
CANADA / JUDGMENT

Wells v. Kolbe

2020 BCSC 1530

COURT

Supreme Court of British Columbia

DECIDED

15 October 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1530 Wells v. Kolbe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wells v. Kolbe,

2020 BCSC 1530

Date: 20201015

Docket: M41261

Registry: Penticton

Between:

Matthew Charles Wells

Plaintiff

And

Melissa Leigh Kolbe and Darren Victor Hafftor

Defendants

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:

M.D. Brooke

Counsel for the Defendants:

M. Geekie

Place and Date of Trial/Hearing:

Kelowna, B.C.

August 10 - 14, 17 - 21,

and 24 - 28, 2020

Place and Date of Judgment:

Kelowna, B.C.

October 15, 2020

Introduction

- [1] The plaintiff, Matthew Wells, was injured in a motor vehicle accident when his Mini Cooper was struck on the driver side by a GMC Jimmy in an intersection. The collision involved a significant impact. The defendants deny liability for the collision.
- [2] The plaintiff claims for non-pecuniary damages, loss of income (both past and future), special damages, and for cost of future care. The parties dispute the quantum of damages under each head.

The Facts

Prior to the Accident

- [3] The plaintiff is now 48 years of age, and was 42 at the time of the accident. At the time, he was a single father of a son, Dexter, who is now 14 years old. He had recently separated following a long-term relationship.
- [4] Mr. Wells' working background is in the information technology ("IT") industry. He had started his own IT business shortly before the accident. The extent to which that business may have been successful was in issue in this trial.
- [5] The majority of his formal training is by way of certifications obtained through various companies such as IBM, Hewlett-Packard, Dell, Lenovo, and others. Following high school, he worked in graphic design, which included computer-aided desktop publishing. In 1992, his focus had changed from the artistic and creative to the technical side of the business. He obtained a number of his certifications when he worked in jobs involved in warranty work and what are now referred to as "Help Desks". In those positions he would attempt to remedy technical problems remotely, primarily over the telephone.

- [6] For nine years, he was involved in a start-up company that was set up to assist tour operators in comparing prices. He was with that company until 2001; however, the company went public at around the time of a downward correction in the IT sector and most of the employees, including Mr. Wells, were laid off. He then moved to Calgary where he worked with a company building high-end laptops and computers, and ultimately headed that company's service department.
- [7] Mr. Wells had difficulties with drugs and alcohol for a period of time. He enrolled, successfully, with Alcoholics Anonymous ("AA"), and through someone he met that was involved in AA, he became aware of an IT firm, Adaptive Technical ("Adaptive"). Although he had no initial plans to work for Adaptive, he ultimately worked for them initially as a general technician. At the time of his departure from Adaptive, he had the position of client services manager. While with Adaptive, he earned approximately \$48,000 per year.
- [8] He found that he was spending most of his time driving around the Lower Mainland in traffic and wanted a better way of life for himself and his son. He had discussions with Adaptive about the possibility of relocating to the Okanagan and building up the business in the Okanagan. While that was not how things progressed, his relationship with Adaptive remained strong following his move to Penticton in 2011. He initially relocated to a job with another firm, but he subsequently started his own business, which he named Peach City IT Services.
- [9] When he moved to Penticton, the plaintiff set up a martial arts gym known as Spitfire. Spitfire was an incorporated entity. His reason for setting up this business was not because of any particular skills he himself possessed, but rather because Tae Kwon Do was a passion of his son's. Although he had a modest amount of hands on involvement, he hired professionals to do the actual training. The plaintiff had to close the Spitfire martial arts gym following the accident, but suffered no financial loss and advanced no claim relating to it.
- [10] Peach City IT Services was initially run through the corporation he had created to run the Spitfire gym. However, after the plaintiff closed the gym business following the accident, he renamed the corporation as Peach City IT Services Inc.
- [11] The impact of the accident on the plaintiff's ability to earn income through Peach City IT was a matter of disagreement at the trial.

The Accident

- [12] The accident occurred on May 7, 2015, in the evening. Mr. Wells had dropped off his son at Tae Kwon Do at Spitfire and was on his way to an AA meeting for his 7th year anniversary cake. He was driving south on Martin Street in Penticton at the time of impact. He was struck by a GMC Jimmy driven by the defendant Melissa Kolbe. It was a quiet evening with little traffic. He was going the speed limit. As he passed Eckhardt Street, he saw an SUV coming towards him at the last moment. It was not slowing down. The two vehicles collided and the airbags in his Mini Cooper deployed. His vehicle was subsequently written off.

Photographs at the scene evidence a significant impact.

- [13] Mr. Wells reports he lost consciousness and has only hazy recollections of events. He was extracted from his vehicle and taken to Penticton Regional Hospital. He was discharged from hospital later that evening.
- [14] When at the hospital, Mr. Wells complained of being "foggy". He had various cuts, bruises and abrasions. He complained of both neck ache and headache.

After the Accident

- [15] In the days that followed, Mr. Wells was very limited in his movement and activity. He saw his family doctor who recommended that he not try to work. He reported pain in his neck, back and hip, in addition to complaining of headaches. He also reported anxiety following the accident, and reported symptoms of dizziness, forgetfulness and general fatigue. He was prescribed muscle relaxants and advised to go to massage therapy.
- [16] His ability to work was substantially reduced following the accident. Because he was self-employed and operated his business from his residence, this is not a case with a clear or defined return to work date. He often had clients drop off their computers to his home for repair. He reported having trouble with work, and expressed to his general practitioner difficulties with concentration, exhaustion, anxiety and anger control. Within a month, he had developed trouble with his sleep patterns and expressed a lack of motivation, consistent with depression which he had had in the past. He also complained of double vision.
- [17] While some of the initial symptoms faded over time, the pain in his back, shoulders and hips, together with headaches and concerns about memory loss persisted. He received massage therapy and physiotherapy treatments, and worked with a kinesiologist.
- [18] Approximately two years after the accident, he continued to report ongoing neck pain with pain radiating into the shoulders, anxiety, sleep disturbance, irritability, low back and hip pain, and headaches. While he had improved initially, he found that he did not recover as quickly as he had hoped and expected. He found himself frequently fatigued and unable to work for more than four or five hours per day, substantially less than he had been able to do prior to the accident. He felt constantly tired, which impacted both his ability to work and his interpersonal relationships, especially with his son Dexter.
- [19] While the plaintiff and Dexter did everything together prior to the accident, their relationship has suffered subsequently. Mr. Wells had separated from his long time partner, Trina Hendrickson, some months before the accident and Dexter was struggling with the separation to the point where he had seen a counsellor.
- [20] After the accident he met and subsequently married Danielle Klassen, and the two have a one-year-old son, Charlie. However, Mr. Wells and Danielle have recently separated.

- [21] Mr. Wells' subsequent relationship with Danielle and the blending of the two families created some difficulty and the transition was not as smooth as Mr. Wells might have hoped. Compounding the problem, however, was Mr. Wells' lack of energy and perpetual feeling of tiredness. He was no longer able to do many of the physical activities that he and Dexter previously enjoyed together and in the fall of 2019, Dexter moved out of his father's home and went back to live with his stepmother, Trina Hendrickson.
- [22] The plaintiff's mother, Dori Wells, testified that the plaintiff was more easily frustrated and short tempered, and would snap at Dexter. She said that Dexter does not understand the plaintiff is different now and in her view Dexter is permanently disappointed in the plaintiff.
- [23] Because the plaintiff met his wife Danielle after the accident, she is not in a position to provide insight into changes in the plaintiff. However, she confirmed that he continues to have difficulties with sleeping and that he is permanently tired. He cannot get up in the morning and is often not awake until 9:30 or 10:00. The plaintiff reports that he continues to be foggy in the morning and that it takes him an hour or so to wake up; so much so, he is better to avoid answering the telephone in the morning as he sounds impaired, something that was confirmed by Danielle Wells.
- [24] In February 2018, the plaintiff was on vacation in Mexico. His largest client was a local car dealership, Murray GM. He had been doing Murray GM's IT work since before the accident. Their computer system was somewhat antiquated and was constantly in need of work. While he was in Mexico, Murray GM suffered a large-scale computer system failure, and they needed immediate assistance.
- [25] Although Mr. Wells had arranged for another company to cover for him in his absence, neither that entity nor Mr. Wells via remote access were able to reinstate Murray GM's computers. When he returned to Penticton, Mr. Wells worked long hours, much longer than he had been able to work since the accident, in an attempt to fix the problem and recover the client's information. After the second consecutive long day, Mr. Wells had to go to the hospital on account of his pain. There was no new injury, just an aggravation of his prior symptoms.
- [26] Shortly afterwards, Murray GM replaced Peach City IT with another service provider, which was something they had already decided to do before the system failure but unbeknownst to the plaintiff.
- [27] Other witnesses testified about changes in the plaintiff after the accident. Mr. Scott Lemoine lives in Penticton. He met Mr. Wells in the men's AA group in Penticton approximately nine years ago or so. Their relationship was a casual one and they had sons of similar age. Mr. Lemoine's son also attended at the Spitfire kickboxing gym.

- [28] Mr. Lemoine has noticed changes since the accident. He cannot get Mr. Wells to meet him for coffee before noon, and he described the plaintiff as apathetic and having no energy. In terms of Mr. Wells' professional life, Mr. Lemoine had Mr. Wells assist with a computer hardware installation post-accident. Mr. Wells became frustrated or agitated with it. Mr. Lemoine had not seen him similarly agitated or frustrated prior to the accident.
- [29] Ms. Debbie Harrison was the service cashier at Murray GM, the plaintiff's largest client. She was responsible for booking appointments, calling customers and, as part of her general administrative function, was the person who would most frequently contact the plaintiff for service calls. She would see him a number of times per week.
- [30] Availability and responsiveness were important to Murray GM because if their computer systems are down, some of the technicians cannot do their work and calls cannot be made. Prior to the plaintiff's accident and before Murray GM installed new servers, their system was frequently requiring work. The office was open from 7:30 AM to 6:00 PM and the calls to Mr. Wells could be at any time, early morning or late afternoon. Ms. Harrison found him very responsive, and he was usually at Murray GM within half an hour of a call. She observed that he did not seem to tire and was energetic, with a happy and smiling personality. He was conscientious, she got along with him well, he was good at his job and he was efficient.
- [31] After the accident, she noticed drastic changes. He was no longer what Ms. Harrison described as a 'happy-go-lucky' person. She found him forgetful and he could not remember passwords. She described him as listless. She remembers on one occasion that she called him at 9:30 and he did not arrive for another hour and a half. He then had to leave after 30 to 45 minutes, and he appeared to be confused.
- [32] In 2018, the plaintiff started to try using alcohol again. He was of the view that after ten years of sobriety, he had his addiction under control. He has since decided that he should resume his participation with Alcoholics Anonymous, but other than his wife Danielle's preference that he not use alcohol, there was no evidence that his consumption has become problematic or that it impacts in any way on his daily function.
- [33] He was initially very optimistic about his recovery from his injuries after the accident. He was told that he could expect to improve for the first couple of years after the accident, and he held onto that and remained positive for a time. However, two years has long since passed and as time went by and he did not recover, his optimism has been replaced with feelings of despair.
- [34] He described ongoing difficulty with multi-tasking. He makes a lot more lists and a lot more notes than he used to. While he said it was always important to make lists and notes when taking instructions from clients in IT and he always did so, he finds he needs to do it more often and has to take notes with regard to matters that previously were unnecessary.

- [35] Since his son Dexter has gone to live with Ms. Hendrickson and Danielle Wells has moved out, the plaintiff now lives by himself.
- [36] He continues to suffer from disturbed sleep and often does not wake until some time after 9:30 AM. The plaintiff still reports being foggy when he wakes in the morning, and he is unable to function properly. It takes him at least an hour to get to the point where he is able to communicate effectively, and he has learned not to try to deal with clients during that time.
- [37] He continues to suffer neck and back pain daily, and because of his lack of sleep and pain symptoms, he struggles to work more than four or five hours per day. He finds he constantly needs to rest or nap in the afternoons and evenings, and feels fatigued and unmotivated. Although he sleeps a lot, he is not refreshed when he wakes and lacks the energy he needs for his daily functioning.

Liability

- [38] There is little dispute about how this accident occurred. The plaintiff was driving south on Martin Street and the defendant Melissa Kolbe was driving west on Eckhardt Avenue. They collided in the intersection. Neither vehicle was exceeding the speed limit, and neither took any evasive action. The plaintiff saw the defendant's vehicle approaching moments prior to impact, whereas the defendant did not see the plaintiff until impact.
- [39] The intersection is controlled by traffic lights. The only issue on the question of liability is which driver had a green light and the right-of-way, and which faced a red light and was thus obligated to stop.
- [40] In this case, we have the benefit of independent witnesses with front row seats and a clear and unimpeded view of the accident as it occurred.
- [41] Jeremy and Caitlin Van Troyen had been travelling eastbound on Eckhardt Street and intended to turn right onto Martin Avenue. Mr. Van Troyen testified that the traffic light was red and that he stopped at the intersection. He saw the defendant's black Jeep Grand Cherokee coming straight towards him and he could see that the vehicle was not going to stop, even though the traffic on Martin Avenue had the right-of-way. He told Caitlin Van Troyen to get ready because he anticipated a collision. Ms. Kolbe's vehicle pushed the plaintiff's Mini Cooper into the Van Troyen's truck which was then itself pushed onto the sidewalk.
- [42] Caitlin Van Troyen's evidence accorded with that of Jeremy Van Troyen.
- [43] I accept the evidence of the Van Troyens, which was not shaken by cross-examination. Mr. Van Troyen gave a statement to the police following which the violation ticket was issued to Ms. Kolbe. Ms. Kolbe paid the accompanying fine.

[44] I am satisfied that the plaintiff had a green light and that the defendant Ms. Kolbe faced a red light. She was therefore obligated to stop, but she did not do so.

[45] The defendant is solely responsible for the accident.

Causation

Expert Evidence

[46] The evidence of the medical experts is largely consistent, which is that the plaintiff suffered a mild traumatic brain injury in the accident. None question the plaintiff's credibility or honesty in their dealings with him.

[47] Dr. McCann, doctor of physical medicine and rehabilitation, concluded that the plaintiff's ongoing neck pain and restricted range of motion is consistent with Type II whiplash associated disorder of his cervical spine and evidence of cervicogenic headaches or post-traumatic headaches.

[48] He also found that Mr. Wells had regular and constant pain in his lower back, with radiation into his hips, in the weeks and months following the accident. While pain in these areas was more periodic as opposed to constant, he concluded it was consistent with mechanical lower back pain, and consistent with injury and aggravation of soft tissue structures in the lumbar spine including facet joints, muscles, tendons and ligamentous structures. He said anxiety and increased stress can result in an increased pain response.

[49] Dr. McCann recommended ongoing core stability and strengthening exercises and avoidance of sitting or standing for prolonged periods of time without changing position. Dr. McCann's opinion was that the accident caused the ongoing problems.

[50] The defendant's physiatrist was Dr. Laidlow. During his examination of Mr. Wells, he noted restricted rotation to each side and tenderness in the neck and shoulder muscles. He confirmed that he found the plaintiff believable, and not prone to exaggeration. He concluded the plaintiff suffered a mild traumatic brain injury and that his cognition was impacted by a sleep deficit, pain and the use of prescription medications. He agreed with Dr. McCann's diagnosis of a Type II whiplash injury, and while he found there was room for improvement, he expects that the plaintiff's neck and shoulder discomfort will persist.

[51] Dr. Laidlow found no abnormalities in Mr. Wells' shoulder. Although an x-ray showed some calcification, he said this is normal in 70% to 80% of the population and its presence does not necessarily mean discomfort. Similarly, degenerative changes in the neck such as those identified on Mr. Wells' x-rays are normal amongst the population. The fact that there are degenerative changes does not mean that the person is symptomatic, nor does it necessarily mean that they are more prone to injury, other than an older person is likely to be less resilient to trauma.

- [52] Dr. Laidlow agreed that psychological factors may affect a person's recovery. He also agreed that there is a correlation between sleep and pain symptoms. Psychological factors and a lack of sleep can affect the ability to cope with pain, and testing has shown that people who are deprived of sleep will develop muscle pains, and altered sleep will often affect muscular pain for the worse. Indeed, the prevailing view of the medical experts was that stress and anxiety, poor sleep patterns and pain complaints are often interrelated.
- [53] Dr. Laidlow did not agree that the plaintiff's complaints of carpal tunnel syndrome would have been worsened by the accident unless there was some evidence of trauma to the wrist or the bony mechanics of the wrist. He said he found no evidence of that having occurred in this case.
- [54] Dr. O'Shaughnessy conducted a psychiatric assessment of Mr. Wells to determine if he suffered any mental disorder resulting from injuries sustained in the collision. Diagnostically, Dr. O'Shaughnessy offered opinion that Mr. Wells meets the criteria for post-traumatic stress disorder in partial remission, and a possible mild neurocognitive disorder secondary to concussion.
- [55] Dr. O'Shaughnessy remains concerned regarding Mr. Wells' fatigue and non-restorative sleep patterns insofar as he continues to require naps twice daily. Dr. O'Shaughnessy hopes that Mr. Wells' sleep difficulties will improve as his active rehabilitation continues and his conditioning improves but notes his concern that these are in fact residual symptoms of Mr. Wells' head injury. He notes that he does not think any psychological factors are playing a major role in Mr. Wells' ongoing fatigue issues.
- [56] Dr. O'Shaughnessy concludes that the post-traumatic stress disorder and mild traumatic brain injury/mild neurocognitive disorder were caused by the accident.
- [57] The plaintiff underwent neuropsychological testing with Dr. Ingrid Friesen. Her test results led her to conclude that Mr. Wells does not suffer from a psychological disorder, including depression or anxiety. Dr. Friesen diagnosed Mr. Wells with a mild neurocognitive disorder due to a mild traumatic brain injury. She attributed his current neuropsychological weaknesses to the accident. While the DSM-5 uses the qualifier of "mild" to indicate the individual is capable of completing activities of daily living independently, including grooming, dressing and meal preparation, Dr. Friesen points out that the term does not imply that the effects of the cognitive deficits on the individual's life are mild or inconsequential.
- [58] Dr. Friesen noted that at the time of her assessment, Mr. Wells was more than two years post-accident and that individuals who have experienced a traumatic brain injury typically experience the greatest neurological recovery within the first six months of injury and rarely after two years. It is unlikely, therefore, that Mr. Wells will make further substantial recovery and she considers his neurocognitive weaknesses to be permanent.

- [59] Dr. Falconer is a neurologist who saw the plaintiff at the request of the defendant. While agreeing Mr. Wells suffered a mild traumatic brain injury in the accident, Dr. Falconer's opinion is that based upon his assumption that Mr. Wells suffered no loss of consciousness and a very brief period of disorientation, Mr. Wells' ongoing symptoms are unlikely to have been caused by a mild traumatic brain injury and that there is no organic basis for his ongoing symptoms.
- [60] Dr. Falconer opined that rather than an organic cause, the plaintiff's cognitive complaints are more consistent with somatization or a cogniform disorder. Dr. Falconer's report attaches as appendices reports on somatoform disorder and cogniform disorder. These are not widely accepted in scientific literature, and are not part of the DSM-5, nor were they part of DSM-4.
- [61] The somatization in post-concussion syndrome study references only 60 patients and indicates that further research is required. The term somatization was used by Dr. Falconer to describe when people report pain symptoms but where there are no organic reasons for those symptoms.
- [62] Cogniform disorder and cogniform condition, according to the appendix attached to Dr. Falconer's report, are proposed new subtypes of somatoform disorders that encompass excessive cognitive complaints. The article on cogniform disorder and cogniform condition refers to the difficulty in dealing with DSM-4 diagnoses of malingering, factitious disorder and conversion disorder. The brief article appended to Dr. Falconer's report refers to two proposed diagnostic categories - cogniform disorder and cogniform condition - to address individuals who present with excessive cognitive complaints or invalid test results indicative of exaggeration.
- [63] There is no evidence here of excessive cognitive complaints by the plaintiff, nor test results indicative of exaggeration or malingering. Moreover, an additional significant difficulty with the references in Dr. Falconer's report to somatization and cogniform disorders, to the extent they could become recognized diagnoses, is that both are psychiatric in nature. Indeed, Dr. Falconer agrees and concedes in paragraph four of his third report that, "I would defer to an expert psychiatric opinion as to whether there is a psychiatric secondary gain factitious or other reason to account for his persistent symptoms".
- [64] As such, the articles incorporated by reference into his report are not yet accepted diagnoses or conditions, and even if they were, would be within the realm of psychiatry as opposed to neurology. The defendant's own psychiatrist, Dr. Latimer, confirmed that somatization is not a part of DSM-5, and he was not familiar with the terms cogniform disorder and cogniform condition.
- [65] It follows that I reject Dr. Falconer's explanations of 'somatization' or 'cogniform disorder' for the plaintiff's ongoing symptoms, both because they are not accepted diagnoses, and even if they were, they would be within the expertise of a psychiatrist, not a neurologist.

- [66] Dr. Teal prepared a neurological assessment conducted on September 25, 2018 and a report dated January 22, 2019. In his report, Dr. Teal diagnoses Mr. Wells with having sustained a mild traumatic brain injury based on a brief loss of consciousness and post-traumatic amnesia of an uncertain duration.
- [67] Dr. Teal's opinion is that Mr. Wells' persisting neurocognitive symptoms are multifactorial in cause, likely due to a combination of mild persisting cognitive sequelae of his concussion and contribution by other causes including mood disturbance, sleep issues and psychological factors. His opinion is that these symptoms would not have occurred in absence of the collision.
- [68] Dr. Teal also diagnoses Mr. Wells as suffering from persistent post-traumatic headaches which he says are also multifactorial in origin. He has elements of cervicogenic headaches, tension headaches, and post-traumatic migraine headaches. Mr. Wells had no history of significant pre-collision headaches, and Dr. Teal offers opinion that Mr. Wells' headaches are attributable to the collision.
- [69] In terms of a prognosis, Dr. Teal noted that Mr. Wells has persisting subjective cognitive symptoms more than three years' post-collision and therefore says that Mr. Wells' recovery from his mild traumatic brain injury has likely plateaued. Dr. Teal says there is still room for improvement in his cognitive symptoms. However, this would require not only treatment of his pain and headache issues, but also successfully addressing the psychological factors including anxiety, panic attacks, post-traumatic stress disorder symptoms and symptoms of sleep disturbance.
- [70] Dr. Teal opines that Mr. Wells will continue to suffer headaches for the foreseeable future. He recommends that Mr. Wells be treated by a neurologist in the management of chronic headaches.
- [71] Dr. Teal also found that Mr. Wells' prognosis for return to his previous workload is guarded and likely depends on successful treatment of his mood disturbance, anxiety and sleep issues. He recommends that Mr. Wells be treated and followed by a psychologist and psychiatrist for the management of his symptoms of anxiety, panic attacks, post-traumatic stress disorder and mood disturbance.
- [72] Dr. Latimer, a psychiatrist, evaluated Mr. Wells on behalf of the defendant. His assessment occurred on August 22, 2018. While Dr. Latimer also diagnosed the plaintiff with a mild neurocognitive disorder due to mild traumatic brain injury, consistent with Dr. O'Shaughnessy, Dr. Latimer went on to say:

To the extent that psychological issues are contributing to his functional difficulties, I would expect it to be mostly due to symptoms of ADHD. People with ADHD are known to perform beneath their potential academically and vocationally.

- [73] However, Dr. Latimer was clear during his evidence that he did not undertake a formal test for ADHD and therefore he was not making a diagnosis of ADHD in Mr. Wells' case. He had intended to undertake some testing in this regard, but he was not aware until later in his meeting with Mr. Wells that he was taking Vyvanse, a prescription medication used to treat ADHD, amongst other things. Proper testing, he said, could only be undertaken by having Mr. Wells not take Vyvanse prior to testing, and a formal diagnosis would necessarily include an investigation into Mr. Wells' history, including his academic history.
- [74] Dr. Latimer also agreed on cross-examination that some of the symptoms of ADHD were also symptoms of someone with a mild traumatic brain injury.
- [75] Some of the medical witnesses were asked about the plaintiff's decision to resume consuming alcohol following his years of sobriety. However, while none would recommend he do so, their evidence was consistent that it was not significant unless he was consuming frequently and to excess. There was no evidence of such consumption on the part of the plaintiff since the accident.

The Law

- [76] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. Causation "need not be determined by scientific precision": *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17.
- [77] The primary test for causation asks: but-for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [78] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:
- [78] . . . Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

- [79] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for other people. However, the defendant need not compensate the plaintiff for any effects of any pre-existing conditions that the plaintiff would have experienced anyway (Blackwater at para. 79).
- [80] The Court of Appeal outlined the guiding principles that govern the assessment of psychological injury claims in *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 at paras. 12-13 (B.C.C.A.):
12. It is important to understand what is established and what is not established by the decision in *Maslen v. Rubenstein*. I propose to set out a number of principles extracted from the reasons of Mr. Justice Taylor, for the Court, in the *Maslen* case. The first point is a preliminary point and appears in *Maslen* at p. 133 under the heading "(a) The Background":
 1. The plaintiff must establish that the pain, discomfort or weakness is "real" in the sense that the victim genuinely experiences it.

The remaining ten points are drawn from the part of the reasons headed "(b) The Basic Principles" at pp. 134 to 137:

2. The plaintiff must establish that his or her psychological problems have their cause in the defendant's unlawful act.
3. The plaintiff's psychological problems do not have their cause in the defendant's unlawful act if they arise from a desire on the plaintiff's part for such things as care, sympathy, relaxation or compensation.
4. The plaintiff's psychological problems do not have their cause in the defendant's unlawful wrongful act if the plaintiff could be expected to overcome them by his or her own inherent resources, or "will-power".
5. If psychological problems exist, or continue, because the plaintiff for some reason wishes to have them, or does not wish to end, their existence or continuation must be said to have a subjective, or internal, cause. (NOTE: I consider that this proposition must deal with the conscious mind, otherwise it seems to me to beg the question; see my first observation, later in this Part of these reasons.)
6. If a court could not say whether the plaintiff really desired to be free of the psychological problems, the plaintiff would not have established his or her case on the critical issue of causation.
7. Any question of mitigation, or failure to mitigate, arises only after causation has been established.

8. It is not sufficient to ask whether a psychological condition such as "chronic, benign pain syndrome" is "compensable". Such a psychological condition may be compensable or it may not. The identification of the symptoms as "chronic benign pain syndrome" does not resolve the questions of legal liability or the question of assessment of damages.
9. It is unlikely that medical practitioners can answer, as matters of expert opinion, the ultimate questions on which these cases often turn.
10. Mr. Justice Spencer, at trial in the Maslen case, put the overall test quite correctly in these words:

[C]hronic benign pain syndrome will attract damages ... where the plaintiff's condition is caused by the defendant and is not something within her control to prevent. If it is true of a chronic benign pain syndrome, then it will be true also of other psychologically-caused suffering where the psychological mechanism, whatever it is, is beyond the plaintiff's power to control and was set in motion by the defendant's fault.

11. There must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.¹³ I am sure Mr. Justice Taylor did not consider that the "basic" principles which he set out exhausted all the possibilities for the application of principle to the difficult problems in these cases. The general principles which apply in relation to causation in law will apply to psychological injury as they apply to physical injury.

Discussion

- [81] The defendant argues that the correct approach in assessing injuries that rely almost exclusively on subjective pain reports is the approach discussed by McEachern C.J.S.C. in *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.), where he cited one of his earlier decisions in *Butler v. Blaylock* [1981] B.C.J. No. 31 (S.C.), as follows:

In *Butler v. Blaylock*, No. decided 7th October 1981, Vancouver No. B781505 (unreported), I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -- which could be just his own evidence if the surrounding circumstances are consistent -- that his complaints of pain are true reflections of a continuing injury.

[82] However, the Court of Appeal overturned Butler (appeal decision at [1983] B.C.J. No. 1490 (C.A.)) in a decision rendered after Price was decided. The Court of Appeal confirmed that a plaintiff is entitled to compensation if the pain and suffering is genuine and was caused by the accident, even if no objective cause has been identified. In paragraphs 13 to 15, the Court stated the following:

13 There are three basic reasons which, in my view, support the conclusion that the plaintiff continued to suffer pain as of the date of trial. Firstly, the plaintiff testified that he continued to suffer pain. His wife corroborated this evidence. The learned trial judge accepted this evidence but held that there was no objective evidence of continuing injury. It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the Plaintiff is entitled to recover damages. There is no suggestion in this case that the pain suffered by the plaintiff did not result from the accident. I would add that a plaintiff is entitled to be compensated for pain, even though the pain results in part from the plaintiff's emotional or psychological makeup and does not result directly from objective symptoms.

14 Secondly, all of the medical reports support the view that the plaintiff continued to suffer pain and that it was not likely that his symptoms would disappear completely.

15 Thirdly, and of great importance, is the report of Dr. Lehmann, which was not before the learned trial judge for his consideration. In that report, Dr. Lehmann stated that there were degenerative changes in the cervical spine which pre-existed the accident. He said "they were probably asymptomatic before the accident but I think are probably contributing to his prolonged discomfort." In my view, as this evidence is uncontradicted, these objective findings cannot be disregarded and should be given great weight.

[83] When the plaintiff's complaints are entirely or primarily subjective, the court must exercise caution in determining whether those complaints are genuine. The absence of objective findings increases the opportunity for exaggeration or distortion, and even fabrication. However, the fact that symptoms cannot be objectively photographed or measured does not mean they are not genuine and real and deserving of compensation.

[84] In Prince v. Quinn, 2013 BCSC 716, Justice Williams commented on Price as follows:

[22] It is to be noted that, subsequent to the trial decision in Price v. Kostyba, the trial judgment in Butler v. Blaylock, to which reference had been made, was successfully appealed ([1983] B.C.J. No. 1490); the non-pecuniary award was increased from \$7,500 to \$15,000. In its per curiam judgment, the court said this at para. 13:

... the plaintiff testified that he continued to suffer pain. His wife corroborated this evidence. The learned trial judge accepted this evidence but held that there was no objective evidence of continuing injury. It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages. ...

- [23] In a related vein, almost without exception, the cross-examination of plaintiff's medical experts focuses on the very significant difference between subjective and objective indicators. The tenor of such cross-examinations generally suggests that where meaningful findings are principally based upon subjective evidence - the self-reports of the plaintiff - the evidence should be afforded much diminished weight.
- [24] These propositions are understood.
- [25] With respect, as regards this latter point, it seems to me that this is an approach that must be considered with care. Taken to its ultimate conclusion, it would, in many cases, quite unfairly put a plaintiff in a position where proving a claim would be exceedingly difficult and verging on impossible.
- [26] In my view, the point to be observed is this: where a plaintiff's claim is founded quite substantially on self-reported evidence, it is necessary for the trier of fact to scrutinize the plaintiff's evidence carefully and evaluate it in the light of other evidence, such as the circumstances of the collision, other relevant information concerning the plaintiff's activities and statements made by the plaintiff on other occasions. However, where the evidence of physical injury is substantially based on subjective evidence - the testimony of the plaintiff - that should not constitute an effective barrier to proof of a claim.
- [27] In the final analysis, it is the court's duty to examine the evidence carefully and critically. That is what I have done in this case.
- [85] In this case, the plaintiff's reports of his post-accident symptomology of pain, disturbed sleep, fatigue and anxiety are corroborated by a number of witnesses: his mother, Dori Wells; his wife, Danielle Wells; his former coworkers, Christian Sandino and Gleb Kleiman; and Debbie Harrison, the service cashier at Murray GM.
- [86] It is important to note that the medical practitioners who saw the plaintiff, both for the plaintiff and for the defendant, all reported no concerns about Mr. Wells' level of effort or honesty from their observations.
- [87] The defendant called Christine Morella, the controller at Murray GM, the plaintiff's largest client to give evidence that Murray GM had already made the decision to replace Mr. Wells as its IT consultant well before the system failure in February 2018. However, she also testified that she noticed changes in Mr. Wells after the accident. She described him as frequently in pain with headaches, and while she did not notice that he was any less technically skilled afterwards than he was before, which was not something she would necessarily be in a position to determine, that he was nonetheless slower in performing tasks than he had been previously and was not as alert and energetic after the accident than he was before.

- [88] Ms. Morella agreed that Mr. Wells did not tell her that he had been admitted to hospital following two days of very long hours after he tried to restore Murray GM's system upon his return from vacation. When she was advised at the trial, it was the first time she had heard it. If Mr. Wells had been anxious to amplify his claim, one would expect that he would have ensured that management at Murray GM was aware. Instead, he kept quiet about it, which is more consistent with trying to keep the client rather than promoting the claim.
- [89] When a plaintiff's claim in a personal injury action is based on subjective symptoms, the evidence must be scrutinized most closely in order to ensure fairness. The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, as follows:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [90] If the plaintiff's evidence of the changes in his or her physical, mental, and or emotional state following the accident is not convincing, the opinions of any experts who have relied on the veracity of that evidence will be undermined. Credibility of a plaintiff in a personal injury claim is therefore of great importance, especially when the majority of the symptoms are not easily seen or measured.
- [91] However, if the evidence withstands challenge and the plaintiff is found to be credible, the fact that the case is founded on subjective as opposed to objective evidence will make no difference because a plaintiff with subjective symptoms is no less entitled to compensation than one with objective symptoms, provided the plaintiff's losses are proven.
- [92] On the facts of this case, the plaintiff's evidence is consistent with the evidence of lay witnesses and expert witnesses. I accept his evidence and I conclude that his ongoing symptoms were caused by the accident.

Damages

Non-Pecuniary Damages

Legal Framework

[93] In *Trites v. Penner*, 2010 BCSC 882, Justice Ker set out the general principles regarding non-pecuniary damages. At paras. 188-189, she wrote:

[188] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to both parties . . .

[189] . . . fairness 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 . . .

[Citations omitted]

[94] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

[46] The inexhaustive list of common factors cited in *Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (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;

I would add the following factors, although they may arguably be subsumed in the above list:

- (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: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[95] The assessment of non-pecuniary damages is necessarily influenced by "the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience": *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

Conclusion

- [96] The plaintiff seeks an award for non-pecuniary damages in the amount of \$275,000, and refers to a number of cases in support of what he seeks. In particular, he draws the Court's attention to *Owen v. Folster*, 2018 BCSC 143, where the Court awarded \$210,000 to a 46-year-old plaintiff who sustained a mild brain injury, and *Lines v. Gordon*, 2006 BCSC 1929, rev'd in part 2009 BCCA 106 [Lines], a case where the client also suffered a mild traumatic brain injury. However, the defendant submits, and I agree, that a closer review of those authorities reveals that those plaintiffs suffered much more disabling symptoms than Mr. Wells.
- [97] In *Lines*, the plaintiff was completely unable to work in any capacity, and the Court concluded that a one-on-one worker was required for the rest of his life. He was described as spending his days wandering around Canadian Tire and visiting his children. While I accept that Mr. Wells' daily functioning has been affected by the accident and that it would appear that those changes may be permanent, the impact on his daily function is substantially less than was suffered by the plaintiff in *Lines*.
- [98] Similarly, the plaintiff in *Owen* had more significant ongoing injuries. He had balance issues that precluded him from using ladders, which is clearly not the case given Mr. Wells' evidence about installing security systems. The plaintiff in *Owen* also forgot the names of his children and was unable to walk at all. He would go for walks but would become disoriented and not come home for hours, and his wife described herself more as his caregiver than his partner. Again, while the impact to Mr. Wells' life is apparent, it does not rise to the level that was present in *Owen*.
- [99] The plaintiff also refers to *Wallman v. Doe*, 2014 BCSC 79, a case in which a 53-year-old medical practitioner was profoundly changed as a result of an accident that presented him with ongoing cognitive challenges. The Court awarded \$210,000 in non-pecuniary damages. From my review of that decision, the accident's impact on the plaintiff's daily functioning exceeds those suffered by the plaintiff.
- [100] The defendant submits that an award of between \$40,000 and \$80,000 is appropriate, and refers to authorities in that range. I have reviewed those authorities, but find them unhelpful in determining the appropriate compensation for the plaintiff. For example, in *Gunson v. Sekhon*, 2015 BCSC 2491, the plaintiff missed a month of work and then returned without any additional time off. In *Erwin v. Buhler*, 2017 BCSC 362, the evidence was that the majority of the symptoms resolved within one year, subject to intermittent pain in the back, neck and shoulder.
- [101] In all of the circumstances, the authorities I have been provided do not assist greatly in determining the appropriate compensation for the plaintiff's pain and suffering and the ongoing impact on his life. However, while the authorities provided by the plaintiff involve more significant symptoms, I consider that they are closer to the circumstances of this case than the authorities offered by the defendant. Based upon the plaintiff's ongoing symptomology and the fact that his life has likely been significantly and permanently

impacted, I conclude that an award of \$170,000 under this head of damage is appropriate in the circumstances.

Loss of Future Earning Capacity

Law

- [102] 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. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at paras. 7-8 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); and *Pett v. Pett*, 2009 BCCA 232.
- [103] Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185 [*Lines* (C.A.)]. 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 Corp. of British Columbia*, 2011 BCCA 144 at para. 32.
- [104] Our Court of Appeal restated the legal tests for past and future loss of income earning capacity in *Grewal v. Naumann*, 2017 BCCA 158 as follows:
- [46] . . . What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events [citing *Smith v. Knudsen*, 2004 BCCA 613 at para. 613].
- . . .
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event.

- [105] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from Pallos, and the "capital asset approach" in Brown. The "earnings approach" will generally be more helpful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32, whereas the "capital asset" approach may be more appropriate if it is not.
- [106] The earnings approach engages a form of mathematical analysis that involves either an estimation of the plaintiff's annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating the net present value or awarding the plaintiff's entire annual income for a year or two: Pallos; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [107] As described in Gilbert at para. 233, capital asset approach involves considering factors such as:
- [233] . . . i) whether the plaintiff 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 herself as a person capable of earning income in a competitive labour market.
- [See also Brown at para. 8].
- [108] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:
- [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, supra, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, supra, at 79. . . .

Facts

- [109] The plaintiff's resume confirms that he was able to obtain and maintain employment throughout his adult life. There is a gap in his resume from 2004 to 2008, which was a period when Mr. Wells struggled with drugs and alcohol, primarily the latter. In 2008, he became sober, which was maintained with regular attendance at AA meetings. 2008 was also when he obtained employment with an IT firm in the Lower Mainland, Adaptive Technical.
- [110] Adaptive was a relatively small firm at the time, but it grew while Mr. Wells was there, and it continued to grow subsequent to his departure in 2012. When he was hired, he was described by one of Adaptive's owners, Stefan Neuberg, as someone who fit the mould of what they were looking for, because he was well spoken and had good technical skills. In terms of technical skills, he was not at a senior level at the time he was hired, but he grew into that level of skill over time.
- [111] In addition to his technical skills, Mr. Wells' interpersonal skills led to his assuming a customer service role, whereby he would work with difficult clients, or clients who had expressed unhappiness with Adaptive's services. His suitability for the role was a combination of his technical skills and his superior interpersonal skills.
- [112] In 2012, Mr. Wells decided to relocate to Penticton. He worked briefly for another IT service provider in the South Okanagan. He then discussed with Adaptive the possibility of establishing an Okanagan branch of Adaptive. Mr. Wells had left Adaptive on good terms and would have been welcomed back had he chosen.
- [113] Adaptive's model of marketing was to cold call potential clients. Adaptive was looking for clients who would enter into monthly service contracts whereby the client paid a monthly fee calculated based upon the number of devices. Major projects, such as installation of new equipment, would generally be additional billing, also known as project billing.
- [114] Mr. Wells found the market in the Okanagan to be different. First, most potential clients were not interested in a monthly service contract, but rather wanted someone to call when they had problems. This work was described by Mr. Wells and others as "break fix" work. Mr. Wells also found cold calling to be ineffective. In addition to the fact that he did not enjoy cold calling, he found that potential clients in the Okanagan were more receptive following face-to-face meetings and interactions.
- [115] Adaptive continued to pay Mr. Wells on a contract basis for small amounts of work from time to time as Adaptive had a few clients in the Okanagan. Mr. Wells and Adaptive continued to maintain contact with each other, but the different business models resulted in the parties agreeing that Mr. Wells would pursue his business on his own and that the parties could always revisit the possibility of a more formal affiliation in the future.

- [116] Mr. Wells described working up to 12 hours a day trying to build the business. One of his early successes was a local car dealership, Murray GM. One of the strategies he employed to build his business was to do some work for a prospective client at no charge, with the hope that he would be hired in the future.
- [117] Mr. Neuberg is one of two owners of Adaptive. Presently, Adaptive has 16 employees, including the two owners. Mr. Neuberg does not have a formal degree but has technical certifications.
- [118] Mr. Neuberg said that when Adaptive commenced operations, he and his partners had to put in significant hours, often working seven days a week, 12 hours a day, which was necessary in order to build the business. He said that lots of people try to build a business such as Adaptive, but many do not succeed.
- [119] Notwithstanding the standing offer for Mr. Wells to return, Mr. Neuberg says that he does not know whether there would be a position for Mr. Wells if he were to reapply now because of his concerns about his current technical skills, a concern that was not a factor when he worked with Adaptive. Mr. Neuberg said he may give Mr. Wells a job if he were desperate, but he would not hire him if he could only work four hours per day.
- [120] Mr. Troy Schalm was called as a witness by the defendant. Mr. Schalm was previously involved in a company called Connect IT. He was one of the partners and the general manager for about eight years. He is no longer an owner, having sold Connect IT in September 2019. Connect IT provides IT services to the plaintiff's former client, Murray GM; when the plaintiff lost his contract with Murray GM, Connect IT took over.
- [121] Mr. Schalm's role was solely management, and he was not involved in the technical side of the IT business. Mr. Schalm bought into Connect IT in 2011. He agreed that in the early days of Connect IT, he and the managers were working 12 hours a day, including weekends, for much of the first five years, and that it required energy and enthusiasm to build the business.
- [122] He described one of the challenges facing Connect IT when trying to build an IT firm in Penticton was that there were only 100 or so companies they were interested in servicing in the South Okanagan. It required patience to build the business because potential clients do not like change. He said that in many cases the incumbent has to make a drastic error before a business will entertain the possibility of a new service provider.
- [123] His experience with marketing was similar to what Mr. Wells described, which was that the South Okanagan market is better approached by way of face-to-face meetings as opposed to cold calls. He confirmed that service is critical, and having someone available 24 hours per day is important, as are interpersonal skills.

[124] He agreed that there is room in the Penticton market for an individual to provide IT services. His evidence was that if a person works hard, there is no reason they cannot make \$100,000 per year as long as they are able to keep up with the required paperwork and emails in the evenings and weekends. The IT technicians at Connect IT make between \$70,000 and \$80,000 per year, depending on seniority and experience.

Positions of the Parties

[125] The plaintiff argues that his business was poised for success at the time of the accident. He testified that the accident put a halt on his ability to spend the time needed to continue to grow his business and that he had some 40 clients at the time, 25 of which he had by the end of 2014.

[126] Relying on the evidence of both Mr. Troy Schalm, the former general manager of Connect IT, and Mr. Stefan Neuberg, one of the principals of Adaptive, the plaintiff seeks an award for loss of future income in the amount of \$1,525,750. He arrives at this amount by estimating his annual loss at \$125,000 per year, after taking all contingencies into account and recognizing a marginal residual employability, and multiplying it by the economic multiplier to age 70.

[127] The annual amount of \$125,000 proposed by the plaintiff is based upon a starting point of \$100,000 per year, and then adding a premium to reflect what the plaintiff says he would have been able to earn through growth of his computer or IT business, and what amounts to leverage of future employees. He refers to Mr. Schalm's evidence that the partners in Connect IT drew salaries of \$110,000 while leaving \$300,000 of profit in the business annually, and sold the business for \$2.5 million in 2019; and Mr. Neuberg's evidence that the partners in Adaptive draw salaries of \$140,000 while building a business of substantial value.

[128] The defendant denies that the plaintiff has suffered any loss. During cross-examination, the plaintiff was taken through his invoice book for the years 2014 to 2017, and through that exercise it was determined that he invoiced seven clients in 2014, an additional five clients in 2015, ten new clients in 2016 and a further nine new clients in 2017.

[129] The defendant had an accountant, Mr. Benade of KPMG, undertake a review of the various invoices. Mr. Benade found that the hours billed by Peach City IT did not change materially after the accident:

Year

Hours per year

Average per week

Pre-Accident 2015

268.5

5.84

Post-Accident 2016

339.5

7.38

2017

295.0

6.41

2018

275.5

5.99

2019

248.0

5.39

[130] He performed calculations to determine Peach City IT's estimated net profit, after adding back in certain business deductions such as rent and vehicle expenses each year:

Year

Net Profit

2015

\$14,684

2016

21,199

2017

22,229

2018

17,483

[131] The defendant says that the majority of the growth in the plaintiff's business therefore post-dated the accident.

Discussion

- [132] Any attempt to quantify Mr. Wells' loss is by its very nature a difficult undertaking because his business was in its infancy. However, if I accept that the plaintiff's business would have been successful, he is entitled to be compensated for his loss, however difficult the quantification exercise might be.
- [133] I have no doubt that Mr. Wells was working very hard at developing Peach City IT up until the date of the accident. He was previously able to work up to 12 hours a day, but as a result of the accident, he struggles to work more than five hours per day. I accept that he can work more than five hours in a day on occasion, and I also accept that he did not work 12 hours per day every day prior to the accident. However, I accept that his ability to work has been significantly curtailed by the accident.
- [134] I accept that the business had an upward trajectory. The business's revenues actually increased even though Mr. Wells' ability to work decreased, and it is reasonable to conclude that the increase in sales after the accident was a product of his pre-accident labours.
- [135] The parties' economists made reference to the National Occupational Classifications with regard to Mr. Wells. The NOC 2171 category is an IT Consultant; NOC category 2281 is the category for a Computer Network Technician. Mr. Benning was asked by the plaintiff to assume that the plaintiff was in the NOC 2171 category, whereas Mr. Hildebrand questioned whether Mr. Wells would be better described in the NOC 2281 category because those in NOC 2171 typically have either a related university degree or college diploma, and Mr. Wells has neither.
- [136] The reason the NOC categories matter in economic modelling is that the income expectations, which are based on statistical averages, differ by category. According to Statistics Canada, the average income for a male in British Columbia in the NOC 2171 category, which is an IT Consultant, is \$85,654 [\$88,634 for those with bachelor degrees and \$78,589 for those with a college diploma]. By contrast, the average income for a British Columbia male in the NOC 2281, which is the category for a Computer Network Technician, is \$64,578 per year.
- [137] The difficulty with relying on the National Occupational Classifications is that there are aspects of a person's job functions that may fall into different categories from the majority of the work they undertake. Not every worker can be slotted neatly into one of the classifications. Moreover, the classifications include employees and the self-employed who do not work for incorporated entities, but they do not include people who are in a one-person corporation such as Mr. Wells.
- [138] I accept that Mr. Wells was a hard-working, energetic and motivated businessman who would have continued to pursue his business. His interpersonal skills, which were recognized by Adaptive Technical when they assigned him a role that included working with difficult clients or those with whom the firm had a strained relationship, are the sorts

of skills that would lead to the inference that the plaintiff would have experienced ongoing success with his business. Indeed, it is likely that while technical skills and know-how would form the basis of his business, it was his other less tangible attributes that would have contributed equally to his success.

- [139] The difficulty in this case is the absence of any track record in order to determine his level of income. I am satisfied that the increase in Peach City IT's revenues was a consequence of his marketing and sales efforts prior to the accident. There is no evidence and little suggestion that he was able to undertake much in the way of marketing following the accident.
- [140] Mr. Neuberg testified that he has received more calls for technical help from Mr. Wells since the accident. He gave a recent example where Mr. Wells must have missed something, although he does not know why he would have missed it, because it was a fairly basic matter. Mr. Neuberg's evidence in this regard is consistent with that of Mr. Gleb Kleiman and Mr. Christian Sandino, both former co-workers of the plaintiff, who testified about communications they have had with the plaintiff about technical matters since the accident.
- [141] I am also satisfied that Mr. Wells' ability to work has been hindered as he has described it. That is, he struggles to work more than four or five hours a day, when previously he could work up to 12 hours in a day.
- [142] The plaintiff's vocational consultant, Mr. Nordin, is of the opinion that the plaintiff is in his best possible employment situation because his functional limitations render him unsuitable for retraining and he is not competitively employable as an employee. Accepting as I do Mr. Wells' limitations on a daily basis, it follows from the evidence of Mr. Neuberg that Adaptive Technical would probably not be prepared to rehire Mr. Wells because he is simply unable to work sufficient hours.
- [143] Evidence that tends to support the fact that the plaintiff would have succeeded in his business includes his work with Murray GM. While Ms. Morella testified that Murray GM was looking for a replacement IT consultant before the catastrophic system failure in February 2018, because they had outgrown the services that Mr. Wells could provide, I do not consider Murray GM's proposed replacement of Mr. Wells to be a negative contingency in determining his prospects of success.
- [144] The plaintiff secured Murray GM as a client prior to the accident and held onto them for some years after, but it was Murray GM's growth, during which time the number of employees doubled, and not anything to do with Mr. Wells' service, that led the management at Murray GM to the conclusion to replace him.
- [145] It is entirely reasonable that a business that had grown substantially such as Murray GM would need a bigger service provider. This does not mean that the plaintiff would not have successfully grown his business as a "one-man show" in the smaller business sector, even if

he would not have been able to service adequately those larger businesses that were more suited to a company such as Connect IT. The fact that he was able to recruit Murray GM as a client, and retain them until they outgrew him, is evidence that establishes that he was likely to succeed.

- [146] I am satisfied that if it were not for the accident, the plaintiff would have continued to put in significant hours in order to build his book of business and that he would have been successful in so doing. The difficulty in this case is trying to determine the degree of success.
- [147] Mr. Schalm, who was called to testify by the defendant, said that a "one-man show" can make \$100,000 per year in IT in the South Okanagan. Of course, that does not necessarily mean that Mr. Wells would have been such a person, nor do I understand Mr. Schalm to be providing expert evidence as to the expected level of income of a successful one-person firm other than to provide something of an estimate.
- [148] The economists who testified at this trial, Mr. Benning for the plaintiff and Mr. Hildebrand for the defendant, also did not have sufficient information about IT firms specifically in the Penticton area in order to provide opinion evidence on the point.
- [149] A significant difficulty I have with the defendant's position that the plaintiff suffered no loss is that when the plaintiff left Adaptive in 2012, he had a standing invitation to return if he so chose. As such, even if Peach City IT had ultimately proven to be unsuccessful, Mr. Wells' worst-case scenario, at least from a financial perspective, would have been to return to work for Adaptive Technical as an employee.
- [150] The evidence of Mr. Neuberg was that a technician at Adaptive would now make in the range of \$70,000 - \$80,000 a year depending on the person's skill set. Mr. Neuberg's evidence was that Mr. Wells was at a senior level at the time he departed. Even if his skills had deteriorated somewhat from when he left to some hypothetical return date, his strong interpersonal skills, which led to his customer-service involvement would have had value, likely putting him to the top end of the range.
- [151] While the salaries currently paid by Adaptive Technical are only of hypothetical interest given my conclusion that Mr. Wells would have succeeded in building Peach City IT, it nonetheless informs the decision of his income potential, and in particular, the lower end of the range of what he might have been expected to earn.
- [152] All of that said, I consider the plaintiff's suggestion that he would have built Peach City IT to the point where it had employees and where it would have seen him benefit from profits derived from the labours of those employees to be speculative. In order to take on employees, the volume of work must increase significantly to the point where there is enough work to keep an employee busy full time, in addition to there being work for the firm's principal.

- [153] Mr. Wells has never been an employer, and the volume of growth in the business that would be required would be significant. I do not accept that just because people such as Mr. Neuberg and Mr. Schalm have been successful in growing their respective businesses through the years, that it follows that Mr. Wells would have enjoyed a similar level of success.
- [154] While it is possible that Mr. Wells would have succeeded to the point where Peach City IT would have employees and that he would enjoy an income beyond that of a one-person firm due to leverage, the possibility that he would experience such a level of success strays beyond the realm of a real and substantial possibility and becomes merely speculation. The law is clear that a plaintiff cannot recover based upon mere speculation.
- [155] The NOC classifications, while inapplicable in the case of self-employed incorporated individuals, inform the analysis of future income loss, even if they do not determine it. Based upon the evidence at the trial, I am satisfied that the plaintiff's business would have grown to the point where the plaintiff would earn an income of \$80,000 per year, and even if his business did not succeed, that he would have been able to secure employment at approaching that level of income, whether in the Okanagan or the Lower Mainland.
- [156] However, this is not the end of the matter, because some account must be taken for the fact that he has a residual ability to earn income. I do not accept the plaintiff's suggestion that his residual earning capacity will over time erode to zero due to his diminished skills and ability to work. It is now five and a half years after the accident, and the plaintiff continues to earn an income. If his business were to dry up altogether, I would expect this would have occurred prior to today's date.
- [157] Based upon his income in the years since the accident, a residual income of \$20,000 would be reasonable.
- [158] His loss of future income is therefore \$60,000 per year. Using the economic multiplier of 12.206, which takes into account absences from the workforce, his loss of future earning capacity is \$732,360 (\$60,000 x 12.206).

Past Loss of Earning Capacity

Law

- [159] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the accident.
- [160] 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 BCSC 62 at para. 3. The trial judge has a discretion to determine what period of time is appropriate for the determination of net income loss: *Lines (C.A.)* at paras. 181-186. In exercising this discretion, the trial judge should keep in mind that the

plaintiff is to be put back in the position he or she would have been in had the accident not occurred: Lines (C.A.) at paras. 185-186; Wong v. Toor, 2015 BCSC 2367 at para. 60.

- [161] 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 at para. 27; Morlan v. Barrett, 2012 BCCA 66 at para. 38.

Discussion

- [162] I have already concluded that the claimant would have been successful with his business.
- [163] Mr. Benning's report assumes a linear increase in the plaintiff's wages between the date of the accident and the date of trial, with his income at the date of trial, which he assumed to be in accordance with NOC 2171. After adjusting for income tax, Mr. Benning's calculations result in an estimate for past wage loss of \$201,024.
- [164] The approach taken by Mr. Hildebrand was to increase annual revenues by 5%, which he says represents a reasonable growth estimate for a business. The calculations performed by Mr. Hildebrand involve gross revenue and a percentage for cost of sales of 20% in order to determine gross profit; based on his assumptions, his opinion is that the plaintiff's past loss of income is \$29,230.
- [165] The difficulty with this approach is that while 5% may be a reasonable estimate for established businesses, Mr. Wells' business was in its infancy. As Mr. Hildebrand admits in his report, it is difficult to project the plaintiff's income absent the accident, because there are no comparable sales data for small IT consultancies in the Okanagan that would inform his opinion.
- [166] In all of the circumstances, I conclude that a step-up approach as proposed by Mr. Benning is the fairest way to determine the plaintiff's past wage loss. However, rather than the stepped increases in the approximate amount of \$12,900 as suggested by Mr. Benning in his May 14, 2020 report, annual increases in the "Without Accident Income" of \$8,000 would be appropriate. I trust that counsel will be able to agree on the appropriate calculations.

Costs of Future Care

Legal framework

- [167] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition insofar as that is possible. The process necessarily involves the court predicting the future needs of the plaintiff. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: Milina v. Bartsch (1985),

49 B.C.L.R. (2d) 33 at 84 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

[168] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Simmavong v. Haddock*, 2012 BCSC 473 at para. 126; *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

[169] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. If a plaintiff has not used a particular item or service in the past even where it has been recommended, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously recommended services will be utilized in the future, the plaintiff can recover for such services. This may particularly be so where the cost of the service may have been a factor in not using it in the past: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70; *Simmavong* at para. 126.

[170] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

Discussion

[171] The plaintiff relies on a functional capacity evaluation and cost of future care report prepared by an occupational therapist, Carole Kennedy. She conducted approximately one and a half days of testing of the plaintiff, followed by a visit to his home to review any home care needs. She did not conduct any further testing in the home, relying on the testing conducted at her office a few weeks before.

[172] The defendant also tendered a report from an occupational therapist, Natalie Allende. She did not conduct any testing or assessment of Mr. Wells, and her report was therefore in response to Ms. Kennedy's report by way of a critique. Both Ms. Kennedy and Ms. Allende testified at the trial.

[173] The parties agree that for any items that are required for the remainder of Mr. Wells' life, the appropriate method of calculation is to determine the annual cost, and then multiply that amount by 24.299, which is the multiplier based upon Mr. Wells' life expectancy. Both Mr. Benning and Mr. Hildebrand agreed on the multiplier.

- [174] The plaintiff seeks an award of cost of future care for treatment modalities (occupational therapy, massage therapy, physiotherapy); pool and gym pass; Botox treatments; medications; childcare costs; housekeeping assistance; and various equipment. The defendant argues that virtually none of these items are justified, but concedes that two of the medications, Cymbalta at an annual cost of \$1,784.70, and Aleve, which estimates at \$10 annually, are justified.
- [175] There are a number of items recommended by Ms. Kennedy that are also supported by Ms. Allende, even though the defendant in its closing submissions did not make those concessions. These include 17 to 30 sessions of psychological counselling over the balance of Mr. Wells' lifetime; monthly physiotherapy sessions for one year; 12 kinesiology sessions over his lifetime in order to update his exercise program for symptom management; pain relieving devices - heating pad, a home traction unit, SI belt; prism lenses; ergonomic office equipment - sit/stand desk, ergonomic office chair, anti-fatigue mats; exercise equipment - Bosu ball, yoga mat, therapy bands, foam roller; and gym/pool pass.
- [176] The costs associated with the items recommended by Ms. Kennedy and acknowledged as appropriate by Ms. Allende are as follows:
- a) 17 - 30 psychological counselling sessions - \$3,315 to \$5,850;
 - b) 12 kinesiology sessions - \$936;
 - c) Pain relieving devices - \$570 every 4 years - \$142 per year;
 - d) Ergonomic office equipment - annual cost of \$192, based on Ms. Kennedy's cost and replacement schedule;
 - e) Exercise equipment - \$62 per year; and
 - f) Gym/pool pass - \$708 per year (discussed below).
- [177] Since the above items were recommended by Ms. Kennedy and the recommendations agreed to by Ms. Allende, there would seem to be no reasonable basis to deny those claims, notwithstanding defence counsel's submissions. Ms. Allende in coming to her recommendations had the benefit not only of reviewing Ms. Kennedy's report but also the medical evidence that existed at the time of her report. The items listed above that were supported by Ms. Allende are allowed.
- [178] Items (a) and (b) are one time costs, whereas the others are annual costs and therefore are subject to the agreed upon multiplier. I have rounded these to \$33,000.

Homecare

- [179] Ms. Kennedy recommends weekly housekeeping services, in addition to seasonal spring and fall house cleaning assistance. Ms. Allende says there is insufficient information regarding his tolerance for bending and general tolerances to justify the services

recommended. The evidence does not support the suggestion that the plaintiff is unable to perform the weekly functions of home ownership, even if it could perhaps take him longer than it may otherwise take. There is also scant evidence as to how much time the plaintiff spent on those activities prior to the accident.

[180] I accept that some assistance may be required with spring and fall yard work. Ms. Kennedy suggests eight hours in each of spring and fall, and that the appropriate hourly rate is \$45 per hour. This would also be an annual expense, although she says it can be expected to taper off as Mr. Wells ages, presumably because he would be less likely to continue to live in a home with a yard.

[181] The weekly claims are not allowed, but I award the plaintiff \$10,000 on account of the seasonal work.

General labour for home and vehicle maintenance

[182] Again, there is little evidence of the work that the plaintiff used to do before the accident in this regard, nor much in the way of evidence of what he has not been able to do afterwards. One of the matters that is referred to in Ms. Kennedy's report is the need to fix the sprinkler system at the plaintiff's home. However, there is no evidence that the claimant had the requisite know-how to repair his irrigation system without hiring a third-party even if the accident had not occurred.

[183] I understood from his evidence that he has a newer model vehicle, which would perhaps imply less ongoing maintenance and a vehicle with more technology that makes it increasingly difficult for individuals to repair their own vehicles. More importantly, there is also no evidence to support the suggestion that the plaintiff possesses the technical skills to repair and maintain his vehicle, or that he ever did so before the accident. This claim is also rejected.

Botox treatments

[184] The plaintiff has been told previously that Botox treatments may alleviate some of his symptoms. However, he has been disinclined to this before due to a fear of needles. I consider it highly unlikely that he would pursue this form of treatment, and indeed Dr. McCann was of the view that it would likely be counterproductive given his aversion. No allowance is made for this item.

Pool and gym pass

- [185] The plaintiff has been recommended to exercise regularly at the gym and public pool, which is something he does with some frequency. The defendant does not disagree with the recommendation, but says that it should not be allowed as part of the cost of future care because people should be exercising anyway and therefore it is not caused by the accident. I do not agree.
- [186] While it is in everyone's best interests to maintain some level of physical fitness, it is only when a person suffers an injury that it becomes an important part of their ongoing routine in order to maintain health for daily activity. Many people are physically fit without having a gym pass. I reject the suggestion that everyone is somehow obligated to be a member of a gym such that it is not recoverable as a future care item. This claim is allowed.

Physio and massage

- [187] The plaintiff's evidence was that physio or massage gives him relief for approximately three or four days, and that his function increases during that period. However, the recommendation from Ms. Kennedy is for monthly treatments. As such, what is proposed on the part of the plaintiff would appear to have only minimal benefit.
- [188] Dr. Laidlow in his report did not recommend any ongoing treatments. Dr. McCann makes no such recommendations either.

Ongoing counselling

- [189] Ms. Kennedy's report recommends monthly counselling sessions. She points out that Dr. Friesen and Dr. O'Shaughnessy recommended ongoing psychological counselling, 12 to 20 sessions pursuant to Dr. Friesen, and 5 to 10 sessions by Dr. O'Shaughnessy which are recommended to be undertaken together with Mr. Wells' son Dexter, whose relationship with Mr. Wells has been affected by the accident. Ms. Allende favours the 17 to 30 sessions referenced by Dr. Friesen and Dr. O'Shaughnessy.
- [190] There would appear to be little medical justification for the ongoing monthly counselling sessions. The 17 to 30 sessions as recommended by Drs. Friesen and O'Shaughnessy and agreed to by Ms. Allende are allowed, and were addressed above.

Medications

- [191] The plaintiff advances a claim for the following medications:

Medication

Yearly Cost

Duloxetine (Cymbalta)

\$1,784.70

Tramadol

\$1,185.80

Vyvanse

\$1,987.85

Alprazolom

\$289.80

Cambia

\$873.60

Melatonin

\$91.25

Aleve

\$24.48

[192] As noted earlier, the defendant concedes the Cymbalta is appropriate. Both Dr. Teal and Dr. O'Shaughnessy recommend tapering off the use of Tramadol. Moreover, the plaintiff himself stated a preference to try to reduce the amount of medications he takes on an ongoing basis.

[193] The annual costs of the medications claimed by the plaintiff is \$5,051.68, which equals \$122,750.77 when projected over the plaintiff's lifetime using the multiplier. The defendant concedes the Cymbalta as claimed on a reduced amount on account of the Aleve, totaling \$43,609.

[194] I accept that he will continue to incur the cost of medications for the remainder of his life, even though he will probably reduce the amount of prescription medication he takes over time. An allowance of \$70,000 is appropriate for the plaintiff's future medication needs.

Nanny costs

[195] The plaintiff and his wife currently pay \$15 per hour for two days of childcare, and \$12.50 per hour for two other half days of childcare. The plaintiff's estimate is that childcare will cost \$61,776 over the next four years. While I have no reason to question the childcare costs, I am not satisfied that the motor vehicle accident has caused any increase in the costs that the plaintiff and his wife would otherwise incur. This claim is not accepted.

Hearing testing/earplugs

[196] I agree with Ms. Allende that there is no apparent medical justification for any further investigation or for any expenses associated with the plaintiff's hearing.

Conclusion on cost of Future Care

[197] The total of the amounts allowed as set out above for the cost of future care is \$113,000.

Special Damages

[198] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281; *Milina* at 78.

Conclusion

[199] The plaintiff's claim for special damages consists of travel expenses, treatments, prescriptions and miscellaneous other costs. The total sought is \$19,267.92. The only disputed items are an MRI expense incurred on October 16, 2015, in the amount of \$895 and the cost of a new bed in the amount of \$5,550.72.

[200] The fact that the plaintiff has had such significant difficulties with sleep since the accident justifies an attempt to alleviate the problem by way of a new bed. As for the MRI, the defendant says that this could have been obtained through MSP and therefore paying for the MRI privately is not justified. I do not agree. The plaintiff's decision to incur this expense in order to try to ascertain what was causing the symptoms is not unreasonable. The special expenses are allowed as claimed in the amount of \$19,268, \$6,291.92 of which is subrogated to the plaintiff's insurer.

Summary

[201] In summary, damages are awarded as follows:

a)

Non-pecuniary damages

\$170,000

b)

Loss of future income capacity

\$732,360

c)

Past wage loss

[to be calculated per para. 166]

d)

Cost of future care

\$113,000

e)

Special damages

\$19,268

Costs

[202] If the parties are unable to agree on costs, they may contact Supreme Court Scheduling within 14 days to arrange to speak to the issue.

"Wilson J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/15/2020BCSC1530.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/wells-v-kolbe-2020>

Prepared on 26 October 2026 · Esheria