
CANADA / JUDGMENT

Wiles v. Seabrook

2019 BCSC 13

COURT

Supreme Court of British Columbia

DECIDED

8 January 2019

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2019 BCSC 13 Wiles v. Seabrook

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wiles v. Seabrook,

2019 BCSC 13

Date: 20190108

Docket: M160261

Registry: Vancouver

Between:

Wayne Keith Wiles

Plaintiff

And

Thomas Mathew Seabrook

Defendant

And

Docket: M162920

Registry: Vancouver

Between:

Wayne Keith Wiles

Plaintiff

And

Benjamin Phillip Walker and Michelle Christine Sallee

Defendants

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for Plaintiff:

R.C. Marcoux and

S. Khazamipour

Counsel for Defendants:

C. Schuld

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 23, 24, 25, 26, 27, 30, 2018

May 1, 2018

Place and Date of Judgment:

Nelson, B.C.

January 8, 2019

I

- [1] This claim involves a suit for damages arising out of a motor vehicle accident which occurred on February 13, 2014, and a second one which occurred March 26, 2015.
- [2] Liability is admitted for both accidents. The trial is about the assessment and quantification of damages. The heads of damages sought are non pecuniary damages, compensation for lost wages, compensation for future earnings and income capacity, future care costs and future housekeeping costs.
- [3] The plaintiff claims damages primarily for neck pain. The defendants acknowledge some non pecuniary loss, some income loss, some loss for future care and housekeeping and agreed special damages of \$2,464.00. The total amount is according to them, subject to a proportionate discount due to the plaintiff's failure to mitigate.
- [4] The plaintiff was born May 31, 1954 in New Westminster, B.C. He graduated from highschool in 1973. He began to work for the Hudson Bay Company and worked there for the next 22 years, becoming the manager of the shipping and receiving department. He was laid off in

1994. In 1996 he went to work for the Fraser Valley Society for the Challenged. He earned \$9.50 an hour there. He is grateful to his wife for allowing him to work there as long as she did. He was employed there for 8 years. In 2005 the Fraser Valley Society for the Challenged closed. In 2006 the plaintiff started driving a bus for HandyDART. He worked there for 14 years until his motor vehicle accident on February 13, 2014.

- [5] The plaintiff was very involved in a number of home improvement projects. He started with a modest and rundown home and turned it into something much more. He began by removing indoor/outdoor carpet glued to the floor and shag carpet that was also glued to the floor. The underlying floors were hardwood. These were sanded and varnished and exposed.
- [6] The next project was a second floor addition which took close to a year. The project was quite expensive but they had to build the addition to make room for their expanding family. The plaintiff contracted out the digging, but picked the lumber and poured the foundation himself.
- [7] The plaintiff had a contractor for finish work and electrical. He had to come back and redo the work, something which never happened to the plaintiff. He also redid the kitchen.
- [8] The plaintiff built a playhouse in the back yard for his children. It was a real hit. The neighbourhood had a lot of children and they'd come and play in it and have a lot of fun. The plaintiff's backyard always had children in it.
- [9] The plaintiff testified that the children were always around and wanted to help and he enjoyed working with them.
- [10] The plaintiff testified that he had tried very hard to grow a banana tree. There were even some small bananas on it. It was clearly a source of pride for him.
- [11] The court heard that Walter, the plaintiff's son, helped with the reroofing project in 2013 and the plaintiff described one of the photos as depicting the two of them playing around and having fun.
- [12] The court was told that the plaintiff and his family went camping every year and went hiking and fishing. They went to Kentucky-Alleyne most often, but also to the Rockies, Quesnel, Barkerville, and other places around British Columbia.
- [13] The family initially tented, but then began using the camper van the plaintiff acquired from his aunt when his uncle passed away. Kentucky Lake was like a second home.

First Accident

- [14] The plaintiff was not sure what happened at first. When he came to he was confused and asked for someone to call an ambulance because he knew something was not right.

- [15] When the plaintiff arrived at the hospital, he was complaining about his chest and was told there is nothing wrong with his heart. The plaintiff was kept on a backboard for hours and was in excruciating pain. He kept asking for something to kill the pain.
- [16] The plaintiff eventually got a CT scan around 4 am after arriving at 7 or 7:30 pm, but no one could read it, so he had to wait for results. Eventually it came back and the plaintiff was told he had a stable fracture - it was very painful, but he was glad it was stable, because he wanted to go home.
- [17] The plaintiff was released with a collar and some medication.
- [18] When the plaintiff got home, he was in so much pain and he didn't know what to do. He testified he was crying and upset and tried to get some rest, but could barely move.
- [19] The plaintiff testified that he couldn't dress himself or do any functions on his own and he even needed help going to the washroom.
- [20] In the following two weeks, the plaintiff could not dress himself or move his arms to eat, so his wife had to help him with everything.
- [21] Mrs. Wiles took the plaintiff to see Dr. Dubec about two weeks or 10 days after the accident. The court heard that Dr. Dubec checked him out and gave him a prescription.
- [22] The plaintiff testified that he was very depressed. He was a pretty easy going guy until the accident happened, but he was upset and grew difficult to get along with.
- [23] The plaintiff testified that he was so frustrated and upset and just didn't know how to handle it. He just couldn't help his reactions at the time and had headaches every day.
- [24] The court heard that the plaintiff's concentration is not so great. He testified the lack of sleep has a lot to do with it.
- [25] The plaintiff testified that he is having trouble toileting, but doesn't have his wife helping him anymore. The plaintiff has never not had a problem with the pain and the headaches and the shoulders. It's ongoing, just sometimes less and sometimes more intense.
- [26] The plaintiff testified that the children's playhouse is in a bit of disrepair and things have been left around the yard. Before the accident, the plaintiff was a bit of a neat freak and everything had its place. Now the yard is not so well cared for.

Second Accident

- [27] The plaintiff testified that he was on his way to work and entered the intersection of 176th and Number 10 highway when he was hit by another vehicle that had run the red light.
- [28] The plaintiff's vehicle was spun around and there was a second impact at the rear of his vehicle. The other vehicle left the scene, but the police brought him back. The court saw dash cam footage of this accident.

- [29] Dr. Sahjpaul got the results of the MRI and explained to the plaintiff that it is possible he will have to put up with the pain. There is an operation the plaintiff could get, if it's unmanageable, and if he can't do the things that he wants to.
- [30] The court heard that the plaintiff pushed to get back into full time work, but had difficulty with pretty much everything - the continuous movement back and forth, the sitting for extended periods, the loading and unloading of people and things.
- [31] The court heard that the plaintiff had a hard time reaching for the lift controls and getting his arm up because reaching above his head is very painful.
- [32] The plaintiff went back to work because he wanted to support his family. He was not feeling 100% and was struggling daily and was in a lot of pain by the end of the day.
- [33] The court heard that Dr. Dubec said he shouldn't be working and gave the plaintiff a note, which he gave to his employer. The plaintiff had to use his vacation first and then applied for EI medical.
- [34] Prior to the accidents, the plaintiff was planning on retiring at 65.
- [35] The court heard that Walter found his father a pleasure to be around prior to the accidents. Walter testified that the Wiles' family went on bike rides together, went camping every year, and that Walter helped his father with the projects around the home.
- [36] Walter testified that he remembers his father building a whole addition onto the family home, a playhouse, a fish pond, a shed, a deck, and a kitchen expansion. Walter also remembers his father renovating the kids' bathroom in 2012 and reroofing the entire house in 2013.
- [37] The court also heard about the plaintiff's devotion to his banana tree, which Walter testified required significant attention. The court heard how the plaintiff wrapped and winterized the banana tree with leaves, Styrofoam, sleeping bags, and hay.
- [38] The court heard that the plaintiff was off work for quite a while and mostly stayed in bed or on the couch.
- [39] Walter testified that his father was very depressed and angry. His father lashed out and one time threw a cup and broke it because he was so frustrated. Walter testified that he was different from before the accident, when his father was always doing things and had lots to look forward to.
- [40] The court heard that the garden has been neglected since the accident and junk has accumulated. Walter testified that he tries to take it out, but all the junk is just piled around.
- [41] The court heard that Mrs. Wiles' first impression of the plaintiff's house was that it was a nice little house that needed a lot of work.

- [42] The court heard that the renovations meant the family had a better quality of life, but they did the renovations on a shoestring. Mr. and Mrs. Wiles went to flea markets and garage sales - the dining room chandelier was from a flea market.
- [43] Mrs. Wiles testified that the budget was challenging while the plaintiff was at the Fraser Valley Society for the Challenged, but Mrs. Wiles appreciated that he had more time to spend with the kids.
- [44] The court heard that the family tried to go camping every year since the kids were born.
- [45] Mrs. Wiles testified that the plaintiff re-shingled the roof about 15 years ago, and then again before the first accident. It took the whole holiday and that was the only year the family didn't go camping.
- [46] Mrs. Wiles testified that the plaintiff was upset and was having a hard time coping with not being able to do what he wanted to as he was a go getter. The plaintiff got distressed and angry with everyone. He would yell at people for no particular reason and one time he "lost it" and threw a dish in the kitchen.
- [47] Mrs. Wiles testified that the plaintiff said he had to go back to work because they were getting tight for cash and living on their RRSPs and Christmas was coming so he tried to go back. The court heard that the plaintiff was in desperate straits when he would get home from work - he was exhausted, angry and upset.
- [48] Mrs. Wiles testified that before the accident, the plaintiff always cut the grass, did the deck and the front stairs, trimmed everything, fixed up and cleaned the fishpond. He made a big vegetable garden each year that took a lot of maintenance and he maintained the playhouse because eventually they'd need it again for grandchildren.
- [49] The court heard that the yard is in total disrepair and the playhouse is now beyond repair, which Mrs. Wiles finds sad because they thought grandchildren would play there. Mrs. Wiles has tried to do things in the yard, but the plaintiff comes out with her and gets mad that she has to do it because he cannot.
- [50] Tiffany Wiles, the plaintiff's daughter, testified that she had a very positive upbringing and that the Wiles' family went camping, on hikes together, gardened together, and went out on adventures.
- [51] The court heard that the Wiles' family went to a regular camping spot at Kentucky Lake every summer.
- [52] Tiffany testified that her father was a lot more grumpy and less pleasant to be around since the accidents. He is more frustrated and tends to cry often.
- [53] The court heard that there is more junk lying around and the plaintiff cannot dispose of it himself. Tiffany testified that the garden is non-existent and the house is a lot more messy because her father cannot care for it like he used to.

- [54] Ms. Heinrich, one of Mrs. Wiles best friends, testified that, since the accident, the plaintiff is not as outgoing, doesn't talk as much, and is very careful about his movements. He is not as fun anymore and is more reserved.
- [55] Ms. Heinrich testified that she can tell the plaintiff is in pain if he moves a certain way, especially with his neck. Ms. Heinrich testified that the plaintiff is very stiff and cautious about how he moves.
- [56] The court heard that, before the accidents, the plaintiff's backyard was always very nice and had a fish pond a special area of the garden where the plaintiff kept fruits and vegetables and things. Ms. Heinrich testified that the yard was always very tidy and the plaintiff was always doing something different in the yard.
- [57] Ms. Heinrich testified that the yard is not as well groomed as it used to be and the grass tends to be a bit taller and is not as nicely cut. She testified that the trees are not trimmed like they used to be.

II

- [58] There were a number of medical witnesses called.
- [59] Dr. Sahjpaul's clinical practice focuses mainly on the spine and spinal disorders. He also practices brain tumor surgery, and brain trauma. Dr. Sahjpaul estimates that 70% of his clinical practice involves treatment of spinal disorders.
- [60] In his medical legal report, Dr. Sahjpaul diagnoses the plaintiff with the following injuries:
- Neck pain - myofascial and probably facet mediated with a component arising from the C5-6 facet fracture;
 - Arm symptoms - probably due to a combination of C6 nerve root compression in addition to referred from the neck injury;
 - Thoracolumbar pain, myofascial;
 - Headache - cervicogenic with a possible component from concussion i.e. mild traumatic brain injury;
 - Cognitive and personality changes, maybe reflective of some degree of traumatic brain injury;
 - Impaired sleep; and
 - Driving anxiety.
- [61] Dr. Sahjpaul opines that the above injuries were caused by the 2014 Accident and were aggravated by the 2015 Accident. Dr. Sahjpaul opines that the plaintiff will not be symptom free and will probably have ongoing myofascial/facet mediated pain on a permanent basis.

- [62] Dr. Sahjpaul is of the opinion that, given the nature of the plaintiff's injuries, he would not be able to perform "manual labour type work" or "jobs that require heavy lifting, excessive neck movements, etc."
- [63] Dr. Sahjpaul opines that the plaintiff's experienced limitations at work are reasonable.
- [64] Dr. MacInnes was qualified as an expert in medicine with special knowledge in Anesthesiology and Pain Management. Dr. MacInnes is capable of giving opinions on the diagnosis, prognosis, treatment, management, extent of disability and future care of chronic pain.
- [65] In his medical legal report, Dr. MacInnes diagnoses the plaintiff with the following injuries:
- a. Chronic whiplash-associated disorder;
 - b. Right C5 facet flake fracture;
 - c. Chronic mechanical neck pain;
 - d. Cervicogenic headache;
 - e. Chronic myofascial pain syndrome;
 - f. Subacute chronic radicular neck pain;
 - g. Depressive symptoms; and
 - h. Sleep disorder.
- [66] Dr. MacInnes' overall prognosis for the plaintiff's chronic pain is guarded. Dr. MacInnes anticipates continued flares and exacerbations in the plaintiff's future.
- [67] Dr. MacInnes opines that the plaintiff should take medical leave from his employment at MVT. At the time he wrote his report, Dr. MacInnes opined that there was a very real possibility that the plaintiff could no longer tolerate the job duties of the HandyDART driver.
- [68] Dr. MacInnes opines that the plaintiff will likely require ongoing assistance for heavier housework and yard work "from this point forward".
- [69] Dr. Robertson was qualified as an expert in medicine with special knowledge in Psychiatry. Dr. Robertson is capable of giving opinions on the diagnosis, prognosis, treatment, management, extent of disability, and future care of psychiatric conditions.
- [70] In his medical legal report, Dr. Robertson diagnoses the plaintiff with the following injuries:
- a. Concussion or mild traumatic brain injury;
 - b. Adjustment disorder with depressed mood verging on major depressive disorder; and
 - c. Somatic symptom disorder, predominantly pain.

- [71] Dr. Robertson opines that for the plaintiff, his work and keeping busy outside of work were meaningful and important to him and the loss of his ability to continue with these would make the plaintiff vulnerable to mood difficulties.
- [72] Dr. Robertson opines that it is likely the plaintiff's mood and pain are impacting his cognitive functioning.
- [73] Dr. Robertson opines that if the plaintiff has ongoing pain and limitations similar to those he has now, even without worsening, he will likely have a further worsening of his mood and be at risk for either the development of or a worsened major depressive disorder.
- [74] Dr. Dubec was qualified by the court as an expert in medicine with special knowledge in family medicine. Dr. Dubec is capable of giving opinions on the diagnosis, prognosis, treatment, management, extent of disability, and future care in the field of family medicine.
- [75] Dr. Dubec testified that family doctors are the primary caregivers, the front line of care, and a patient's first access point in the medical system. If necessary, the family doctor will refer the patient to a specialist.
- [76] The court heard from Dr. Dubec that radiculopathy involves the compression of a nerve close to the neck or spine resulting in symptoms distally.
- [77] Dr. Dubec testified that a CT scan is the "gold standard" for detecting fractures and that an MRI is better for soft tissue injuries.
- [78] In his medical legal report, Dr. Dubec diagnoses the plaintiff with the following injuries:
- a. Spinal fracture of right C5 facet;
 - b. Soft tissue injuries of the neck and upper back;
 - c. Neurologic radiculopathy of right C5 and C6 nerve root distribution;
 - d. Post-traumatic headache; and
 - e. Post-traumatic depression and anxiety.
- [79] Dr. Dubec opines that the plaintiff's neck pain and upper right extremity numbness is likely multifactorial, originating from the initial trauma and fracture as well as nerve root inflammation or compression and myofascial injury.
- [80] Dr. Dubec opines that once the plaintiff told him he could no longer safely drive and that he would stop working to avoid placing himself or others at risk, he supported the plaintiff's decision to stop.
- [81] The parties have agreed to the facts surrounding the plaintiff's past and future wage loss.
- [82] From March 3, 2014 to November 4, 2014, the plaintiff took an unpaid medical leave of absence from MVT Canadian Bus Inc.

[83] Subject to the court's ruling on the medical evidence, the parties have agreed to the calculation of the quantum of the plaintiff's past and future loss of income earning capacity. Agreed statement of facts #8 summarizes the losses as follows:

- a. 2014 net past wage loss \$30,852
- b. 2014 loss of pension benefits \$3,622
- c. 2014 sick leave used \$2,078
- d. 2015 net past wage loss (sick and unpaid) \$1,072
- e. 2017/18 loss of non-wage benefits \$4,472
- f. 2017/18 net past wage loss \$42,775
- g. 2017/18 loss of pension benefits \$5,206
- h. 2018/19 loss of Earning Capacity \$69,965

Totals \$160,042

[84] The defence's only witness was Dr. Marc Boyle. He was called to testify as an orthopaedic surgeon. Dr. Boyle testified as follows:

- a. The plaintiff did not suffer a fracture to the C5-C6 facet bone;
- b. The plaintiff only suffered from soft tissue injuries as a result of the accidents;
- c. The plaintiff's soft tissue injuries should have healed relatively quickly;
- d. The plaintiff's reported symptoms are exaggerated and inorganic;
- e. The plaintiff's reported disabilities are simply a "nuisance";
- f. The plaintiff is able to perform the duties of a HandyDART driver;
- g. The plaintiff's organic symptoms are a result of pre-existing degenerative changes in his neck that have since progressed.

He admitted that CT scans are more sensitive to MRI scans, as far as bony structures are concerned.

[85] Dr. Boyle felt that there should be no permanent impairment to the plaintiff. It was his opinion that the plaintiff could work and that his complaints were due to his attitude. He noted that he showed a great range of motion in his neck on spontaneous motion than on command. He maintained that the plaintiff did not have a flake of his C5 facet. He felt that even if he had residual injuries they would not be intrusive to work. He felt the accidents did not accelerate pre-existing degenerative changes. The plaintiff took time off work as an unpaid leave. He did not apply for disability benefits due to a mistaken view that employees of MVT had been terminated for applying for disability benefits. This led directly to his paying \$5,414.36 out of his own pocket. Regular full time or part time employees (more than

20 hours) were eligible for long term disability benefits.

[86] Dr. Boyle provided a third opinion dated March 1, 2018, reiterating his conclusion that the plaintiff did not have a flake fracture of his C5 facet, and opining that:

- a. The plaintiff did not have radiculopathy;
- b. That even if the plaintiff had residual injuries, they would not be intrusive to work;
- c. That the Accidents did not accelerate pre-existing degenerative changes;
- d. There was no C5-6 root compression that would result in neuritis;
- e. There was no need for injections or surgery; and
- f. That an exercise program (as opposed to a multi-modal management program) was all that is required for ongoing treatment.

[87] The plaintiff has received Long Term Disability payments pursuant to the Collective Bargaining Agreement between MVT Canadian Bus Inc. and Amalgamated Transit Union Local 1724.

[88] Mr. Ardian Lagji testified. He is a payroll manager at MVT and has been with the company since October of 2013. He testified that he worked with MVT's bargaining team going back to 2014. Mr. Lagji explained that the negotiation process for the 2014 CBA took approximately six months. At the end of negotiations in 2014 the CBA shed light on the negotiations that led to the change.

1. The Union agrees that the Employer will transition the administration of the Union single benefit plan (the "Single Benefit Plan") to a new provider, GroupHealth no later than December 1, 2014 (the "Benefits Transition Date").
2. Starting the first day of the pay period immediately following the Ratification Date, the Employer agrees to pay 100% of the benefit premiums for the existing Single Benefit Plan for eligible employees as outlined in Article 8.01.
3. The Union agrees that in order for the Employer to pay 100% of the benefit premiums for eligible employees, the transition of providers to GroupHealth will result in changes to insurance and benefit carriers for Extended Health, Dental, Life, Accidental Death & Dismemberment (AD&D), Employee Assistance Program (EAP) and Long Term Disability benefits as well as the implementation of programs that will assist in managing the costs of the Single Benefit Plan.

[89] In *Cunningham v. Wheeler*; *Cooper v. Miller*; *Shanks v. McNee* [1994] 1 S.C.R. 359, the Supreme Court addressed the issue before the Court.

[90] The Supreme Court of Canada decided that benefits payable pursuant to the provisions of a collective agreement in which the parties agreed to the benefits as part of the compensation package of an employee are not to be deducted from the award. The majority took the position that benefits which are the result of a collective bargaining agreement are "paid for by the plaintiff", in the same way as is a privately purchased disability insurance policy and so are subject to the insurance exception (p. 407-408):

In *Ratych v. Bloomer*, there was no evidence put forward that the plaintiff had paid for the disability benefits. What type of proof will be required to show that the benefits are in the nature of insurance? It is my opinion that what is required by the *Ratych* decision is that there be evidence adduced of some type of consideration given up by the employee in return for the benefit. The method or means of payment of the consideration is not determinative. Evidence of a contribution to the plan by the employee, whether paid for directly or by a reduced hourly wage reflected in a collective bargaining agreement, will be sufficient.

[91] In the recent case of *Thompson v. Helgeson*, 2017 BCSC 927, the principles in *Cunningham* were applied to a personal injury claim in British Columbia.

[92] In *Thompson*, the plaintiff had been injured in a motor vehicle accident in 2012.

[93] The plaintiff was a full-time delivery truck driver for United Parcel Service ("UPS"), which had a Collective Bargaining Agreement in place with the Teamsters Union.

[94] At the time of trial, the plaintiff was off work due to her 2012 accident. Pursuant to the Collective Bargaining Agreement, the plaintiff was entitled to Disability Pension that was not subject to a subrogation clause.

[95] The defendant in *Thompson* argued that the plaintiff's entitlement to her Disability Pension should be reduced from her award for loss of future income earning capacity.

[96] Similar to the case at bar, the plaintiff in *Thompson* called a witness who was involved in the negotiation of the collective agreement. The witness testified that the Teamsters Union's goal in the negotiation was to negotiate the best agreement possible from its perspective and that the final compensation package involved trade-offs between wages and other benefits.

[97] Mr. Justice Sewell decided for the plaintiff and did not reduce the Disability Pension entitlement from the claim of future loss of earning capacity:

In this case, Ms. Thompson called Mr. Bethel, a representative of her union, who testified that he was a member of the union bargaining committee that negotiated the collective agreement. Mr. Bethel confirmed the common sense inference that in collective bargaining the object of the employer is to negotiate the best agreement possible from its perspective and that the final compensation package involves trade-offs between wages and other benefits

In addition, the Pension Plan Members' Booklet expressly states that the Pension Plan expresses the benefits negotiated in the collective agreement between UPS and the Teamsters Union.

Accordingly, I find that this case is governed by the decision in *Cunningham*, and that there should be no deduction of any Disability Pension amounts received by Ms. Thompson from the damages awarded for loss of earning capacity.

[98] In the case at bar the plaintiff has entered comparable evidence to support the criteria in *Cunningham* through the testimony of Ardian Lagji and through the provisions of the 2014 CBA. Accordingly, I find that there should be no deduction of any disability amounts paid to the plaintiff from the damages awarded for loss of earning capacity.

[99] The loss of capacity to perform work of economic value like housekeeping, falls to be decided. In 2000 Madam Justice Huddart delivered reasons in *McTavish v. MacGillivray*. She recognized the importance of the law developing in the way it does so that disadvantages to lower income families and women do not persist. At para. 52 she said:

52 Unless appropriate care is taken in evaluating the loss, lower income families and lower income women will be disadvantaged by a legal principle that affords full compensation only for those who were financially able to hire someone in the pre-trial period to perform household services or whose family members are able to take time off work to do necessary housekeeping tasks.

She went on at paras. 63-64 to say:

63 As we have seen, it is now well established that a plaintiff whose ability to perform housekeeping services is diminished in part or in whole ought to be compensated for that loss. It is equally well established that the loss of housekeeping capacity is the plaintiff's and not that of the family. When family members have gratuitously done the work the plaintiff can no longer do and the tasks they perform have a market value, that provides a tangible indication of the loss the plaintiff has suffered and enables the court to assign a specific economic value in monetary terms to the loss. This does not mean the loss is that of the family members or that they are to be compensated. Their provision of services evidences the plaintiff's loss of capacity and provides a basis for valuing that loss. The loss remains the plaintiff's loss of economic capacity.

64 This approach to valuation of the plaintiff's loss has the advantage of encouraging family benevolence, without providing a windfall to the wrongdoer. It discourages the hiring of less satisfactory and perhaps more expensive substitute services. It allows a court to determine what services are reasonably necessary by reference to what services family members were prepared to provide...

[100] In *Kim v. Lin*, 2018 BCCA 77, Bauman C.J. writes:

[27] This case requires the Court to again consider the proper approach to the somewhat vexing issue of valuing loss of housekeeping capacity. The difficulty with these types of cases arises from the challenge of understanding the true nature of the loss a plaintiff suffers when they are unable to perform household tasks.

[34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.

[101] The plaintiff always had a project on the go. The plaintiff submits that he would have continued to put 300 hours a year into such projects until he reached the age of 75 years. The estimated value of such work ranges between \$99,453 and \$250,561. The plaintiff says that that range is appropriate in the circumstances.

[102] With respect to cost of future care the plaintiff divides his claim into two sub-claims:

- a. Cost of future home maintenance;
- b. Cost of future medical care.

[103] His claims for costs of future home maintenance include the following:

- a. Power washing the house, deck, deck stairs and outdoor railings;
- b. Cleaning the gutters;
- c. Cleaning and maintaining the two backyard ponds;
- d. Cutting the grass in the front and back yards;
- e. Clearing the front and back yards of all debris and leaves; and
- f. Organizing and transporting away all rubbish.

He engaged James von Broembsen, a landscaper who assessed the costs of the following:

- a. Weekly lawn maintenance;
- b. Weekly garden bed maintenance;
- c. Spring clean-up;
- d. Fall clean up;
- e. Pruning;
- f. Debris removal;
- g. Aeration;
- h. Liming;
- i. Overseeding;
- j. Power raking; and

k. Top dressing.

Mr. von Broembsen estimated the costs of these services to be \$7,906.50 per year.

[104] Raymond Joe Richard assessed the costs of pond maintenance at \$3,470.21 and the purchase of a new filter including tax at \$2,450 - \$2,618.

[105] Mr. George Louvris, a co-owner of Mr. Junk Removal Inc. estimated the one time cost of removing garbage at \$834.75.

[106] Mr. Mohammad Hassan the owner of Mighty Moe Property Maintenance Services inspected the property and found the costs of installing new gutters was \$2,068.50. He suggested that \$675 per year would be required to replace the cleaning. The annual costs of this work is as follows:

- a. Landscaping \$7,906.50
- b. Pond maintenance \$3,470.21
- c. Power washing \$675.00

\$12,051.71

[107] This comes to \$157,000 when the discount rate is applied in accordance with the Present Value Table provided in *Civji*, using 16 years as the proper time.

[108] Costs of future medical care is based on the following:

- a. Kinesiology sessions - six sessions x \$80 \$480
- b. Physiotherapy - two sessions x \$20 \$40
- c. Gym pass - 12 months x \$50 \$600
- d. Counselling - 15 sessions x \$105 \$1,575
- e. Medication - \$25 per year \$25

\$2,720

Applying the same multiplier and 16 years brings this total to \$37,000, or a total of \$194,000 for costs of future care.

[109] Special damages are agreed at \$8,097.

[110] Non pecuniary damages are sought at \$150,000 - \$180,000 on the basis of *Power v. White*, 2010 BCSC 1084, *Risling v. Riches-Glazema*, 2016 BCSC 2423, *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81. In that case Voith J. awarded \$180,000 and observed:

- [113] The plaintiff seeks an award of between \$180,000 and \$200,000 for his non-pecuniary losses and relies on several cases in support of that award. Those cases include *Felix v. Hearne*, 2011 BCSC 1236 (CanLII); *Zawadzki v. Calimoso*, 2011 BCSC 45 (CanLII); *Burdett v. Eidse*, 2010 BCSC 219 (CanLII). var'd in relation to the future loss claim, 2011 BCCA 191 (CanLII): and *Alden v. Spooner et al*, 2002 BCCA 592 (CanLII).
- [114] Invariably, the circumstances and details of these cases, and the cases referred to within them, vary in different respects including, for example, the age of the particular plaintiff, and the nature of the plaintiff's particular injuries. In *Felix*, for example, the plaintiff was able to maintain a more physically-active life than has Mr. Poiolos. In *Zawadzki*, the plaintiff had become an alcoholic following the accident he was involved in.
- [115] Each of these cases, however, deals with a plaintiff who suffered from various ongoing physical injuries that had become chronic, as well as a range of psychological conditions. In each of these decisions, this combination of physical and psychological impairment combined to diminish the plaintiff's self-reliance, and to significantly alter both their social and professional lives.
- [111] Similar damages were found in *Ranahan v. Iron Horse Enterprises & Logistics Inc.*, 2017 BCSC 759, *Ali v. Padam*, 2017 BCSC 1849, and *Kim v. Lin*, 2016 BCSC 2405.
- [112] In summary the plaintiff submits that the following damages are appropriate:
- a. Non Pecuniary Damages \$150,000 - \$180,000
 - b. Loss of past and future income
earning capacity \$160,042
 - c. Pecuniary loss of capacity to
perform work of economic value \$100,000 - \$250,000
 - d. Cost of Future Care \$194,000
 - e. Special Damages \$8,097
\$612,139 - \$792,139
- [113] The defendant takes a different position about the plaintiff and relies on the reports of Dr. Boyle. Dr. Boyle's conclusions are contained in these reasons at paras. 85-86.
- [114] Following the first accident the plaintiff did not work from February 13, 2014 - November 4, 2014. He was paid employment insurance for a portion of his time off work. He did not apply for benefits based on a mistaken impression that employees of MVT had been terminated for applying for disability benefits. He ended up paying directly for ongoing health coverage totalling \$5,414.36.

[115] He would have been entitled to benefits amounting to 66 2/3% of his monthly earnings for the duration of his absence - June 2014, until he attained the age of 65.

[116] The defendant suggests it is well established that an award for non pecuniary loss is meant to compensate him for among other things, pain, suffering, disability, inconvenience and loss of enjoyment of life. The "functional approach" to this head of damage is not on injury alone but includes the following non-exhaustive and potentially overlapping factors:

- a. Age of the plaintiff;
- b. Nature of the injury;
- c. Severity and duration of pain;
- d. Disability;
- e. Emotional suffering;
- f. Loss or impairment of life;
- g. Impairment of family, marital and social relationships;
- h. Impairment of physical or mental abilities; and
- i. Loss of lifestyle.

Derived from *Stapley v. Hejslet*, 2006 BCCA 34, at paras. 45-46.

[117] The defendant says that the determination of quantum depends heavily on the court's acceptance of Dr. Boyle's expert reports, which include opinions that the plaintiff's pain symptoms are exaggerated. The contrast is stark. Dr. Boyle's opinion is that the plaintiff's life would have been minimally affected by the minimal ongoing residual that he associates with the plaintiff's injuries. The medical opinion produced by the plaintiff is to the effect that the plaintiff has suffered a partially disabling permanent injury.

[118] The defendant identifies the principal area of controversy outlined in Dr. Boyle's reports. The balance of the medical evidence is much more in favour of the plaintiff. It must be said that the plaintiff's evidence was quite convincing and certainly suggested injuries of greater extent than one would expect from what happened to him.

[119] The plaintiff claims that notwithstanding the disputes about the specific diagnosis of the plaintiff's neck injury, he complains that he continues to suffer from constant neck pain that extends to his shoulders and causes headaches. His demeanour has changed from that of an energetic man to a person who is frustrated by his current situation in life.

- [120] The plaintiff is not suffering from what has been termed "typical soft tissue injuries". The base line for this award is \$25,000. The plaintiff suffers from a serious injury which, considering the impairment of his enjoyment of life calls for a much more serious award. The plaintiff's claim for wage loss is larger than is justified by the medical evidence. I agree that his loss of income for 2014 should be for between half the income and 9 months. I fix the sum at \$25,000.
- [121] The defendants do not dispute the plaintiff's income loss of \$1,072. The award should not include losses from June 2017, to date of trial. There are not enough indications that he was unable to work in that period and Dr. Sahjpaul and Dr. MacInnes appear to agree there is insufficient justification for an award during this time. This leaves a total wage loss claim of \$26,702. To this should be added \$20,000 being the approximate amount of income loss in 5 months of time off work. This totals \$46,702.
- [122] The defendants address the "Housekeeping claim" as follows. The plaintiff claims \$7,906.50 for landscaping per year. \$3,304.96 per year for the Koi's pond maintenance, garbage removal of \$834.75 and gutter cleaning \$675 per year.
- [123] On the basis that the Koi pond is likely to require no maintenance once the modification is completed, \$2,210 is the proper measure of damages. The limited maintenance of the Koi pond has been delegated to the son, and family assistance is a compensable loss, for which I allow \$1,000 per year, for 10 years.
- [124] The rubbish around the house has been there since before the accident and is not a loss attributable to the accident. There is no basis for an order directing the removal of the rubbish.
- [125] The plaintiff's inability to do yard work is not indicated by the medical evidence. Dr. MacInnes says it is generally recommended for people to return to as many activities as possible prior to the start of their pain symptoms. He said that "Mr. Wiles has no physical limitations and should not be restricted in any activity."
- [126] The issue of renovation capacity should be reduced by 50% as the plaintiff's spouse must be deducted, as in *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2014 BCSC 212, at para. 145-147. The Sanghera case was reversed on the finding but the reason for the reversal was that the 50% deduction was not a capital investment but better characterized as housework. The plaintiff's proposal of a renovation is a capital investment. I make a modest allowance for this of \$50,000. The plaintiff has had the good fortune to have a house in the Vancouver market, from which it has been the plaintiff's good fortune to benefit. I allow \$50,000
- [127] Compensation for loss of homemaking capacity may be assessed either as non-pecuniary damages or a pecuniary loss of capacity. In *McTavish v. MacGillivray*, 2000 BCCA 164, Huddart J.A. explained:

68 In my view, when housekeeping capacity is lost, it is to be remunerated. When family members by their gratuitous labour replace costs that would otherwise be incurred or themselves incur costs, their work can be valued by a replacement cost or opportunity cost approach as the case may be. That value provides a measure of the plaintiff's loss. Like the trial judge I would prefer to characterize such compensation as general damages assessed in pecuniary terms, reserving special damages for those circumstances where the plaintiff actually spent money or incurred a monetary liability, although I do not wish to state a settled view on that question in the absence of full submissions as to the consequences of the distinction, if any.

69 A plaintiff who performed the tasks with difficulty or functioned with the tasks undone and never to be done will be compensated for that loss under the head of pain and suffering and loss of amenity, just as she would if she were to go to work every day, earning her regular wages, but suffer in the course of mitigating her loss.

[128] In *Kim v. Lin*, 2018 BCCA 77, at para. 29-30 the Court of Appeal recognized the interdependent nature of non pecuniary and pecuniary compensation for loss of homemaking capacity and quotes the passage from *Remedies: The Law of Damages*:

Where the plaintiff continues to perform the tasks but with difficulty, requires more time to complete tasks, or manages to get by without doing or intending to do these tasks, the loss may be compensated for as part of non-pecuniary damages for pain and suffering and loss of amenity. Specifically, compensation is intended for the plaintiff's pain in persevering with housework, loss of satisfaction in not contributing to the upkeep of one's home, and/or for having to live with a disordered and perhaps not a well-functioning home. There may be a fine line between situations of diminished capacity to perform tasks and when the plaintiff completes tasks with difficulty. Care needs to be taken in making these distinctions to ensure fairness to both plaintiff and defendant. A pecuniary award may be appropriate where the evidence indicates that a reasonable person in the plaintiff's circumstances should not be expected to continue to perform the tasks in question due to their injuries. Such a position avoids prejudicing plaintiffs who are stoic, or are unable to benefit from gratuitous services or afford to hire replacement services prior to trial.

Cost of Future Care

[129] There must be some evidentiary link from the assessment of pain to the recommended treatment of a health care professional. In this case the evidence of Dr. MacInnes recommends a monitored exercise program to assist with the plaintiff's functional ability and tolerance. I do not see a need for counselling sessions. I will allow \$1,200 for a gym pass. The other therapies recommended will be payable out of the general damages if necessary.

[130] The special damages are submitted at \$8,097.24. Of this \$5,414.38 are payments to maintain medical benefits during the unpaid leave of absence brought about by the mistake of the plaintiff. I will allow \$8,097.00.

[131] Accordingly I allow:

Non Pecuniary Damage \$120,000

Past income loss \$72,000

Pecuniary loss of capacity of perform work

Of economic value \$50,000

Cost of future care \$10,000

Special Damages \$8,097

Gym Pass \$1,200

[132] Costs may be spoken to if they cannot be agreed.

"McEwan J."

The Honourable Mr. Justice McEwan

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