
CANADA / JUDGMENT

Yannacopoulos v. Cronk

2015 BCSC 1154

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1154 Yannacopoulos v. Cronk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yannacopoulos v. Cronk,

2015 BCSC 1154

Date: 20150703

Docket: M111601

Registry: Vancouver

Between:

Michael Yannacopoulos

Plaintiff

And

Gordon Louis Cronk

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiff:

Jim Hanson

Counsel for the Defendant:

Maria A. Crawford

Meera C. Jain

Place and Date of Trial:

Vancouver, B.C.

February 23-27,

March 4-6, 9-10 and 12, 2015

Place and Date of Judgment:

Vancouver, B.C.

July 3, 2015

Introduction

- [1] The plaintiff Michael Yannacopoulos sues for damages for injuries suffered as a result of a motor vehicle accident which took place on September 22, 2009, on King George Boulevard between 84th and 86th Avenue in Surrey, British Columbia (the "Accident"). Mr. Yannacopoulos was driving the middle vehicle in a three-car collision. As a result of the Accident, Mr. Yannacopoulos suffered a blow to his head, injuries to his neck, back, shoulders, right wrist, and dental injury. The main issue at trial concerned his low back pain which had lingered after the other injuries resolved.
- [2] Mr. Yannacopoulos advances a claim for non-pecuniary loss, past loss of earnings, future loss of earnings, special damages, future care, and loss of future housekeeping capacity. Liability is not in issue. The defendant does not dispute that Mr. Yannacopoulos suffered injury in the Accident, but disputes the quantum. A central issue concerns Mr. Yannacopoulos' condition prior to the Accident and the implications that this has for the damages to be awarded.

Facts

- [3] Mr. Yannacopoulos is 55 years old. Together with his wife Angeles, he is the sole proprietor of an accounting business, Yannacopoulos Accounting Services Inc. The business specializes in providing accounting and tax planning services to small businesses.
- [4] Mr. Yannacopoulos has been married for 32 years and is the father of two children: Anthony, who is 23, and Cristina, who is 21.

Pre-Accident

- [5] Mr. Yannacopoulos suffered from a number of medical conditions prior to the Accident. These included hypertension, hypothyroidism, high cholesterol, obstructive sleep apnea, Factor V Leiden thrombophilia which is a condition in which the patient is at greater risk to form abnormal blood clots that can block blood vessels, asthma, and obesity. Mr.

Yannacopoulos had been markedly overweight since adolescence. He is 5'6" and weighs approximately 300 pounds. He was referred to a cardiologist in 2006 after complaining of being easily fatigued.

- [6] Mr. Yannacopoulos was also suffering from spondylolysis at L4 prior to the Accident as indicated in 2004 and 2006 X-rays. This is a congenital condition in which there is a discontinuity in the bony elements of the spinal column. Many persons who have this condition will be asymptomatic. In addition, many persons who have this condition will not experience any further deterioration. However, some patients will experience symptoms as a consequence of this condition and further deterioration is a possibility.
- [7] Finally, commencing in 2001, Mr. Yannacopoulos had been periodically seeking treatment for lower back pain prior to the Accident. He received massage therapy, and attended physiotherapy and his family physician in relation to these complaints. The complaints appear to have been intermittent. They continued to 2009, shortly before the Accident.
- [8] As noted, one important issue is whether and to what extent these conditions, and in particular the complaints of low back pain, interfered with Mr. Yannacopoulos' level of function. A number of friends and family testified that prior to the Accident Mr. Yannacopoulos maintained an active and energetic lifestyle without limitation. In addition, they testified that this active lifestyle continued without interruption up to the time of the Accident.
- [9] Witnesses described Mr. Yannacopoulos as an enthusiastic golfer. They stated that he participated in frequent hunting, fishing, and camping trips and was able to do heavy work on those trips without limitation. Witnesses stated that he played soccer and he was described as an agile and active goalie. He was said to have enjoyed long walks, which he was able to do without limitation, and travel. He was said to take part in hiking and bicycle riding. Witnesses stated that he demonstrated no limitations in any of these activities as well as standing, walking, dancing, and climbing stairs.
- [10] Mr. Yannacopoulos was described as having a very active social life. He attended many functions in the Greek community and hosted many events at his home. He was described as an excellent host, very gregarious and sociable.
- [11] The friends who testified stated that they were not aware of any issues with Mr. Yannacopoulos' back prior to the Accident. Angeles Yannacopoulos stated that she could only recall one problem with Mr. Yannacopoulos' back - that was an instance of back spasm that occurred in Victoria, perhaps 13 years ago. She stated that she does not recall Mr. Yannacopoulos ever complaining of lower back pain before the Accident. His son Anthony testified that he could recall Mr. Yannacopoulos taking Tylenol for back pain when they were golfing together before the Accident.

- [12] Mr. Yannacopoulos agreed that he did suffer from periodic episodes of low back pain prior to the Accident. However, it was his evidence that these episodes did not interfere with his lifestyle or ability to function. He stated that they were episodic in nature. His description of his activities prior to the Accident was to the same effect as that of his family and friends.
- [13] On cross-examination, many of the witnesses' memories of Mr. Yannacopoulos' activities were from many years prior to the Accident. For example, Gregory Chambers agreed in cross-examination that the last time he recalled seeing Mr. Yannacopoulos biking was in approximately 2001. Kevin Spence described Mr. Yannacopoulos taking part in Greek dancing, but agreed in cross-examination that this had occurred about 20 years ago at Cristina Yannacopoulos' christening. Anthony Yannacopoulos described long walks to his grandparents' house, to the village in Whistler, and around Disneyland, as well as skiing and downhill biking with his father, but these memories were all from when he was about 14 to 16 years old or two to four years before the Accident.
- [14] The medical and treatment records reflect a somewhat different picture. Mr. Yannacopoulos began receiving massage therapy for low back pain in 2002 after an accident suffered while bike riding. The pain is described as a constant ache on both sides with the left side being worse. He continued to receive massage therapy treatments thereafter on a periodic basis for lower back pain in 2002, 2003, 2004, 2005, 2006, and 2009.
- [15] He attended at the emergency department in Victoria in 2004 in relation to an episode of low back pain. In November 2005, Mr. Yannacopoulos reported to his family physician that he had stopped biking, and that he had ongoing low back pain with no radiculopathy. He attended physiotherapy where the clinical records report that he complained of low back pain, especially with standing and slow walking. The records note that his low back pain had been bad for two to three years and refer to the acute episode in 2004.
- [16] Mr. Yannacopoulos attended his family physician on four occasions in 2006 with complaints of low back pain. In July 2006, he reported to his family physician that he had decreased exercise about a year ago, had now gone biking but with increased back pain. He was put on medication. At a subsequent visit in November his physician diagnosed mechanical back pain and prescribed an increased dosage of medication.
- [17] Mr. Yannacopoulos attended Dr. Cheung, a cardiologist, for cardiac reassessment in September 2006. He reported being fatigued and stated that he had only recently resumed regular physical activity. He reported that he was now using an elliptical trainer for five to ten minutes and was increasing his walking.
- [18] Mr. Yannacopoulos attended physiotherapy again in 2007 with complaints of low back pain. The clinical records note that he reported experiencing low back pain for five years.

- [19] Mr. Yannacopoulos was attending massage therapy for complaints of lower back pain in 2009, a few months prior to the Accident. The clinical records describe the low back pain as chronic. He completed a patient history form in May 2009 in which he complained of poor quality sleep, poor energy levels, and poor exercise habits. He identified low back soreness and described his symptoms as being medium, stating that he was required to stop after 15 minutes of walking due to pain.
- [20] Mr. Yannacopoulos stated that he did not recall making the reports described in the clinical records. However, he agreed that he would have been honest in reporting his condition to the treating professionals.
- [21] Finally, Dr. Weiler, Mr. Yannacopoulos' family physician, stated that prior to the Accident, Mr. Yannacopoulos was also suffering from spondylosis which is the degeneration of the spine causing discs to dry out and compress and encompassing facet joint arthritis. A degree of spondylosis is universal or near universal with aging. The onset and progression will vary. Many persons will have some degree of spondylosis but will not experience pain. However there will be patients who do experience pain as a result of this condition. Both trauma and obesity are factors which can accelerate the degeneration and the development of symptoms.

The Accident

- [22] On the day of the Accident, Mr. Yannacopoulos was driving his pickup truck positioned behind other vehicles at a red light. His truck was struck by a full-sized pickup that had been travelling at 60 kph just before the Accident. He stated that he saw the vehicle that struck him approaching in his rear-view mirror, not slowing down. After the crash he was in a horizontal position. He tried to get up. The seat had moved into the back of his vehicle. He felt dizzy and had a pain in his head. He recalled speaking to people who came to assist at the scene and to the emergency attendants.
- [23] A description of the Accident was provided by Anne Loewen, who was driving another vehicle that was involved in the Accident. The car behind her had been hit and pushed into her vehicle. She described swerving her car to the left into the median while the truck behind her went off to the right, coming to rest on the grassy area near the sidewalk. It was her impression that the truck's seat had been broken. She observed the driver being thrown around in the vehicle.
- [24] Mr. Yannacopoulos was taken from the scene by ambulance to Surrey Memorial Hospital's emergency department. X-rays were taken of his cervical, thoracic, and lumbar spines which were reported as normal. He was released later that day.
- [25] Angeles Yannacopoulos recalled waiting for her husband at the hospital on the day of the Accident. He was in a neck brace, very upset, and in considerable pain. He was spitting up pieces of a broken tooth. She observed a golf ball-sized bump on his head.

Post-Accident

- [26] During the days following the Accident, Mr. Yannacopoulos testified that he experienced pain in his head, where he had a large bump, as well as pain in his neck, back, left arm, right wrist, and dental injuries from a broken tooth. He complained of headaches and problems with his memory.
- [27] Mr. Yannacopoulos took about a week off work to heal in the immediate aftermath of the Accident. He returned to work as soon as he felt he was able. He stated that within a few weeks all his pain resolved except for the pain in his neck and back. The neck pain resolved within a few months. However, the low back pain has not resolved. He felt that he was still having memory issues.
- [28] He said that he was not able to return to the activities he enjoyed before the Accident. He tried to do work around the house but was not able to complete the tasks. He tried hunting, fishing, and soccer but realized that he was not able to participate. He was not able to dance, and had difficulty standing and walking. He tried to attend social functions as before but found he did not enjoy them.
- [29] Mr. Yannacopoulos commenced physiotherapy in October 2009 and continued to receive treatment until August 2010. He commenced massage therapy treatment in November 2009 and continued with those treatments until June 2010. He was prescribed pain medication and nonsteroidal anti-inflammatories. In 2010 he began working with a personal trainer.
- [30] A record from physiotherapy dated November 17, 2009, records that he was able to stand for half an hour and to walk on the treadmill for 15 minutes. By January 2010 he was able to manage 15 minutes on the treadmill. The same entry was reflected in the April 2010 notes from physiotherapy.
- [31] A further X-ray of the lumbar spine was performed on March 31, 2010. This reported grade 1 spondylolisthesis of L4 on L5 due to spondylolysis of L4 and thinning of the L4-5 disc. Spondylolysis can lead to a condition called spondylolisthesis or anterolisthesis which is a slippage of the vertebrae, an anterior slippage in the case of anterolisthesis.
- [32] Mr. Yannacopoulos had an MRI of his lumbar spine performed on September 24, 2010, which reported an L4-5 annular tear with disc extrusion compressing the thecal sac with left L5 nerve root displacement as well as moderate left foraminal narrowing encroachment upon left L4 nerve root. The MRI also reported mild to moderate facet arthropathy at L2-3 and L3-4.
- [33] Mr. Yannacopoulos was referred to Dr. Winston Gittens, a neurosurgeon, for an opinion concerning his L4-5 disc herniation. The appointment was on October 26, 2010. Dr. Gittens recommended continued conservative management with exercise, weight loss, and swimming, and if symptoms persisted, an L4-5 discectomy.

- [34] The conservative treatment did not result in improvement and so on November 14, 2011, Mr. Yannacopoulos was admitted to Royal Columbian Hospital for a left L4-5 discectomy performed by Dr. Gittens.
- [35] Mr. Yannacopoulos did not experience relief from his symptoms following the surgery. Dr. Gittens recommended physiotherapy and weight loss. Mr. Yannacopoulos started back at physiotherapy. In the meantime, Dr. Weiler tried several different courses of medication, none of which provided much assistance.
- [36] Mr. Yannacopoulos was seen by Dr. Vondette, physical medicine and rehabilitation specialist, for an independent assessment arranged by his counsel in May 2012. Dr. Vondette made a number of recommendations and Dr. Weiler reviewed these with Mr. Yannacopoulos. The recommendations included consideration of bariatric surgery, and a referral to a physical medicine and rehabilitation specialist in interventional spine.
- [37] A repeat MRI of Mr. Yannacopoulos' lumbar spine was performed on December 27, 2012. Dr. Weiler noted that:

The MRI reported mild epidural lipomatosis, a central canal congenitally at the lower limits of normal and superimposed spondylosis elements at L4-5 level including facet arthropathy, ligamentum flavum hypertrophy, small disc bulge and residual or recurrent left paracentral focal disc protrusion, with resulting mild displacement of left L5 nerve root. Additionally, there are mild changes of lumbar spondylosis at other levels of the lumbar spine.

- [38] Mr. Yannacopoulos consulted with Dr. M. Adrian, a physical medicine and rehabilitation specialist in interventional spine:

Dr. Adrian diagnosed Mr. Yannacopoulos with chronic mechanical lower back pain, lumbar spondylosis with low grade L4 on L5 anterolisthesis, and deconditioning. Dr. Adrian recommended repeat x-rays and a bone scan to help localize a specific source of pain.

X-ray of lumbar spine performed April 2, 2013, reported L4 spondylolysis with anterolisthesis of L4 on L5, degenerative disc changes at L4-5, L5-S1, and degenerative facet changes at L4-5, L5-S1.

Bone scan performed on April 10, 2013, reported very mildly active facet joint arthropathy involving L4-5 bilaterally and L5-S1 on left, and mildly active degenerative changes of distal thoracic spine.

- [39] On August 1, 2013, Dr. Adrian performed a lumbar epidural steroid injection. Mr. Yannacopoulos experienced an adverse reaction following the injection on the left side and therefore the right side injection was not performed. Mr. Yannacopoulos did not report improvement after the epidural procedure. On a follow-up visit, Dr. Adrian recommended bilateral L4-5 lumbar facet joint injections.

- [40] Mr. Yannacopoulos was receiving treatment for his lower back with a kinesiologist at Dr. Weiler's recommendation during this period. He received ten treatments between September 2013 and February 2014. The final report noted some objective improvement, substantial improvement in forward flexion, smaller improvements in other areas, but no subjective improvement. Mr. Larivière, the kinesiologist, recommended that Mr. Yannacopoulos take a series of aqua therapy sessions.
- [41] On May 29, 2014, Mr. Yannacopoulos received bilateral facet joint injections at L4-5. He reported some improvement after this procedure, however, this did not persist. In July 2014, he had a consult concerning bariatric surgery but decided against the surgery. Dr. Weiler then referred him to Live Well Exercise Program under the supervision of Dr. Zentner, an internal medicine specialist.
- [42] In August 2014, Dr. Weiler diagnosed Mr. Yannacopoulos with moderate depression and anxiety after administering standard screening tests. She prescribed medication and suggested that he consider a referral for counselling. She also referred him to Dr. S. Wu, interventional radiology, for consideration of lumbar facet radiofrequency ablation procedure. That treatment has not been performed.
- [43] In October 2014, Dr. Adrian recommended Mr. Yannacopoulos consider facet joint ablation with Dr. Wu. That treatment has not been performed.
- [44] In the months before trial Mr. Yannacopoulos received a referral for counselling. He was in the process of being referred to a counsellor who specialized in pain at the time of trial and had attended a few sessions of counselling. He said that he had not noticed any improvement but was not ruling it out. He has also reconsidered bariatric surgery as a possible option.
- [45] He said that at present he feels pain every day. He finds stairs a challenge. He is able to sit all day at work without pain, provided he stretches from time to time. He is not able to stand for more than two minutes without pain and then only for about five minutes before he has to sit. Walking any distance is a problem. He is able to walk without pain for about five minutes and then with pain up to 15 minutes before he has to sit. He has numbness in his thigh. He stated that he still has memory problems and has difficulty understanding TV shows. He has lost his desire to go to social activities and finds that when he does go he is isolated because of restrictions on his ability to walk and stand.
- [46] Mr. Yannacopoulos' family and friends described a significant and persistent change after the Accident. Mr. Yannacopoulos no longer plays golf, soccer, or indoor hockey, although he attends some games as a spectator. He has not been able to participate in fishing and hunting in the way he did before the Accident. He is not able to perform tasks while camping and is no longer able to assist with the heavy work around the house. He has great difficulty standing for any length of time and has to rest after about 15 minutes of walking. He struggles with the stairs at work.

[47] The witnesses noted that Mr. Yannacopoulos is no longer as sociable as he was before the Accident. He goes out to socialize much less and when he does go out he is withdrawn and does not mingle. He is not an active host as before at gatherings hosted at his home. His mood seems down.

Expert Evidence

Dr. Kathleen Weiler

[48] Dr. Weiler became Mr. Yannacopoulos' family physician in 2011. Dr. Weiler stated that in her opinion Mr. Yannacopoulos sustained neck and back injuries, post-concussion syndrome, mild to moderate depression, and anxiety symptoms as a result of the Accident. He developed chronic low back pain with radiation to his legs that is of multi-factorial origin including mechanical pain, spondylosis, facet arthrosis, lumbar radiculopathy, and L4-5 disc herniation which has been surgically repaired. It was her opinion that the Accident aggravated pre-existing lumbar spondylosis and contributed to worsening of mechanical back pain, lumbar disc herniation, and L4 on L5 anterolisthesis. Her long-term prognosis was guarded.

[49] Dr. Weiler agreed that prior to the Accident, Mr. Yannacopoulos was suffering from spondylosis which was intermittently symptomatic. Spondylosis is a progressive degenerative condition. There are patients who suffer from this condition who will remain asymptomatic. For those who become symptomatic, the progress will be from mild and intermittent symptoms to chronic and constant.

[50] She agreed that obesity increases the strain on both the joints and the soft tissue. Obesity could therefore result in a more rapid degeneration and a worsening of the symptoms of spondylosis. She also agreed that a progression from spondylolysis to spondylolisthesis is a likely progression if someone is putting strain on their back.

[51] Dr. Weiler stated that she did not observe or treat head injury symptoms. The diagnosis of concussion was made by another physician.

Dr. Michael Vondette

[52] Dr. Vondette is a specialist in physical medicine and rehabilitation. It was his opinion that:

[T]he extent of his current back pain and associated disability, both of which are currently significantly worse than what he experienced prior to September 22, 2009, is primarily the result of the trauma he sustained in the September 22, 2009 MVA. As of September 22, 2009 he was more susceptible to sustaining a more significant degree of injury as a result of the trauma he sustained in this MVA. He also would have been susceptible to experiencing a more prolonged and difficult post-traumatic clinical course as a result of this trauma. But for the trauma he wouldn't be experiencing pain of similar severity and persistence.

- [53] His prognosis was guarded, although he felt that Mr. Yannacopoulos might experience some significant improvement if he were to lose 75 to 100 pounds, a prospect he felt was only likely with bariatric surgery.
- [54] Dr. Vondette was of the view that it is unlikely that spondylolysis would progress to anterolysthesis in the absence of trauma at such an advanced age as Mr. Yannacopoulos and that in his case it was the trauma that caused the progression. However, he agreed that obesity is a risk factor in chronic back pain. Obesity is also a factor that will make the back pain worse once it develops.

Dr. Ian Turnbull

- [55] Dr. Turnbull is a neurosurgeon. It was his opinion that:

Although he said that he has had difficulty with his memory since the accident, he had a very brief period of unconsciousness and I do not believe that he suffered a brain injury or that his memory problem is in any way a physical consequence of the MVA.

I could find no objective evidence to support his complaints of back pain apart from his complaint of back pain when I elevated his legs. The nerves leaving his lumbar spine and going to his legs are all functioning completely normally.

I have no treatment recommendations, apart from supporting what he has been told with respect to his gross obesity.

His failure to improve his back pain problem following the operation suggests that the MRI finding of damage to the L4-5 disc was not an important cause of his back pain, since that particular disc lesion has been dealt with. The pain can be attributed to soft tissue injury.

Mr. Yannacopoulos has a mechanical-type low back pain which is aggravated by activity and relieved by rest. His gross obesity is contributing to the pain that he is experiencing as a result of placing excessive stress on his lumbar spine with simply the activities of normal living.

- [56] Dr. Turnbull noted that excess weight is a factor that aggravates degeneration, making it more likely that a person with degenerative conditions in the spine and facet joints will become symptomatic. In addition, excess weight increases the risk of failure of surgery.

Causation

- [57] In the present case it is conceded that Mr. Yannacopoulos was injured in the Accident. A central issue in the litigation is the significance, if any, to be attached to his history of back complaints prior to the Accident.

[58] Mr. Yannacopoulos asserts that prior to the Accident he suffered from minor incidents of low back pain that were not disabling and not progressing. Counsel submits that the evidence does not establish a measurable risk that his condition would have progressed but for the Accident. The defendant submits that Mr. Yannacopoulos' pre-existing degenerative changes were symptomatic prior to the Accident, would have continued to be symptomatic, and would likely have progressed regardless of the Accident.

[59] The leading case is *Athey v. Leonati*, [1996] 3 S.C.R. 458, in which Major J. for the Court, stated at paras. 32, and 34-35:

32 The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

34 The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: *Cooper-Stephenson*, supra, at pp. 779-780 and *John Munkman, Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, supra; *Malec v. J. C. Hutton Proprietary Ltd.*, supra; *Cooper-Stephenson*, supra, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis in original.]

- [60] The plaintiff's position is that prior to the Accident, Mr. Yannacopoulos' low back pain was not continuous and not disabling and that there is no evidence that it was progressing. Counsel submits that the history of the low back pain before the Accident must be put into the context of the evidence about Mr. Yannacopoulos' high level of activity right up to the date of the Accident.
- [61] I agree that the low back pain before the Accident was not continuous. However, as Dr. Weiler explained, where there is a progression in such cases the likely course is from intermittent and episodic to chronic and continuous. That is the course that is present in this case. It is noteworthy, in my view, that the complaints of low back pain prior to the Accident are markedly similar to the complaints post-Accident. Moreover, while the trips for treatment were intermittent, it is noteworthy that the pain was characterized as chronic a few months before the Accident.
- [62] The frailties of the lay evidence concerning Mr. Yannacopoulos' pre-Accident activities limit the usefulness of this evidence. Mr. Yannacopoulos was a very poor historian. The other lay witnesses were doing their best in a difficult task, looking back so many years. It was clear from the cross-examination that their recollections with respect to the timing of activities were not precise and in many cases they were describing activities from many years prior to the Accident. The clinical records pre-dating the Accident, on the other hand, describe significant limitations on activities and most noteworthy, difficulty walking more than 15 minutes as a consequence of low back pain.
- [63] As noted above, Mr. Yannacopoulos was suffering from spondylolysis, a congenital condition in which there is a discontinuity in the bony elements of the spinal column, at L4 prior to the Accident, as indicated in the 2004 and 2006 X-rays. While many persons who have this condition will be asymptomatic and will not experience any further deterioration, spondylolysis can lead to a condition called spondylolisthesis or anterolisthesis which is a slippage of the vertebrae.
- [64] Mr. Yannacopoulos did develop anterolisthesis after the Accident. The X-ray report dated March 31, 2010 indicated spondylolisthesis due to spondylolysis. The X-ray taken in April 2013 showed a significant progression.
- [65] Trauma can trigger the progression from spondylolysis to anterolisthesis. As noted, Dr. Vondette was of the view that it is unlikely that spondylolysis would progress to anterolisthesis in the absence of trauma at such an advanced age and that in Mr. Yannacopoulos' case it was the trauma from the Accident that caused the progression.
- [66] However, Dr. Turnbull stated that for trauma to be the trigger he would expect the trauma to have been bone-breaking in severity and to cause immediate, excruciating pain. The X-rays taken at Surrey Memorial Hospital the day of the Accident indicated a normal examination. In addition, Mr. Yannacopoulos reported that although his back hurt in the immediate aftermath of the Accident, his most significant pain was in his head and wrist.

- [67] I conclude that in the present case the Accident was not the cause of the progression from spondylolysis to anterolysthesis. I prefer Dr. Turnbull's opinion in relation to this issue. In addition, I note the absence of slippage in the imaging conducted after the Accident. The wear and tear associated with obesity can also cause the progression from spondylolysis to anterolysthesis. Both Dr. Turnbull and Dr. Weiler addressed this connection. I find in the present case that the progression was the result of the strain arising from Mr. Yannacopoulos' weight.
- [68] As noted earlier, Mr. Yannacopoulos also suffered from spondylosis, the degeneration of the spine causing discs to dry out and compress and encompassing facet joint arthritis. While many patients with this condition will be asymptomatic, I find that Mr. Yannacopoulos was symptomatic prior to the Accident. In addition, I find that given his obesity his symptoms would likely have continued to progress. However, the trauma of the Accident accelerated this progression.
- [69] As noted, Mr. Yannacopoulos suffered an annular tear at L4-5 which was identified in an MRI scan conducted on September 24, 2010. He underwent a discectomy at Royal Columbian Hospital on November 14, 2011. The surgery did not relieve his symptoms, causing all of the doctors who provided opinions to conclude that the disc herniation was not the principal source of his lower back pain.
- [70] I have concluded that absent the Accident, Mr. Yannacopoulos would have continued to suffer from intermittent episodes of back pain and reduction of function. In addition, I find that there is a measureable risk that his condition would have become chronic absent the Accident. Accordingly, a reduction in damages is warranted.
- [71] In *Hoy v. Williams*, 2014 BCSC 234 [Hoy], a 15% reduction was assessed. The court noted the plaintiff's excellent physical condition before the accidents as a relevant consideration in limiting the reduction. In *Olynyk v. Turner*, 2012 BCSC 1138 [Olynyk], the court concluded that there was a 60% likelihood that the plaintiff would have experienced the same symptoms he now experiences in ten years in any event. A reduction of 30% was assessed. In *Filsinger v. ICBC*, 2009 BCSC 232 [Filsinger], a reduction of 20% was applied to account for the pre-existing condition. In that case the plaintiff's pre-existing back condition was quiescent at the time of the accident but was found to be likely to manifest at some time in the future. The Court of Appeal, in *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2012 BCCA 331, reduced a 40% deduction to 20% noting that the trial judge had failed to address the timeline over which the expected future degeneration would likely occur and to account for such a timeline in the percentage by which damages are reduced. In *Johnson v. Kitchener*, 2012 BCSC 1796, a 10% deduction was assessed in circumstances in which the plaintiff had degeneration of his neck and back prior to the accident but was not symptomatic. There was some evidence that his neck would have become symptomatic without the accident but it was unclear when and how debilitating his symptoms would have been.

- [72] In the present case, Mr. Yannacopoulos was not asymptomatic at the time of the Accident. He had been having episodes of back pain similar to those he experienced post-Accident since 2002. His weight caused constant strain on his spine and soft tissue. I have concluded that the Accident accelerated a degenerative process that was well established and progressive. However, it is not possible to estimate how long it would have taken, absent the Accident, for Mr. Yannacopoulos' condition to reach the state he was in after the Accident. In all of the circumstances I have concluded that a 25% deduction is appropriate.
- [73] There is some suggestion in the evidence that Mr. Yannacopoulos has suffered from a brain injury or that he continues to suffer from post-concussion syndrome as a result of the Accident. For example, Mr. Yannacopoulos and his wife described memory loss and suggested that he is unable to understand television shows.
- [74] In my view, the suggestion that Mr. Yannacopoulos suffers from cognitive impairment is at odds with the evidence concerning his performance in his profession. For example, Baljinder Johal is an accountant who has obtained a Certified General Accountant designation. She is currently working toward completion of an MBA. She has seven years' experience as an accountant. Mr. Yannacopoulos hired Ms. Johal in March 2013. It was her evidence that Mr. Yannacopoulos oversees all the work of the firm as well as meeting with the clients. He attends the office from 8:00 a.m. to 4:00 p.m., sometimes leaving early for meetings with clients or medical appointments. She estimates that he leaves early perhaps three or four times a month. In addition, Mr. Yannacopoulos puts in extra hours on the weekends during tax season.
- [75] She stated that his memory usually appears good but that perhaps two or three times he has mentioned to her that he has forgotten something. She stated that Mr. Yannacopoulos is very professional and prompt in reviewing work and responding to inquiries.
- [76] Mr. Yannacopoulos has memory of the events leading up to and immediately following the collision. For example, he testified that he recalled seeing the vehicle driven by the defendant travelling toward his vehicle prior to the impact. He recalls speaking with people at the scene within minutes of his vehicle coming to rest. He has continuous memory of events following the accident. Any loss of consciousness was minimal.
- [77] Mr. Yannacopoulos was not disoriented after the accident. He was assessed by the paramedics at the scene who graded him as 15/15 on the Glasgow Coma Score. This is a normal score. He was given a neurological assessment at the scene which indicated normal functioning. The triage report at the hospital noted no neurological deficits.

- [78] Dr. Larigakis, who was Mr. Yannacopoulos' family physician at the time of the Accident, made an initial diagnosis of concussion. However, there is no suggestion that he referred Mr. Yannacopoulos to a specialist in relation to this issue. Dr. Weiler stated that she did not diagnose a head injury and had never observed any symptoms of a head injury. Finally, Dr. Turnbull stated that he did not believe that Mr. Yannacopoulos suffered a brain injury or that his memory problem is in any way a physical consequence of the Accident.
- [79] I find that while he did suffer a blow to his head in the Accident resulting in a painful bump to his head, Mr. Yannacopoulos did not suffer a brain injury in the Accident. I find further that any memory problems are not the result of the Accident.

Non-Pecuniary Loss

- [80] Mr. Yannacopoulos seeks an award of \$140,000 for non-pecuniary loss. Counsel submits that Mr. Yannacopoulos has suffered and will continue to suffer both from chronic pain and from the inability to pursue his former way of life and former social and recreational activities.
- [81] It is submitted that prior to the Accident, Mr. Yannacopoulos was very active, participating in many social activities and recreational pursuits. He enjoyed golf, hiking, bicycle riding, hunting, and fishing. He participated in floor hockey and indoor and outdoor soccer. He enjoyed taking long walks and travelling. He was active in the Greek community, participating in many community organizations and social activities and enjoyed Greek dancing. He was able to work long hours at his business and to do the heavy work around the house.
- [82] Counsel submits that in the aftermath of the Accident, Mr. Yannacopoulos is now severely limited. Virtually all social and recreational activities are a challenge. He is unable to engage in many of the activities he once enjoyed such as golf, ocean fishing, bicycle riding, and hiking. His participation in other activities is very limited.
- [83] Counsel relies upon the following cases as establishing the range of damages: *Debou v. Besemer*, 2014 BCSC 1766; *Kirkham v. Richardson*, 2014 BCSC 1068; *Crane v. Lee*, 2011 BCSC 898; and *Bruno v. Diamzon*, 2014 BCSC 1270 [Bruno].
- [84] The position of the defendant is that an appropriate award for non-pecuniary loss is in the range of \$60,000 to \$80,000, from which a 30% reduction should be made to account for the pre-Accident, moderately symptomatic, degenerative condition suffered by Mr. Yannacopoulos. The result would be an award of \$42,000 to \$56,000. Counsel submits that Mr. Yannacopoulos' low back pain and function had returned to the same levels reported pre-Accident. The low back pain was triggered by walking for about 15 minutes, as had been the case before the Accident and was alleviated by sitting, again as in the pre-Accident presentation.

- [85] Counsel relied upon the following cases as indicative of the appropriate range for non-pecuniary loss: Olynyk; Gilmour v. Machibroda, 2008 BCSC 260; Filsinger; Baxter v. Jamal, 2010 BCSC 289; and Hoy.
- [86] In my view, the cases relied upon by the plaintiff to establish the appropriate range reflect damages that are more severe than those in the present case and do not account for the difficulties that were present and manifest in the plaintiff's original position. In addition, there is a prospect of improvement in Mr. Yannacopoulos' low mood with counselling and treatment for his depression, which he is only just commencing. There is also the prospect of improvement in his low back pain in the event that he loses weight and improves his conditioning.
- [87] I award \$80,000 under this head, less a 25% reduction to account for the degenerative condition, for a total award for non-pecuniary loss of \$60,000.

Past Earnings

- [88] Mr. Yannacopoulos seeks an award of \$250,000 in relation to past lost earnings. Counsel notes that Mr. Yannacopoulos testified that his method of marketing his business involved community activities. He met new clients through his social and recreational activities. Mr. Yannacopoulos testified that after the Accident he has not been able to engage in these social and recreational activities and his business has suffered. Counsel notes in addition that Mr. Yannacopoulos' chargeable hours have declined since the Accident. Mr. Spence testified that prior to the Accident he referred clients to Mr. Yannacopoulos' firm but that he has not done so since the Accident.
- [89] Mr. Yannacopoulos relied upon the opinion of Kevin Turnbull, a chartered accountant and economist, who identified a pre-Accident rate of growth in the business of 9.4% compared to a post-Accident growth rate of .8% to June 30, 2014. Mr. Turnbull prepared calculations based upon a continuation of the pre-Accident rate of growth to 2014 or for a 9.4% growth for two years followed by a growth of 4.7% until the end of fiscal 2014. Mr. Turnbull assumed no growth in the business following the end of fiscal 2014. Mr. Yannacopoulos' submissions are based upon the more conservative of these calculations.
- [90] The defendant submits that Mr. Yannacopoulos has not established any past income loss. Counsel concedes that Mr. Yannacopoulos took some time off work in the immediate aftermath of the Accident and that he has missed, albeit unquantified, time off work to attend medical appointments. However, because Mr. Yannacopoulos is not an hourly paid employee, these absences do not translate into a quantifiable past income loss. There must be evidence of a lost opportunity to bill a client. The defendant submits that no such loss has been identified.
- [91] Counsel notes that Mr. Yannacopoulos has contended that he was forced to hire more senior, highly qualified employees to look after the higher level work that he previously handled himself. It is the case that Mr. Yannacopoulos hired Ms. Johal who is an accountant with a

Certified General Accountant designation. However, the defendant notes that at the time of the Accident, Mr. Yannacopoulos employed Trevor Lott who was completing his CGA designation. Mr. Lott terminated his employment to pursue a different opportunity. Ms. Johal was hired to replace him. Thus Ms. Johal's hiring was not the result of the Accident.

- [92] In addition, Mr. Yannacopoulos testified that for many years he has been making a transition in his business to higher end work that can be billed out at a higher rate. He stated that he has been turning away potential clients who required only bookkeeping services. The more sophisticated work required more qualified employees. The defendant submits that the composition of Mr. Yannacopoulos' staff reflects this change; he employs fewer bookkeepers and a more qualified accountant who is capable of handling the higher level work.
- [93] Mr. Turnbull rejected the contention that Mr. Yannacopoulos needed to hire more labour as a result of the injuries sustained in the Accident. He concluded that the percentage of revenue paid toward subcontracts, which were the employee salaries in Mr. Yannacopoulos' business, had dropped post-Accident. He noted that "[t]his would seem to contradict Mr. Yannacopoulos' assertion that he needed to hire more labour as a result of the injuries sustained in the accident."
- [94] Mr. Yannacopoulos testified that because of the Accident he is not able to work the same hours that he did prior to the Accident. His counsel notes that his chargeable hours have declined since the Accident.
- [95] However, Mr. Yannacopoulos does not record the total number of hours he works. There is accordingly no way to measure his pre and post-Accident hours. In addition, he only recorded his chargeable hours for one year prior to the Accident so there is no measure of his chargeable hours for an extended period prior to the Accident. In the years 2005 to 2013, the firm's total chargeable hours declined from 6,034 in 2005 to 4,513 in 2008 and continued a general trend of decline thereafter. This suggests that there are forces other than the Accident responsible for any decline in hours worked.
- [96] Ms. Johal's evidence is that Mr. Yannacopoulos is in the office full days, with few exceptions and works overtime during tax season. In any event, Mr. Turnbull rejected Mr. Yannacopoulos' hours as a measure of income loss and I accept his reasoning in this regard.
- [97] Counsel for the defendant submits that Mr. Yannacopoulos has not established any loss arising from marketing activities, noting that as Mr. McKay stated in his report, Mr. Turnbull did not conduct a review of the business development activities either pre or post-Accident. There was no analysis of client acquisition either pre or post-Accident.
- [98] I find that Mr. Yannacopoulos has not established a past loss of income. There were a number of changes taking place in the firm's business that started before the Accident and continued after. First, there was a general trend to increase the hourly rates. The nature of the work was changing; Mr. Yannacopoulos stated that he was trying to steer the business to

what he considered more complex and profitable work and away from pure bookkeeping services. As part of this transition, while he was not necessarily "firing" existing clients, he was turning away new clients who were seeking pure bookkeeping services.

- [99] Both of those changes would have the effect of increasing profits; however there was also a clear trend, with some fluctuations, of an overall reduction in billable hours charged out by the firm. This trend started well before the Accident and continued after. This is a factor that depressed profits.
- [100] Mr. Turnbull acknowledged that a business such as Mr. Yannacopoulos' would not continue to expand indefinitely. However, the cut-offs that he chose were entirely arbitrary and his analysis does not account for the other forces that were impacting the profitability of the firm. In addition, as noted by the defendant, there was no analysis of client acquisition before and after the Accident and no analysis of how the other changes in the firm's business might affect the potential pool of referrals quite apart from the Accident.
- [101] In the circumstances, I find that Mr. Yannacopoulos has not demonstrated that his firm suffered a loss of income as a result of the Accident, nor has he established that the firm lost the opportunity to increase its profitability as a result of the Accident. I make no award under this head of damage.

Special Damages

- [102] The plaintiff claims special damages in the amount of \$19,936.69 to June 15, 2014, together with an additional \$781.73 to January 22, 2015. It was his position that the amounts claimed are reasonable and that all expenditures were the result of his injuries caused by the Accident.
- [103] The defendant submits that the special damages should be reduced to account for the impact of the pre-existing degenerative condition. In addition, the defendant submitted that the following expenses were not causally related to the Accident or reasonable out-of-pocket expenses:

Mileage

The plaintiff has not provided any basis for his calculation of \$500. He has not detailed the distance he traveled to and from appointments. Moreover, as the plaintiff was attending treatments prior to the accident, the plaintiff would have incurred some of this cost in the absence of the accident.

Parking Re. Appointments with Dr. Gittens, Dr. Saujpal, Dr. Andreou, and Dr. Adrian

The defendant submits that the costs associated with attending appointments with Dr. Gittens, Dr. Saujpal, and Dr. Adrian were costs that the plaintiff would have incurred in the absence of the accident.

The appointment with Dr. Anderou, urologist, was for treatment of pre-existing erectile dysfunction.

Impact Power Washing

The plaintiff's health was deteriorating prior to the accident, including his low back. The plaintiff would have likely incurred the cost of cleaning and sealing his drive way in the absence of the accident. The plaintiff also testified that he had installed a new driveway since the accident and did not know how to seal it. It is submitted therefore that he would have had to out source this task even if the accident had not occurred.

Workplace Resource Custom Office Desk Chair

No medical evidence was provided to support the necessity of obtaining a custom office desk chair. No documentary evidence was indicated showing that the custom office desk chair was a medical recommendation. The plaintiff's evidence was that it was his decision to purchase the desk chair on a recommendation made to him by a friend.

SPARC BC - Disability Permit

The plaintiff has not proved that his current low back symptoms are causally related to the accident. The plaintiff may have incurred the expense of disability permit in the absence of the accident.

Sungod Physiotherapy

The plaintiff injured his right shoulder in 2012 while moving a mattress. Some of the physiotherapy sessions claimed were used to treat this unrelated shoulder injury.

Fitness World Gym Membership

The plaintiff was a member of a gym on and off prior to the accident. The plaintiff had retained personal trainers prior to the accident. The plaintiff would have likely incurred this expense in the absence of the accident.

K.L. Elliott - Painting Exterior of the House

The plaintiff testified that he would at times touch up the exterior of the house on weekends. He has never painted the entire exterior of the house. The project took 18 hours to complete. It would not be economical for the plaintiff to have completed the work himself. The plaintiff would have likely retained someone in the absence of the accident to paint the entire exterior of the house.

The Painter - Interior House Painting

The plaintiff's son testified that the plaintiff did not paint the inside of the house prior to the accident. The plaintiff's wife testified that the plaintiff would at times assist her with interior painting but she did the majority of it. She stated that the last time they painted the interior of the house was 12 to 15 years ago and that it was not something they did on a regular basis. In fact, the plaintiff's son testified that his uncle owned a painting company and would have been retained to do the work as needed. The project took 30 hours to complete. It would have been more economical for the plaintiff to retain someone rather than do it himself.

MRI

No medical evidence was provided to support the necessity of obtaining a private MRI scan in 2010 and again in 2012. No documentary evidence was indicated showing that the private MRI scans were medical recommendations. The plaintiff's evidence was that it was his decision to receive a private MRI so that he did not have to wait.

Car Washes

The plaintiff would have likely incurred the expense of washing his vehicle in the absence of the accident. Although he testified that he would have done so, it is unreasonable that the plaintiff would have washed his car in the winter months prior to the accident.

[104] I agree with the defendant's submission concerning mileage, the attendance at urologist Dr. Anderou, the power washing, the painting of the interior and exterior of his home, and the car washing claims. In the result, I award \$14,744.97 under this head of damages.

Loss of Future Earnings

[105] Mr. Yannacopoulos seeks an award of \$850,000 which is roughly the mid-point between retirement at age 65 and at age 70 in the more conservative of the assumptions relied upon in Mr. Turnbull's quantification. Mr. Turnbull had prepared projections of future lost earnings based upon projected growth in the business. He projected two scenarios for the future growth of business absent the Accident based upon a 9.4% increase in sales to August 31, 2014 and based upon a 9.4% and 4.7% increase to August 31, 2014, and contrasted those with the projections based upon post-Accident performance.

[106] Counsel submits that the severe and disabling back pain has clearly rendered Mr. Yannacopoulos less capable of earning income and less marketable. He has lost the ability to take advantage of all opportunities and is less valuable to himself as a person, thus meeting all four of the criteria in *Brown v. Golaiy* (1985), [1997] 26 B.C.L.R. (3d) 353 (S.C.).

- [107] The position of the defendant is that Mr. Yannacopoulos' physical functioning at work and work capacity have not been affected by the Accident to such an extent that future income losses are likely to occur. Counsel notes that his duties as an accountant are sedentary. Mr. Yannacopoulos testified that his post-Accident work life is relatively unchanged. His back pain is relieved by sitting and he is able to work a full day taking breaks as needed to stretch.
- [108] I agree with the submission of the defendant that Mr. Yannacopoulos' physical functioning and work capacity have not been affected by the Accident to such an extent that future income loss is likely, with one qualification. The Accident has accelerated the progress of the pre-existing degenerative condition. In the result I find that there is a realistic possibility that as a result of the cumulative effect of his chronic pain Mr. Yannacopoulos will retire sooner than he would have chosen to do absent the Accident.
- [109] Mr. Yannacopoulos testified that he loved his work and wanted to continue as long as possible. It was his evidence that before the Accident there were no limitations on his ability to do so. He stated that since the Accident he has concluded that he will likely retire earlier than he would have preferred.
- [110] As noted earlier, I have concluded that significant degenerative change was present in Mr. Yannacopoulos' original position. I think that it is probable that the pre-existing degenerative changes would have resulted in Mr. Yannacopoulos choosing to retire earlier than would have been his choice absent chronic back problems. However as noted, I have concluded that the Accident will likely have an effect in the future in accelerating this progress.
- [111] The assessment of damages is a matter of judgment based upon the evidence, not a mathematical calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. The approach to be taken by the court was described as follows in that judgment by Huddart J.A, for the court, at para. 11:
- [11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware*, *supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.
- [112] As Mr. Justice Abrioux noted in *Karim v. Li*, 2015 BCSC 498 at paras. 148-150, there are two approaches to the valuation, the earning approach and the capital asset approach:

- [148] There are two possible approaches to assessing loss of future earning capacity: (i) the earning approach (Pallos), or (ii) the capital asset approach (Brown). Both approaches are correct and their appropriateness in the circumstances depends on whether the loss can be quantified in a measurable way: *Perren v. Lalari*, 2010 BCCA 140.
- [149] The earnings approach involves a form of math-oriented methodology such as (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value, or (ii) awarding the plaintiff's entire annual income for a year or two: *Pallos* at 271; *Gilbert* at para. 233.
- [150] The capital asset approach is employed when future loss cannot be measured in a pecuniary way.
- [113] I have concluded that the present case does not lend itself to the earning approach. Mr. Turnbull's projections for the future are an extension of the approach he adopted with respect to past loss of income. I have concluded that this approach is flawed for the reasons I discussed in the section dealing with past loss.
- [114] The difference between Mr. Yannacopoulos' original position and his likely future post-Accident is an acceleration of retirement at some point in the future that cannot at present be ascertained or estimated with any precision. In all the circumstances, I award \$50,000 with respect to loss of future earnings.

Cost of Future Care

- [115] The plaintiff seeks an award of \$11,386 to cover the following future care costs:

Radiofrequency Ablation

\$912.50

Recommended by Dr Vondette.

Assumes 50% chance that Mr. Yannacopoulos will resort to this treatment, and 50% chance he will utilize private option for first year of treatment (thereafter, assume all treatment covered by public scheme).

Physiotherapy, Kinesiology, and Gym pass (one time cost):

\$1,755

Recommended by Dr Vondette (page 8 of March 2, 2015 report).

Counselling

\$2,000

(assuming 10-15 sessions).

Recommended by Dr Vondette (page 9 of report)

Acetaminophen (annual)

\$4,034

Recommended by Dr Vondette (page 8)

Bidet toilet seat

\$2,386

Bidet installation

\$299

Recommended by Dr Vondette (page 8)

Total:

\$11,386

[116] The position of the defendant is that any award for future care should be modest. In particular, the defendant submitted:

Radiofrequency Ablation

The plaintiff has indicated that he has no plans to pursue this treatment in the near future as he has been informed that his chances of it being successful is 50/50. He testified that he may elect to pursue the treatment if the severity of his pain increases. Since the plaintiff has not even decided if he will undergo the treatment, he is capable of waiting for it to be performed publically at no charge to the plaintiff.

Physiotherapy/Exercise Program

The plaintiff attended physiotherapy and a gym prior to the accident. He would have likely continued to do so, and so would have incurred these costs without the accident. In addition, the plaintiff is currently attending an exercise program for the purposes of losing weight and maintaining good health and fitness as he did prior to the accident. This has nothing to do with the motor vehicle accident.

The plaintiff has indicated that he did not experience any relief with physiotherapy in the past.

Counselling

Future care costs for psychological support should not be allowed, as there was no foundation supporting it in evidence. The court was not provided with a psychological opinion.

Bidet Toilet Seat

The plaintiff has no plans to install a bidet toilet seat.

Pain Medication

The plaintiff is not currently using any pain medication. He also testified that he did take Tylenol on occasion before the accident.

[117] I agree with the defendant's submissions with the exception of the cost for counselling which is supported by Dr. Vondette and which Mr. Yannacopoulos has undertaken. I award \$2,000 for the cost of future care.

Loss of Future Homemaking Capacity

[118] Mr. Yannacopoulos seeks an award in the amount of \$60,091 in relation to this head of damages based upon the following:

Homemaking assistance. 2 hours monthly (to age 80)

\$11,979

Hedge trimming. \$500 every 1 - 2 years (to age 70)

\$4,864

Power washing. \$682.50 annual expense (to age 70)

\$8,748

Gutter cleaning. \$150 annual expense (to age 70)

\$1,730

Car washes. Annual cost \$296 to \$317 (to age 70)

\$3,929

Other maintenance/yard work. 5 hours per month (to age 70)

\$28,841

Total:

\$60,091

[119] Counsel submits that the need for home and yard maintenance assistance is supported by Dr. Vondette. Counsel cites Reynolds v. M. Sanghera & Sons Trucking Ltd., 2014 BCSC 212; and Bruno, in support of an award under this head.

[120] The position of the defendant is that an award in the order of \$2,000 to cover occasional assistance for heavier jobs is the most which can be justified under this head. Counsel notes that Mr. Yannacopoulos' contribution to homemaking prior to the Accident was limited to occasional vacuuming and assistance with meal preparation. In addition, the plaintiff's age, obesity, and pre-existing degenerative conditions make it likely that he would require assistance with heavier household tasks absent the Accident.

[121] I am satisfied that as a result of the Accident, Mr. Yannacopoulos has suffered a loss in his capacity to perform household tasks. However, I agree with the submission of the defendant that given Mr. Yannacopoulos' other physical challenges, he would require such assistance going forward in any event. The effect of the Accident was to accelerate his need for such assistance. In the circumstances, I have concluded that an award of the magnitude proposed by Mr. Yannacopoulos is not supported by the evidence. In addition, as the majority emphasized in *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178 (C.A.) at para. 29, leave to appeal ref'd [1995] S.C.C.A. No. 263, a cautionary approach is to be taken with respect to such awards. In all the circumstances, I award \$10,000 with respect to this head of damages.

Summary

[122] In summary, I award the plaintiff the following:

Non-pecuniary loss

\$60,000.00

Loss of past income

\$0

Special damages

\$14,744.97

Loss of future earnings

\$50,000.00

Cost of future care

\$2,000.00

Loss of future homemaking capacity

\$10,000.00

Total

\$136,744.97

[123] Absent any circumstances of which I am unaware, the plaintiff is entitled to the costs of this action.

"Ross J."

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