanted to try the injections in spite of the associated risks. After the injection, Mr. Vankoll testified he experienced relief for three months and it helped him perform his duties at work. Although he still had some pain, he experienced improvement in his movement. By the end of the three months the pain slowly returned to pre-injection levels. Mr. Vankoll discussed with Dr. Johnson the option of having more injections but ultimately decided he did not want to get injections every three months for the rest of his life.
- [34] Mr. Vankoll testified that his mid-back pain has improved. He testified he now experiences mid back pain approximately three times a month depending on his activity level. However, he continues to have low back pain daily, although some days are better than others. He testified that certain activities aggravate his back pain such as bending, lifting, climbing stairs and walking and standing for longer periods of time.

Post-Accident Work History

- [35] In June 2015, Mr. Vankoll left his employment at Pioneer for a better paying position at LaFarge working as an independent contractor for Dennis Murphy Trucking. At the time Mr. Vankoll's father was also working at LaFarge. Mr. Vankoll's main duty was to drive a stacker and front end loader, unloading barges of dirt. This was a physically demanding job with long hours. Mr. Vankoll testified the physical demands exacerbated his back pain and acknowledged in cross-examination that he did not enjoy the work.
- [36] While he was working at LaFarge, Mr. Vankoll took his first course in fire protection at BCIT with a plan to obtain employment in the fire protection industry like his uncle and brother.
- [37] In October 2015, Mr. Vankoll left LaFarge and began working with Mountain Fire Protection Ltd. ("Mountain Fire") as a junior fire technician. Mr. Vankoll testified he had no particular career goal in mind when he started at Mountain Fire but he was interested in making a good living. Mr. Vankoll was aware his hourly wage would increase with the more courses he

took so he enrolled in the electrical course for fire protection at BCIT. Although Mr. Vankoll did not pass the course in the fall 2015 term, he retook the course and passed in 2016. While working at Mountain Fire, Mr. Vankoll became aware of the sprinkler fitter position but did not think it was a job that suited him due to the physical demands. Mr. Vankoll decided to leave Mountain Fire in July 2016 to find more lucrative work.

- [38] In July 2016, Mr. Vankoll returned to Pioneer to work on commission as a fulltime salesman. While he did not experience any physical discomfort at this job, he decided to leave in April 2017 due to the financial uncertainty of commission-based work.
- [39] From May 2017 until October 2018, Mr. Vankoll worked as a junior fire alarm technician with Fire-Pro Fire Protection Fraser Valley (1036359 BC Ltd.) ("Fire Pro FV"). This was a full time position which required occasional overtime work. As a junior fire alarm technician he performed similar duties as at Mountain Fire such as testing fire extinguishers, smoke alarms, emergency lighting, and fire pumps. He worked primarily in townhouses but also worked on low and high rise buildings and some commercial facilities. Mr. Vankoll's work partner Chris Kanoa and his boss Matt Lee would assist Mr. Vankoll with the tasks that were more physically demanding such as climbing stairs in the townhouses or lifting heavier items. Mr. Vankoll was often tasked with sitting at the fire panel while his colleague would attend to the individual units to check the smoke alarms. In addition to the accommodations made by his co-workers, Mr. Vankoll purchased a power drill which assisted him in doing the overhead work. Mr. Vankoll decided to leave Fire Pro FV because he wanted to become a fully certified fire technician and matters were not progressing at Fire Pro FV.
- [40] Mr. Lee testified that Mr. Vankoll was a great employee who was hard working and always keen to take on work. While accommodations were necessary due to Mr. Vankoll's injuries, he said Mr. Vankoll did a great job and he would not hesitate to hire Mr. Vankoll again. Mr. Lee explained that fire technicians usually work in pairs, with the junior technician doing more of the "grunt work" and the senior technician doing the less physical work, but that was not always the case. Mr. Lee also testified that he spoke to Mr. Vankoll "all the time" about more lucrative career options in the industry. With respect to the option of becoming a sprinkler fitter, Mr. Lee said he spoke to Mr. Vankoll a few times but there was no position at Fire Pro FV at that time. They also discussed the possibility of a career as a lead fire technician and the process required for certification. Mr. Lee advised Mr. Vankoll that if he dedicated himself to his work and gained the necessary experience, in four to five years he would become qualified to be a service manager, a role where he could make between \$28 and \$32 per hour. Mr. Lee also stated that a senior and experienced fire technician could make \$40 per hour.
- [41] By the time Mr. Vankoll left Fire Pro FV he had decided he wanted to pursue a career as a fully certified fire technician. Since October 2018, Mr. Vankoll has been working full time as a junior fire alarm technician with Mircom Technologies Ltd. ("Mircom") making \$21 per hour. At Mircom, Mr. Vankoll primarily works in low rise and high rise buildings where he can avoid climbing stairs by using the elevator, reducing the chances of agitating his back

pain. In addition, he works with other technicians who assist him with the more demanding physical tasks when he is concerned about his back.

- [42] Mr. Vankoll anticipates completing the necessary courses to become a certified fire technician by spring 2020. Once he obtains his certification stamp he will advance to senior technician or lead technician and his pay will increase accordingly. At present, there is a steady demand for certified fire technicians in the industry.

Post-Accident Social and Recreational Activities

- [43] Despite some modifications to accommodate Mr. Vankoll's back pain, he has continued to engage in many of the same activities he enjoyed prior to the accident, including: hunting, fishing, camping, hiking and 4x4ing. He also tries to run or go walking a few times a week, usually on weekends. He has had to scale back the frequency and intensity of all activities. For instance, he takes shorter hikes on trails (rather than off trails); he takes more frequent breaks when fishing; and he sleeps on a cot when he is camping. Mr. Vankoll no longer snowboards or dirt bikes due to a concern of the risk of further injury to his back.
- [44] Mr. Vankoll continues to enjoy working on vehicles but now is now limited to smaller jobs and relies on his father and brother to do the rest of the work. He now takes his vehicle to the garage for oil changes and tire rotations which he used to do on his own. He also used to do this for all the family vehicles.
- [45] Mr. Vankoll has also scaled back the activities he does around the house and no longer does the yearly pressure washing. He continues to mow the lawn and shovel snow but his brother assists him with the heavy lifting. He continues to work on his carpentry projects and, since the accident, has built a couple of spice racks as well as a play structure for his nephew, although he required some assistance with heavy lifting.
- [46] Mr. Vankoll's brother, Joshua and his friend Jeremy Regan testified about the changes they noticed in him since the accident. Joshua testified that prior to the accident, his brother was a handyman, passionate about carpentry and a "busy body", which I understood to mean very active and always doing something. But post-accident, he is often laying on the couch after work too sore to do any activity. Joshua says his brother is still the same person but he is no longer as energetic or ambitious as before. Mr. Regan made the same observations about the changes in Mr. Vankoll. According to Mr. Regan, Mr. Vankoll was not "carrying himself the way he used to" and would often need to take breaks when they were out for a walk. They no longer skateboard or snowboard because Mr. Vankoll does not want to risk further injury to himself.

EXPERT EVIDENCE

[47] The plaintiff led evidence from two medical experts - Dr. Waseem, a physiatrist and Mr. McNeil, an occupational therapist. The defendants led evidence from Dr. Gallimore, an orthopaedic surgeon. All experts were cross-examined. While I have read the expert reports and considered their viva voce testimony, I will not review the medical evidence in detail. I will however detail the key findings and opinions.

Dr. Zeeshan Waseem

[48] Dr. Waseem is a physiatrist who has expertise in physical medicine and rehabilitation. Dr. Waseem's expert report dated October 4, 2019, was filed as an exhibit at trial.

[49] Dr. Waseem conducted an assessment on Mr. Vankoll on September 21, 2019. In addition to Mr. Vankoll's description of his back pain Dr. Waseem also reviewed Mr. Vankoll's medical records, the specialist reports of Dr. Shearer and Dr. Dawson and the x-rays.

[50] Dr. Waseem conducted a physical exam of Mr. Vankoll's spine and noted that both his cervical spine and thoracic spine were entirely normal in terms of range of motion. Mr. Vankoll reported increased pain in his lower back when performing flexion, extension and bilateral movements during motion testing, although Dr. Waseem did not find a reduced range of motion. Dr. Waseem's findings included:

- Increased pain with range of motion testing of the lumbar spine;
- Weakness of the core abdominal muscles, lumbar extensors and oblique muscles bilaterally; and
- Increased lower back pain with an anteriorly directed shearing force at L4-L5.

[51] Dr. Waseem opined that Mr. Vankoll's injuries have resulted in chronic mechanical pain of the lumbar without a directional preference. Dr. Waseem also opined that Mr. Vankoll will likely continue to encounter difficulties with employment that involves heavy lifting and repetitive bending unless he is able to work at his own pace.

[52] Dr. Waseem recommended Mr. Vankoll continue with his regime of self-directed exercises to manage his symptoms. He also viewed further injections as an option for the future. In cross-examination Dr. Waseem agreed that an individual could have injections 3 to 4 times per year, but there are risks associated with the injections such as infection, bleeding, nerve damage and bruising. Dr. Waseem also testified he does not consider injections to be a lifelong solution. Rather, Mr. Vankoll should focus on his exercise regime to strengthen his core muscles which will in turn increase function and muscle endurance while decreasing symptoms.

- [53] In terms of Mr. Vankoll's prognosis, Dr. Waseem opined that the likelihood of full symptomatic recovery is low. Mr. Vankoll's symptoms have persisted for over five years and his recovery has plateaued. While Dr. Waseem acknowledges there is the potential for Mr. Vankoll's condition to improve, but his condition is "chronic, unremitting and permanent."
- [54] Dr. Waseem was extensively cross-examined. Despite challenges to Dr. Waseem's basis for objectively measuring pain, nothing arose that detracts from his opinion regarding Mr. Vankoll's chronic condition. Dr. Waseem disagreed with Dr. Gallimore's finding that Mr. Vankoll's condition had resolved, stating: "I cannot accept it is resolved when it is still there".

Russell McNeil

- [55] Mr. McNeil is an occupational therapist with a speciality in functional capacity evaluation. Mr. McNeil's expert report, dated October 22, 2019, was filed as an exhibit at trial.
- [56] Mr. McNeil examined Mr. Vankoll on September 16, 2019 from 9:30am to 1:30pm. Although the examination was scheduled for a full day, it ended early due to Mr. Vankoll's reports of increased pain during some of the exercises. Mr. McNeil described Mr. Vankoll as a minimizer, meaning Mr. Vankoll did not overstate his pain response.
- [57] Mr. McNeil was asked to provide a functional capacity evaluation of Mr. Vankoll both with respect to sustaining employment as a fire service technician but also as a sprinkler fitter as well as any alternate employment. In addition, Mr. McNeil was asked to assess Mr. Vankoll's ability to perform housekeeping tasks and yard work.
- [58] Mr. McNeil's report details all of the testing performed on Mr. Vankoll which included active range of motion, grip strength, upper and lower extremity strength and trunk muscle endurance. Mr. McNeil concluded that Mr. Vankoll's had an issue with lower back pain.
- [59] With respect to the work requirements of a fire service technician, Mr. McNeil concluded that Mr. Vankoll "demonstrated the capacity to perform the physical demands of his present work as a fire service technician" but found that Mr. Vankoll did not demonstrate the capacity to perform the work as a sprinkler fitter. With respect to alternate employment, Mr. McNeil opined Mr. Vankoll is "best suited for work in the light physical demands category and in occupations where he is able to limit his exposure to prolonged static and dynamic spinal positioning and low level work".
- [60] Mr. McNeil also opined that Mr. Vankoll has the capacity to perform household chores and yard work but would need to pace himself while he performed the work.
- [61] Mr. McNeil was extensively cross-examined, particularly with respect to his reliance on various databases which he used to determine ability. Although I found Mr. McNeil became defensive during cross-examination, especially when questioned about his knowledge of the demands of a sprinkler fitter position, but that does not detract from the weight of his opinion.

- [62] When cross-examined about the records from Karp indicating Mr. Vankoll's ability to perform certain weight bearing exercises at the gym, Mr. McNeil explained that doing exercises in the gym does not equate with an individual's ability to perform physically to the same extent in the real world.

Dr. Christopher Gallimore

- [63] Dr. Gallimore is an orthopaedic surgeon who was called by the defendants. Dr. Gallimore was qualified to provide opinion evidence relating to the cause, diagnosis, treatment and prognosis of musculoskeletal injuries, including soft tissue injuries and chronic pain. Dr. Gallimore conducted an independent medical examination on April 27, 2018 and his report, dated May 14, 2018, and an addendum report, dated April 11, 2019, were filed as an exhibit at trial.
- [64] Dr. Gallimore conducted a clinical examination on Mr. Vankoll and concluded that his mechanical back pain had resolved. During his testimony, Dr. Gallimore clarified that what he meant was Mr. Vankoll's symptoms resolved but not the pain itself. Dr. Gallimore opined that Mr. Vankoll's prognosis was good. He recommended Mr. Vankoll continue to attend the gym, engage in active exercise and stretches on his own at home.
- [65] However, Dr. Gallimore agreed in cross-examination that given Mr. Vankoll had recently seen Dr. Dawson for an injection, it was expected that he may experience a decrease in pain and corresponding enhanced function and mobility. Dr. Gallimore acknowledged that his opinion was based on the assumptions that Mr. Vankoll's condition would remain unchanged going forward and that after the injection wears off Mr. Vankoll could return to the same condition as before the injection.

FINDINGS

- [66] There is no dispute between the parties as to causation. The evidence clearly establishes that but for the March 5, 2017 collision, Mr. Vankoll would not have developed chronic lower back pain. Nor was there any issue as to Mr. Vankoll's credibility or reliability. I accept Dr. Waseem's opinion that Mr. Vankoll's chronic mechanical back pain is unrelenting and, therefore permanent. Mr. McNeil's assessment of Mr. Vankoll aligns with Dr. Waseem's findings. Overall, Mr. Vankoll will have permanent lower back pain, but if he paces himself and continues to exercise, he will be able to continue in his chosen career.
- [67] I cannot give any weight to Dr. Gallimore's opinion as it was based on an assessment which took place while Mr. Vankoll was experiencing the benefit of the injection treatment. Indeed, Dr. Gallimore conceded that his opinion was based on the assumption that Mr. Vankoll's presentation would not change. He also agreed that when the benefits of the injection wore off, Mr. Vankoll could have returned to the situation he was in prior to the injection treatment.

- [68] Therefore, I accept the opinion of Dr. Waseem and Mr. McNeil that Mr. Vankoll has chronic lower back pain which may improve with exercise, but will never completely resolve.
- [69] I have also considered the evidence of Mr. Vankoll, his brother, his good friend and the others who knew Mr. Vankoll. I am satisfied that Mr. Vankoll has established on a balance of probabilities that his chronic lower back pain was caused by the March 5, 2014 motor vehicle accident. I am also satisfied that the evidence has established his injury is permanent.

DAMAGES

- [70] As stated earlier, the parties have agreed on special damages. What remains to be determined are Mr. Vankoll's claims for non-pecuniary damages, loss of future earning capacity and loss of past and future handyman capacity.

Non-Pecuniary Damages

The Legal Principles

- [71] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. Compensation should be fair to all parties and is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882; *Benavides v. Doe*, 2015 BCSC 1831 at para. 94, *aff'd* 2017 BCCA 15.
- [72] The appropriate amount of compensation is not merely a function of the seriousness of the plaintiff's injuries viewed in isolation. As outlined by Kirkpatrick J.A. in *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley] at paras. 45-46, courts must consider the effect of the injuries on the plaintiff's particular circumstances, taking into account factors such as the plaintiff's age, the nature of the injury, the severity and duration of the plaintiff's pain, the extent of any disability, the effect on family and social relationships, impairment of the plaintiff's mental and physical abilities, and the impact on the plaintiff's lifestyle. It is therefore necessary for the court to have an "appreciation of the individual's loss": *Stapley* at para. 45.
- [73] The assessment of non-pecuniary damages is also influenced by the plaintiff's personal experiences in dealing with the injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25 [Dilello]. Equally important is the trier of fact's subjective appreciation of the evidence describing those injuries, the pain, suffering, loss of amenities and disability and their consequences on the plaintiff's personal and economic future: *Dilello* at para. 25.
- [74] Ultimately, the Court must make an award of damages for pain and suffering and loss of enjoyment of life that is tailored to the specific circumstances of this plaintiff.

Position of the Parties

[75] Mr. Vankoll submits that an award of \$85,000 is appropriate under this head of damage. In support of this position, he relies on:

- Villing v. Husseni, 2015 BCSC 1604 (\$85,000)
- Dickenson v. Passero, 2015 BCSC 908 (\$100,000)
- Carson v. Ehman, 2019 BCSC 2120 (\$85,000)
- Zyda v. Sine, 2019 BCSC 2173 (\$75,000)

[76] Counsel for the defendants contends that non-pecuniary damages should be in the range of \$50,000 to \$60,000. They rely on:

- Smith v. Evashkevich, 2016 BCSC 1228 (\$50,000)
- Moody v. Hejdanek, 2018 BCSC 380 (\$55,000)
- Kim v. Morier, 2013 BCSC 673 (\$55,000)

[77] It would not serve any real purpose to recount every salient detail of the cases cited to by counsel. While the cases give some guidance as to the general range of damages that might be considered "fair and reasonable", the result in each case is largely fact-driven. While I take some guidance from the assessment of damages set out in the proffered cases, my task is to determine the appropriate amount of compensation based on an individualized assessment of Mr. Vankoll's loss.

Discussion and Award of Non-Pecuniary Damages

[78] Mr. Vankoll is 25 years old. He suffers from chronic lower back pain as a result of the motor vehicle accident. Although his back pain comes and goes it is not expected to ever resolve. I have no doubt that Mr. Vankoll's general well-being is impacted. However, I do not consider his persistent back pain to have inflicted any profound or life-altering effects on Mr. Vankoll.

[79] Since the accident, Mr. Vankoll has been able to pursue a career as a fire alarm technician. Despite his injury, he was capable of working full time while taking evening courses at BCIT with a view to completing his certification as a fire alarm technician. Although he switched his employment several times over the past years, his decision to do so was usually financially motivated rather than having to do with his injury. As Mr. Lee, his former employer testified, despite his physical limitations, particularly with lifting heavier objects or repetitive bending, Mr. Vankoll was a valuable, hard working employee. While accommodations have had to be made for Mr. Vankoll at work, there is no evidence to suggest this detracts from his job performance. Indeed, Mr. Vankoll is well on the path to becoming a certified fire technician.

- [80] As previously discussed Mr. Vankoll continues to enjoy a number of recreational activities including hunting, fishing, camping, hiking and 4x4ing. He also engages in an exercise regime that includes short periods of running and/or walking. While Mr. Vankoll has had to temper the frequency of his engagement and the intensity with which he engages in these activities he is still able to enjoy many of the same recreational activities that he partook with his family and friends as he did before the accident.
- [81] Similarly, he has had to modify some of the tasks he performs around his home. However, he is still able to contribute to the maintenance of both the interior and exterior of the residence. While his brother has had to assume some of the chores, Mr. Vankoll is still actively engaged with household maintenance. However, he has not pursued more physically demanding projects such as installing new floors given his concern that it may exacerbate his pain. Mr. Vankoll continues to enjoy carpentry. For example, he built a play structure for his nephew although he benefitted from some assistance with the heavier lifting. Mr. Vankoll also continues to work on cars along with his brother and father however he is more of an observer. His brother and father perform much of the more labour intensive tasks because he is concerned such activity may aggravate his back pain.
- [82] There is no doubt that Mr. Vankoll's lower back pain has and will continue to have an impact on every aspect of his life in varying degrees. The pain that flows from Mr. Vankoll's accident injuries manifests in different limitations he must now live with. However, the magnitude of his loss and enjoyment of life is not tantamount to a total loss or restriction of the pre-accident life he led. The award must be adequate in ameliorating Mr. Vankoll's conditions. Accordingly, after accounting for Mr. Vankoll's age, the nature of the injury and how the injury has affected his life, as well as the other Stapley factors, I am satisfied that Mr. Vankoll is entitled to modest compensation for the impact the injuries have had on his general well-being.
- [83] Having reviewed the cases provided by both parties, I assess Mr. Vankoll's non-pecuniary damages at \$85,000.

Loss of Past and Future Handyman Capacity

The Legal Principles

- [84] A plaintiff's claim for loss of housekeeping capacity may be compensated by a pecuniary or a non-pecuniary award: *Kim v. Lin*, 2018 BCCA 77 [Kim] at para. 28. In *Palangio v. Tso*, 2017 BCSC 1573 [Palangio], Madam Justice Arnold-Bailey found that a claim for loss of handyman capacity was akin to a loss of housekeeping capacity.
- [85] In determining how to categorize such a loss, courts should consider whether the plaintiff is still able to perform household tasks with difficulty or decides they need not be done. In either of those situations, it is most appropriate to treat the loss under the non-pecuniary head of damages. However, if "family members gratuitously perform the lost services, thereby avoiding necessary replacement costs", it is more appropriate to treat the loss as a

stand-alone head of pecuniary damages (*Liu v. Bains*, 2016 BCCA 374 at para. 26; see also *Kim*).

[86] More recently, in *Riley v. Ritsco*, 2018 BCCA 366, in upholding the lower court decision not to make an award for loss of housekeeping capacity, the Court provided further guidance for dealing with claims for segregated damages:

[102] There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

Position of the Parties

[87] Mr. Vankoll seeks an award in the amount of \$15,000 for his loss of handyman capacity. The defendants submit that the evidence does not support a separate and distinct award.

Discussion

[88] The evidence in this case established that prior to the accident Mr. Vankoll was well-engaged with handywork around the house. Since the accident he has had to moderate some of his activities, but he is still capable of performing many of the same tasks. For example; he continues to cut the lawn, although he does not lift the lawn mower; and continues to deal with the garbage, although his brother assists. While he no longer power washes, I understand this was an activity that was undertaken once per year. I also note there is nothing to suggest that Mr. Vankoll could not perform this task with necessary breaks or going at an acceptable pace. I accept that there are some more physically demanding tasks, such as repairing stairs, that Mr. Vankoll chooses not to undertake to avoid the risk of exacerbating his injury. However, Mr. Vankoll's situation is not comparable to the plaintiff's in *Palangio*. In *Palangio*, the plaintiff had engaged in sustained and heavy lifting like constructing patios, decks, performing exterior painting and doing heavy landscape work. Post-accident, his extensive pain prevented him from doing even lighter tasks like mowing the lawn. I am not persuaded, on the evidence, that the modifications to Mr. Vankoll's handyman activities are sufficiently significant such that it justifies a discrete award of damages. I have already considered the challenges Mr. Vankoll faces performing handyman tasks as one factor in assessing his non-pecuniary damages, set out above.

[89] Accordingly, I make no award for the loss of handyman capacity.

Loss of Future Earning Capacity

The Legal Principles

- [90] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and if so, 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation: *Hoy v. Williams*, 2014 BCSC 234 at para. 153.
- [91] In *Morgan v. Galbraith*, 2013 BCCA 305, the Court of Appeal, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140 [Perren], noted that a plaintiff must establish a "real and substantial possibility" that his or her earning capacity has been impaired (at para. 53). The appropriate means of assessment will vary from case to case: *Brown v. Golai* (1985), 26 B.C.L.R. (3d) 353, 35 A.C.W.S. (2d) 96 (B.C.S.C.) [Brown]; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 52 A.C.W.S. (3d) 458 (B.C.C.A.) [Pallos]; *Pett v. Pett*, 2009 BCCA 232.
- [92] The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32. The standard of proof in relation to future events is simple probability, not the balance of probabilities. Hypothetical events are to be given weight according to their relative likelihood: *Reilly v. Lynn*, 2003 BCCA 49, at para. 92 [Reilly].
- [93] There are two possible approaches to the assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren*, at para. 32. Where the loss is proven but "is not measurable in a pecuniary way" the "capital asset" approach is more appropriate: *Perren* at para. 39. This approach is more typically used in cases where the plaintiff has no clear earnings history: *Sirak v. Noonward*, 2015 BCSC 274, at para. 202. The factors to be considered under the capital asset approach where identified by Skolrood J. in *Jossy v. Johnson*, 2016 BCSC 1023 [Jossy] as follows:
- [133] 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: *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.) [*Brown*]; *Gilbert* at para. 233.

[94] The task of the court is to assess the losses, not to calculate them mathematically. The overall fairness and reasonableness of the award must be considered (*Reilly*, at para. 92).

Position of the Parties

[95] The parties agree that the capital asset approach is appropriate for assessing any loss of future earning capacity.

[96] Mr. Vankoll is seeking an award for loss of future earning capacity in the amount of \$94,239 which is an equivalent of two years worth of earnings based on his annual salary at Mircom of \$47,119.56. Mr. Vankoll submits that he no longer has the capacity to pursue a career as a sprinkler fitter due to his chronic pain. Although he continues to work towards becoming a certified fire technician he remains entitled to compensation for his loss of capacity. In the alternative, Mr. Vankoll seeks compensation to account for his diminished capacity to work.

[97] The defendants take the position that the evidence fails to establish a real and substantial possibility that Mr. Vankoll would have become a red seal sprinkler fitter but for the accident. Further, they submit Mr. Vankoll has failed to establish a real and substantial possibility of a future event leading to income loss. In the alternative, the defendants submit an award for future earning capacity should be in the range of \$23,000 to \$46,000.

Discussion

[98] I will deal first with Mr. Vankoll's submission regarding his loss of capacity to pursue a career as a sprinkler fitter. The thrust of Mr. Vankoll's claim is that, but for the accident, he would have pursued a career as a sprinkler fitter. I agree with the defendants that, at best, the evidence established that Mr. Vankoll expressed an interest in the possibility of becoming a sprinkler fitter, nothing more. As discussed earlier, Mr. Lee stated that Mr. Vankoll spoke to him about potentially obtaining a sprinkler fitter position one day, but there is no evidence that Mr. Vankoll made any further inquiries on the subject. Ms. Harris from the Industry Training Authority of BC testified that sprinkler fitter apprenticeship programs are demanding and take up to six years to complete. Mr. Vankoll testified he knew nothing about the apprenticeship program or the requirements to become a sprinkler fitter. I find the evidence established that Mr. Vankoll's career plan was to pursue employment that was financially rewarding and he had determined this was best accomplished by becoming a certified fire technician. Having considered all of the evidence I find there is no air of reality to Mr. Vankoll's submission regarding a possible career as a sprinkler fitter. I find that submission is one "based more on a hope and an optimistic belief about a possible future opportunity." (*Jossy*, para. 138)

[99] However, my consideration of Mr. Vankoll's loss of earning capacity does not stop there. I find that the evidence has established a real and substantial possibility that his injuries impaired his capacity to earn income. As Dr. Waseem explained, Mr. Vankoll's prognosis for full recovery is poor. While his condition may improve, he will continue to experience pain. His condition is chronic and permanent. I am satisfied that Mr. Vankoll's injuries do cause him discomfort and some limitation, which impact his ability to carry out his work duties. Even though Mr. Vankoll has continued towards becoming a fully certified fire service technician his employer had to accommodate him due to his injury. Despite these accommodations, Mr. Vankoll is regarded as a hard working and valuable employee. Mr. Vankoll is advancing towards qualifications to become a senior fire technician, which would alleviate the requirement for him to do the more physically demanding aspects of the job. Mr. Vankoll has been steadily employed as a junior fire technician and the evidence of Mr. Lee and Mr. Oboril establish that there is high demand for certified fire technicians.

[100] I must also consider both positive and negative contingencies. Contingencies are in many respects, unknowable, however, the following contingencies I find are real and substantial possibilities that attach to Mr. Vankoll's current career choice. Mr. Vankoll is a young man who has chosen to pursue a career as a fire technician. It is possible that he will advance in the industry to the position of a service manager. However, there is of course no certainty that he will have an employer who is willing to make the necessary accommodations nor is there any certainty that Mr. Vankoll will continue to work as a fire technician for his entire career. In addition, while there is demand for fire technicians at present the industry is variable.

[101] Having considered all of the evidence, the contingencies and Mr. Vankoll's circumstances, I assess a fair and reasonable award for Mr. Vankoll's future income earning capacity loss at \$46,000.00.

Special Damages

[102] The parties agree that \$3,994.98 is the appropriate award under this head of damage.

CONCLUSION

[103] In summary, I award the following damages:

Head of Damage

Award

Non-pecuniary damages

\$85,000

Loss of Handyman Capacity

\$0

Loss of Future Earning Capacity

\$46,000

Special Damages

\$3,994.98

TOTAL

\$134,994.98

COSTS

[104] In the parties cannot agree on costs, they are at liberty to apply to me in writing to settle the matter within 60 days of the issuing of these reasons.

"Devlin J."

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