

**[C Pataria v. Bertrand, \[2012\] B.C.J. No. 1298](#)**

British Columbia and Yukon Judgments

British Columbia Supreme Court  
New Westminster, British Columbia

J.D. Truscott J.

Heard: January 30, 31, February 2 and 3, 2012.

Judgment: June 25, 2012.

Docket: M116788

Registry: New Westminster

**[2012] B.C.J. No. 1298** | 2012 BCSC 934

Between Manjot Pataria also known as Joti Pataria and Rajdeep Singh Pataria by his Litigation Guardian Sukhwinder Kaur Pataria, Plaintiffs, and Raymond Bertrand, Harkamal Pataria and Sukhjot Kaur Pataria, Defendants

(224 paras.)

### **Case Summary**

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**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Fibromyalgia or chronic pain — Considerations impacting on award — Age of claimant — Action for damages for personal injuries sustained in 2007 motor vehicle accident allowed in part — 17-year-old plaintiff sustained soft tissue injuries to neck and back and his ongoing expressions of pain had psychological component — Plaintiff was still able to swim, workout and play sports — \$40,000 general damages — Plaintiff awarded \$2,500 for past income loss from summer job — Future income loss highly speculative but back injury was capital loss — \$75,000 awarded for future income loss — Plaintiff teenage boy living with parents so \$5,000 for minimal loss of housekeeping ability — \$2,312 special damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Extent of incapacity — Loss of earning capacity — Children — Loss of housekeeping ability — Special damages — Past loss of income — Employment income — Expenses and expenditures — Medical — Medications — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Affecting recreational activities — Action for damages for personal injuries sustained in 2007**

**motor vehicle accident allowed in part — 17-year-old plaintiff sustained soft tissue injuries to neck and back and his ongoing expressions of pain had psychological component — Plaintiff was still able to swim, workout and play sports — \$40,000 general damages — Plaintiff awarded \$2,500 for past income loss from summer job — Future income loss highly speculative but back injury was capital loss — \$75,000 awarded for future income loss — Plaintiff teenage boy living with parents so \$5,000 for minimal loss of housekeeping ability — \$2,312 special damages.**

Action for damages for personal injuries sustained in a 2007 motor vehicle accident. The plaintiff was, at the time, a 12-year-old passenger in vehicle struck by the defendant when he attempted to change lanes. The plaintiff testified he had back, neck and shoulder pain and headaches and difficulty sleeping so missed school as a result. The plaintiff claimed his athletic abilities had deteriorated, he lost money when unable to maintain full-time hours at a summer job at a lumber yard and had no idea what work he would be suited for in the future, given his inability to perform heavy lifting. The now 17-year-old plaintiff sought \$140,000 non-pecuniary damages, \$5,760 past income loss, \$187,447 future loss of earnings, \$55,000 loss of housekeeping ability and special damages. The defendant argued the plaintiff's complaints were exaggerated.

HELD: Action allowed in part.

The medical evidence established the plaintiff sustained soft tissue injuries to his neck and back and had post-traumatic stress disorder symptoms initially that quickly resolved. The plaintiff was not an injured as he claimed as he was able to swim, workout and play sports regularly and reported symptoms only once or twice per week. The motor vehicle accident was accepted as the cause of the disc protrusion, given the plaintiff's young age and the timing of his complaints. There was, however, no evidence of nerve root impairment. The plaintiff's generalized pain complaints had a psychological component that required treatment. The plaintiff was awarded \$40,000 general damages. The plaintiff was working for a family friend at the lumber yard and, as a 15-year-old, likely had little opportunity to work elsewhere. The plaintiff was awarded \$2,500 past income loss. Given the plaintiff's age, future loss of earnings damages were highly speculative. The plaintiff's academic ability and family work history made it unlikely he would have gone to university regardless of the accident, but there was no reason he could still not pursue a trade not requiring heavy lifting. The plaintiff's back injury and inability to lift heavy was a capital asset loss. However, assessment was difficult given the plaintiff had not obtained a surgeon's opinion and attended counselling as recommended. The plaintiff was awarded \$75,000 loss of earnings. While the plaintiff had helped his mother with chores in the past, he was a teenage boy living at home and there was no evidence what additional chores his mother now had to do. The plaintiff was awarded \$5,000 for loss of housekeeping ability. The plaintiff was awarded \$2,312 special damages for physiotherapy, prescriptions and job

development.

## Counsel

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Counsel for the Plaintiffs: D.I. Wilkinson, K.R. Mohan.

Counsel for the Defendant, Raymond Bertrand: K. Armstrong.

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## Reasons for Judgment

**J.D. TRUSCOTT J.**

- 1** The plaintiff Rajdeep Singh Pataria by his litigation guardian claims against the defendant Raymond Bertrand for personal injuries and other losses he alleges he sustained in a motor vehicle collision that occurred on February 9, 2007 in the City of Surrey, Province of British Columbia.
- 2** The claims of the plaintiff Manjot Pataria have been settled before trial and the defendant Bertrand has admitted liability for the motor vehicle accident. The claims against the defendants Pataria have therefore been discontinued.
- 3** What remains is an assessment of damage claim by the plaintiff against the defendant Bertrand.
- 4** The accident happened when the motor vehicle in which the plaintiff was a back seat passenger was struck from the left side by the Bertrand vehicle as it attempted to change lanes into the lane occupied by the plaintiff's vehicle.
- 5** The accident happened at or near the intersection of King George Highway and 64th Avenue as both vehicles were proceeding west on 64th Avenue.
- 6** At the time the plaintiff was 12 years of age and 17 years of age at the time of trial.
- 7** The plaintiff was seated in the right rear passenger seat and says he was pushed against the right passenger door and hit his face on something in the vehicle that gave him a bleeding nose.
- 8** He was taken to Surrey Memorial Hospital where x-rays were taken that were negative and then he was sent home.

**9** When he awoke at home the next day he says his back, neck and shoulders were sore and he had a headache.

**10** For the first two weeks after the accident he missed school while his back and neck pain and headaches continued. He says he also had problems sleeping.

**11** The evidence is that the plaintiff was quite a good soccer player at a young age and prior to the accident was playing soccer in three different leagues, one of those being an inter-provincial league.

**12** The coach of one of his teams had a connection with the Vancouver Whitecaps organization and at age 10 he and two other players were chosen to play on a Whitecaps prospect team. He only played on this team for a while before he returned to a team in the inter-provincial league in 2006.

**13** He was player of the year in one of his leagues and brought home a lot of trophies during his pre-accident soccer career.

**14** He also played other sports such as ice hockey and ball hockey, basketball and volleyball in school.

**15** Since the accident he says his abilities as a soccer player and in the other sports have fallen off because of his ongoing injuries.

**16** He continued to play soccer after the accident but not in the inter-provincial league and did not play full games because of his injuries. He also continued his other school sports but again not at the same level nor at the same pace.

**17** In March and April 2007 he attended 11 sessions of physiotherapy but cancelled four sessions and had one no-show. No explanations are given by him for these absences.

**18** In his examination for discovery on July 22, 2010 he was asked whether he had played any organized volleyball since the accident and he said he had not because of his symptoms. He was also asked if he had played any basketball and he said he shot the basketball around once in a while but not on any teams.

**19** He agreed at trial that this was not truthful evidence on his part as he continued to play both these sports at school.

**20** He says his back, neck and headaches have continued since the accident and he can't sit in class for more than 20 minutes before he gets a headache and can't concentrate.

**21** At his examination for discovery on July 22, 2010 he said he was only feeling back symptoms once or twice a week.

**22** He says he wakes up three or four times a night with back and neck pain and headaches and can't get back to sleep. He wakes up tired in the morning and misses classes. In grade 12 he missed approximately 63 classes because of lack of sleep.

**23** At home he avoids housework that he says he used to do because of his pain and headaches. He says he used to make his bed, wash dishes, vacuum and cut the grass, but can no longer do any of these tasks.

**24** He avoids any activity that requires him to reach over his head or bend down and he says he can only drive for about 20 minutes before his back starts to act up.

**25** To ease his pain he swims and stretches and uses heat pads but only takes Advil now as medication.

**26** Presently he says he swims twice a week although he says his back is affected after one lap. He also works out at the gymnasium twice a week.

**27** He has taken about 20 sessions of physiotherapy recently although relief only lasts until the next day. This physiotherapy was not recommended by any physician.

**28** In high school in 2008 he started working at his uncle's lumber mill as a summer job. He says he only went there a couple of times a week for four to five hours while his uncle taught him the job.

**29** In 2009 he attended the lumber mill full-time in the summer, six days a week, but says he only worked in the office four to five hours a day making \$12 per hour.

**30** He says he was supposed to work eight to ten hours a day but couldn't handle anything more than the four or five hours. He avoided any heavy lifting.

**31** No income information is produced for this lumber mill job.

**32** In 2010 and 2011 he did not return to the lumber mill because he says his back pain was too much and it wasn't worth it to go there for only four to five hours a day.

**33** He says that in grade 10 he knew he wanted to be a heavy duty mechanic in the trucking industry where his father and uncle work.

**34** In October 2010 he went to work at a diesel repair shop for two weeks as part of a work placement program through his school. On the second day he found he couldn't reach up or bend down as required and he decided he couldn't be a heavy duty mechanic as it required too much agility around the trucks and was too hard on his back.

**35** In November and December 2010 he spent two weeks working for the company Sportschek as a retail assistant on the floor. He says he didn't have much trouble doing this except he was on his feet all the time which put a strain on his back.

**36** In early 2011 he took a one-week course in becoming a trucking dispatch specialist and received a certification for that on February 25, 2011. He says he did well in that position as he was tops in his class but says he has no interest in becoming a dispatcher. He only took the course to get some knowledge of the trucking industry.

**37** He has no plans after grade 12 as he says he has no idea what he is suited for. He has no plans for post-secondary education.

**38** In his examination for discovery he said he had a GPA of 3.5 or something in 2011, but he agrees that this evidence is not true.

**39** The plaintiff's mother works as a baggage handler at the airport. She confirms the plaintiff's physical condition after the motor vehicle accident and his problems sleeping.

**40** She confirms that he used to help her a lot with the dishes and the laundry.

**41** She says he even now has difficulty sitting on the floor of their temple for any length of time and has trouble sitting while driving.

**42** She says it was she and her husband who forced the plaintiff to take the dispatching test.

**43** The plaintiff's sister Manjot, who was in the motor vehicle accident as well, is four and one-half years older than the plaintiff. She works in her uncle's business where she does secretarial work and helps the accountant.

**44** She and the plaintiff still live in the family house. She says prior to the accident the plaintiff was passionate about all sports but mostly soccer and he had above-average skill and lots of speed so he was playing at the highest level for his age. To her he made it look easy.

**45** After the accident she watched his school soccer where he had less endurance and less speed and although he did his best he was not a natural any longer.

**46** Ashley Gill is a family friend and is one year older than the plaintiff. She has known him for six years or so and saw him play basketball before and after the motor vehicle accident. Prior to the accident he had lots of stamina but he lost that stamina after the accident. She was his manager in grade 8 and had to pull him off the floor when she saw pain on his face.

**47** She gives the same evidence about the change in his soccer ability before and after the accident.

**48** Raja Tut is a cousin of the plaintiff and runs the lumber mill as a family business where the logs are planed to make cedar fence panels.

**49** He confirms that in 2008 the plaintiff came to work for him casually for \$8 cash per hour.

**50** In 2009 he hired the plaintiff on the payroll and the plaintiff worked for him for the summer.

**51** He was aware that the plaintiff had back problems so he started him on fairly easy jobs. He moved him around to fence panels where the plaintiff had to lift them eight feet high and he did that for about a week or so. He kept moving him around to different jobs and finally into the office to answer phones and take orders.

**52** He says that the plaintiff was to work 7:00 a.m. to 5:00 p.m. but sometimes he only worked four to six hours a day and some days he was so sore in the morning he didn't come into work until noon. The plaintiff made \$12 per hour and about \$4,500 for the summer.

**53** He says the plaintiff always tried hard but didn't have the endurance. Because he was family Mr. Tut was lenient with him but realized he could only do that for a time.

**54** In 2010 he did not re-hire the plaintiff as he couldn't get enough production out of him.

**55** He says if the plaintiff had not been injured he would be happy to hire him for \$12 per hour.

**Dr. Low**

**56** The plaintiff's doctor is Dr. Low who has been his doctor since 2005. When Dr. Low saw the plaintiff for the first time after the accident he found the plaintiff had only 50% of normal neck movement, 50% of normal right and left shoulder range of movement, and only 30% of normal range of movement of upper and lower back with pain.

**57** The plaintiff was advised to do stretches and stay active with moving and walking.

**58** By March 1, 2007 Dr. Low reported that the plaintiff's shoulder pain was better with almost full range of motion in both shoulders and his neck and back had 50-60% of normal range of motion. The plaintiff was referred for physiotherapy at that time.

**59** By the time of Dr. Low's visit on May 19, 2007 he was concerned the plaintiff's progress was too slow as he appeared to be afraid to push himself because of pain.

**60** When the plaintiff was seen in August 2007 Dr. Low determined that his neck and back had almost full range of motion but he appeared stiff with movement.

**61** In September 2007 the plaintiff returned complaining of neck and back pain but on examination showed normal range of motion in his neck back and shoulders.

**62** The plaintiff's range of motion in his back varied thereafter, often being down to 50% again. Dr. Low continued to encourage the plaintiff to increase his activity and do lots of stretches.

**63** In his final diagnosis following his last examination on September 17, 2010 Dr. Low said he felt the main therapy for the plaintiff's recovery was to continue

activity and stretches but he will likely have recurrent neck and lower back pain on and off for a few more years, based on his slow recovery to that point in time and he may require further physiotherapy and medication if he has any exacerbation of his pain.

**64** The plaintiff was referred by Dr. Low to Dr. Jaworski, a physical medicine and rehabilitation specialist, who saw him on four occasions commencing May 1, 2008 when the plaintiff was in grade 8. He saw the plaintiff thereafter in June 2008, August 2008 and November 2008.

### **Dr. Jaworski**

**65** Dr. Jaworski found some mild restriction of movement in the back and on palpation mild diffuse tenderness over the plaintiff's low back, and his impression on the first visit was of non-specific musculoskeletal aches and pains.

**66** He recommended that the plaintiff do pool exercises three times a week and one hour of brisk walking on the other days of the week.

**67** When the plaintiff returned to see Dr. Jaworski on June 18, 2008 he said he had a good day being essentially pain-free and his sleep was okay. He was swimming twice a week and doing brisk walks as recommended.

**68** When he returned again on August 20, 2008 he was complaining of some neck and low back pain off and on.

**69** Dr. Jaworski says that on a physical examination that day there were some Waddell signs evident that he became concerned about.

**70** He explains that Waddell signs are behavioural expressions of pain, non-organic signs signifying a psychological component.

**71** He explains that there are five categories of Waddell signs being tenderness tests, simulation tests, distraction tests, regional disturbances and over-reaction.

**72** He says that customarily there should be three or more positive Waddell tests before a behavioural component is signified. It is not necessarily a derogatory term as it could amount to fabrication or it could amount to considerable psychological stress.

**73** He didn't record how many positive tests he observed as he says it wasn't important to him.

**74** He says that in every case of chronic pain there is always a psychological component.

**75** However he didn't consider the plaintiff was affected to any significant degree warranting any psychological assistance as he was still physically active and the pain problem did not appear to be intruding into his life to any significant degree.

**76** The plaintiff was then referred by his counsel to Dr. Purtzki, another physical medicine rehabilitation consultant who saw the plaintiff in September 2010 and issued a first report on September 27, 2010.

### **Dr. Purtzki**

**77** Dr. Purtzki found on examination a normal range of motion of the neck with significant tenderness diffusely over the soft tissues of the muscles in the lower back and mid back. The plaintiff had significantly decreased range of motion in the lumbar spine especially in flexion but also in extension and he had a localized area of tenderness at the L5/S1 disc space interval. This was tender to pressure and he had increased pain in this area with hyperextension.

**78** He also had evidence of allodynia, experiencing generally non-painful stimuli as painful over his back.

**79** Dr. Purtzki's diagnosis was of chronic soft tissue pain and dysfunction with evidence of allodynia and hyperalgesia (excessive sensitivity or sensibility to pain). She said that the plaintiff seemed to experience non-painful stimuli as painful and mildly painful stimuli as more painful, as a generalization to the area of pain. She said this is commonly seen with ongoing chronic pain complaints where there is generalization of an initially more focal point of pain.

**80** She had not seen any MRI results at that point in time and only offered the opinion that he might suffer from a disc bulge in the L5/S1 area and she recommended an MRI to look for an L5/S1 disc bulge.

**81** She considered the neck pain to be preliminarily related to diffuse soft tissue injury and whiplash injury.

**82** She considered that he initially had suffered from symptoms of post-traumatic stress with difficulty falling asleep and hypervigilance and fear of driving, although these symptoms had all resolved.

**83** Her treatment recommendation was to treat for diffuse mid and lower back pain and hyperalgesia. She didn't consider physical activation to be the issue because he seemed to be very physically fit and active and she thought that the prominent pain complaint needed to be addressed both from a central as well as from a peripheral aspect.

**84** She also thought that the plaintiff would benefit from targeted stretching and core exercises and that it was important to look at desensitization strategies as well.

**85** In terms of his neck pain she considered that localized facet joint injections with lidocaine and possibly steroids could be helpful for chronic cervicogenic pain. She thought a referral to a physiatrist might be helpful for such injections.

**86** She thought that his headaches were also likely cervicogenic in origin and might improve with treatment of the neck.

**87** She said that he may require vocational counselling on completion of grade 12 as she was personally somewhat doubtful that he would be able to pursue a career as a heavy duty mechanic in the event his symptoms did not improve.

**88** Finally she recommended a referral to the Complex Pain Clinic at BC Children's Hospital or the Chronic Pain Clinic at St. Paul's Hospital if his pain complaints remained unabated and she said exploration of psychological factors contributing to pain was advisable.

**89** Her prognosis at that time was that the plaintiff might have long-standing pain complaints which may not resolve completely and while due to his young age the prognosis for physical recovery is usually excellent, other factors such as an underlying diagnosis of psychological factors needed to be addressed.

**90** The plaintiff had an MRI done of his low back area on April 27, 2011. This revealed a slight disc bulging at L3/4, a mild disc bulge and disc desiccation at L4/5 and a disc protrusion at L5/S1.

**91** The author of the MRI interpreted the results as being a disc desiccation and slight loss in disc height at L4/5 with mild broad-based posterior disc bulging with mild bilateral lateral recess encroachment, and focal midline L5/S1 disc protrusion with associated disc desiccation and loss in disc height. No convincing evidence of traversing or exiting nerve root impingement was present at this level.

**92** In a subsequent report of July 8, 2011 she reviewed the report of the MRI and said the question regarding the causal relationship between the motor vehicle accident, the lower back pain and the disc bulge comes down to probabilities.

**93** She had not found the L4/5 disc to be tender on her examination but she did find the L5/S1 level, where the disc protrusion or herniation was, to be painful on her examination.

**94** She reviewed literature on the incidence of lumbar disc disease in adolescents and concluded that it is much less common in that group and the natural history and causes seem different.

**95** Adolescents are less likely to present with neurological deficits. They mostly present with lower back pain.

**96** She concluded that the plaintiff's onset of low back pain had a definite temporal relationship to the motor vehicle accident and she expressed the opinion that it is more likely than not that the accident is the cause of the disc protrusion which is most symptomatic at L5/S1.

**97** In addition she said the plaintiff has signs of generalized pain and excessive sensitivity to pain which may be related to the chronicity of the back pain but is now an additional impairment that requires treatment.

**98** She recommended a course of core stability exercises which may improve the plaintiff's back pain but she didn't think a lack of exercise is the core issue because it would not likely have made a difference in her view.

**99** She recommended that his generalized pain and sensitivity to pain be treated with medication and cognitive behavioural therapy.

**100** Her prognosis was that the plaintiff will continue to suffer from back pain without any intervention such as micro-invasive therapy or steroid injection. She thought a surgical opinion from a spine surgeon may be helpful and she strongly recommended obtaining this opinion.

**101** She considered the plaintiff at risk for deterioration with neurological symptoms which may then force a discectomy and she expressed concern that the plaintiff will have further herniation of the disc at L4/5 and L5/S1 with heavy lifting. She thought a lighter trade job such as an electrician would not be completely out of the question for him.

**102** At the same time she said that he may experience gradual improvement of pain in the next few years.

**103** She reviewed the reports of Dr. Jaworski and his reference to Waddell signs. She considers that Waddell signs are often misinterpreted and are not indicative by themselves of malingering or secondary gain attempts.

**104** She does not consider the secondary gain issue to be relevant to the plaintiff's complaints but she also says that a psychiatrist is the only one who can diagnose malingering or secondary gain.

**105** She points out that Dr. Waddell published an article in which it was stated that "behavioural signs may be learned responses to pain that have developed since the original injury and of which the patient is largely unaware".

**106** In a follow-up report of December 22, 2011, she reviewed the September 26, 2011 report of Dr. Sovio, orthopaedic surgeon, who examined the plaintiff for the defence on September 20, 2011.

### **Dr. Sovio**

**107** Dr. Sovio examined the plaintiff when the plaintiff was 17 years of age and in grade 12.

**108** The plaintiff told Dr. Sovio he did not have any headaches. He said his neck has discomfort when his back hurts. He complained of low back pain. He said his range of motion was fine but he had discomfort within that range of motion.

**109** He told Dr. Sovio he has continued to play soccer at school with practises and games once a week. He told Dr. Sovio he could only play for perhaps 15 or 20 minutes before having to take a rest.

**110** He also said he went swimming once a week and lifted weights in the gymnasium two or three times a week.

**111** Dr. Sovio's physical examination revealed a healthy looking well muscled young man.

**112** The range of motion of the neck in flexion, extension, side bending and rotation was normal but Dr. Sovio found it interesting that the plaintiff complained of pain in his low back with flexion and extension and side bending of the neck.

**113** The plaintiff complained of discomfort in the lumbar region on palpation and had difficulties with pain in all lumbar movements. Dr. Sovio could not find any physical reason for the plaintiff's back pain. To him the complaints did not fit the picture of any physical injury. He concluded that the plaintiff was functioning at a very good level and there were no significant ongoing problems apart from ongoing subjective symptoms which to him appeared to be exaggerated and appeared to be difficult to quantify.

**114** He didn't consider the plaintiff limited in his physical ability to function and he thought on a physical basis the plaintiff could become a heavy duty mechanic if he wishes.

**115** In his view paying attention from a physical standpoint to the plaintiff's problems serves only to escalate his subjective symptoms.

**116** He considered that the plaintiff needs attention from a psychological perspective which is outside his area of expertise.

**117** He also found positive Waddell signs and said in the face of these signs and what appeared to be exaggeration of symptomatology, functional capacity evaluations are meaningless.

**118** He disagreed with Dr. Purtzki that the plaintiff has physical injuries and needs ongoing medication, injections and other modalities of treatment.

**119** He didn't consider the MRI results to be of any significance as he considered some disc bulging to be a typical finding and noted the plaintiff did not have any nerve root tension signs.

**120** In her review of this report of Dr. Sovio, Dr. Purtzki observed that in her original report she noted the plaintiff had a feeling of normally not painful stimulus as painful and a perception of mild painful stimulus as being very painful.

**121** Although she noted similar issues during her examination as did Dr. Sovio in terms of the plaintiff's interpretation of sensation as being painful, she viewed these findings as part of a chronic pain disorder that needs to be addressed with treatment, but did not view it as malingering.

**122** The plaintiff's reaction to one of the Waddell tests she considered to be an expression of a chronic pain disorder which includes fear of movement, fear of pain and misinterpretation of signals in the body as painful.

**123** She pointed out that Dr. Waddell says that the finding of non-organic behavioural signs does not preclude the existence of organic pathology and she was of the view the plaintiff has a pain generator related to the lumbar spine in addition to the generalized chronic pain.

### **Mr. Padvaiskas**

**124** Mr. Padvaiskas is an occupational therapist who did a work capacity evaluation of the plaintiff on February 14, 2011. He put the plaintiff through work capacity testing and concluded that the plaintiff showed a high level of effort within his pain tolerance.

**125** He found restrictions of movement in bending, stooping, kneeling, pushing and pulling and in heavier strength demands.

**126** He concluded that the plaintiff does not demonstrate suitability for playing competitive soccer in relation to the body movement/body position demands of that sport and does not demonstrate the minimum physical ability to perform work as a heavy duty mechanic.

**127** In his opinion the plaintiff is best suited to jobs that allow a lot of standing and walking and optimal ergonomic sitting positions.

**128** He also found positive Waddell signs on the non-organic testing where there should not have been a pain response in his opinion.

**129** The plaintiff told him that he had stopped all school-related sports after the motor vehicle accident and Mr. Padvaiskas agrees at trial that if he had known that the plaintiff had continued school sports it could potentially have affected his opinion.

### **Mr. Lesmeister**

**130** Mr. Lesmeister has a Masters degree in Counselling Psychology and has worked as a vocational rehabilitation consultant since 2009.

**131** He does not do functional testing but has accepted existing opinions on the plaintiff's functional abilities. However he does do academic aptitude and interest testing.

**132** He assessed the plaintiff on February 16, 2011 and he concluded that the plaintiff's vocational testing scores indicate he is not a candidate for formal academic retraining programs of two years or longer, and may be better suited

to skill-based short-term training or hands-on learning environments that would be physically appropriate with his physical limitations.

**133** Based on the medical information he reviewed, he says the plaintiff's musculoskeletal injuries have impacted his residual physical functioning which has affected the suitability to perform occupations consisting of greater than medium strength demands.

**134** Based on information he received that the plaintiff's parents work in semi-skilled occupations he considers it fair to assume that but for the accident the plaintiff could have likely pursued an employment path requiring at least semi-skilled requirements of short-term training of up to two years.

**135** Given the number and range of the plaintiff's residual limitations he considers it fair to assume the plaintiff has experienced a significant narrowing of possible vocational options and his impairments are expected to last long-term which will affect his level of employability over the course of his life.

**136** His work capacity evaluation findings indicate the plaintiff does not demonstrate suitability for playing soccer at any competent level.

**137** Without any skill upgrading he considers that the plaintiff is quite limited in the type of employments available to him such as cashier, gas station attendant, and other positions typically paying minimum wages and offering only part-time hours.

**138** He did not specifically consider the position of dispatcher where the strength requirement is limited.

**139** He agrees that his testing is not an exhaustive test and he says dispatching would be acceptable for the plaintiff.

**140** He says that based on the medical information reviewed it appears the plaintiff will be best suited to working in lighter strength positions. Examples he gives are sales jobs and select office work although he points out that the plaintiff scored low in numerical and verbal aptitude as well as reading comprehension which are key skill areas for these occupations.

**141** He concludes by recommending that the plaintiff work with a professional to explore job training options for him and he says those vocational supports are available for purchase and typically cost \$100 per hour with approximately 20-30 hours of service being appropriate for the plaintiff.

**142** He also says the plaintiff may need job search services to access particular jobs and they typically charge \$70 per hour for an average of 30 hours.

### **Mr. Benning**

**143** Mr. Benning is the president of PETA Consultants Ltd., a firm of consulting economists. PETA Consultants was retained by plaintiff's counsel to prepare a report on future loss of employment income applicable to the plaintiff based on two assumptions, being:

1. absent the motor vehicle accident and subject to contingencies described, the plaintiff would have otherwise enjoyed employment earnings commensurate with those experienced by the average BC male with a trade certificate or diploma, through to assumed retirement no later than age 65 years; and
2. as a result of the motor vehicle accident the plaintiff will now realize employment earnings commensurate with those experienced by the average BC male with a complete high school education, through to assumed retirement no later than age 65 years.

**144** In comparing assumption 1 to assumption 2 he concludes that the plaintiff's future loss of employment income would be in the order of \$257,793.

**145** He also did a comparison with a modification to assumption 2 that the plaintiff will now realize employment earnings commensurate with those experienced by the average BC male with a complete post-secondary non-union training of less than one year.

**146** In comparing assumption 1 absent the motor vehicle accident to this assumption 3 he concludes the plaintiff's loss of employment income would be in the order of \$181,447.

### **Submissions**

#### **Plaintiff's Submissions**

**147** Plaintiff's counsel submits that, on the strength of the evidence from his witnesses, emphasizing the opinions of Dr. Purtzki and rejecting the opinions of Dr. Sovio, a finding should be made that the plaintiff suffers from a herniated disc in his low back at L5/S1 that causes low back pain, and in addition has a

generalized chronic pain disorder in his back and neck, all caused by the motor vehicle accident of February 9, 2007.

**148** A finding is sought that the plaintiff's pain and complaints will not resolve and he is at further risk of aggravating the herniated disc with any heavy lifting. He is no longer physically capable of being a heavy duty mechanic or doing other heavy duty work.

**149** He also cannot any longer play soccer at the former high level that he played at, denying him ongoing opportunities for soccer scholarships and travel for soccer purposes.

**150** Presently he is only able to work in light/medium strength employments which limits his opportunities and produces a loss of income-earning opportunity claim.

**151** General damages of \$140,000 for pain and suffering are sought relying on the decision in *X. v. Y.*, [2011 BCSC 944](#).

**152** Past loss of earning capacity is also sought in the amount of \$5,760, reflecting his inability to work at the lumber mill in 2010 and 2011 when Mr. Tut's evidence was that he would have hired the plaintiff at \$12 per hour.

**153** A future loss of income-earning opportunity claim is made in the amount of \$181,447, based upon Mr. Benning's calculations on the basis of the loss of earnings approach, or alternatively, \$100,000, based on a loss of capital asset approach.

**154** A loss of future housekeeping capacity claim is made in the amount of \$55,000, based on the award in *McTavish v. MacGillivray*, [2000 BCCA 164](#), brought up to current value.

**155** Past special damages for physiotherapy treatments and prescription costs are agreed in the amount of \$212.80 and an additional claim is made for three hours of services estimated by Mr. Lesmeister in the future for job service assistance to the plaintiff.

### **Defendant's Submissions**

**156** Defendant's counsel submits the evidence of the plaintiff as to the extent of his injuries and their effect on him is exaggerated and his evidence is not to be accepted.

**157** It is submitted the fact that the plaintiff returned to his sports of soccer, hockey, basketball and volleyball after the accident, along with his regular swimming and lifting weights in the gym, all serve to demonstrate that he is not nearly as injured as his counsel claims.

**158** In addition it is submitted that the fact that he gave false evidence on his examination for discovery should also support the conclusion that his evidence should not be accepted.

**159** It is submitted that the fact that Dr. Jaworski and Dr. Sovio both noted Waddell signs in their examinations suggests the plaintiff's complaints of pain are products of his own efforts towards obtaining the secondary gain of a significant judgment in his claim.

**160** It is submitted that Dr. Sovio's opinion that the disc bulging is meaningless as a typical finding should be accepted over the opinions of Dr. Purtzki that the bulging is caused by the accident and will present problems for the plaintiff in the future.

**161** It is also submitted that Dr. Purtzki was an advocate for the plaintiff, being argumentative in cross-examination, and her opinion should not be accepted for that reason as well.

**162** It is submitted the plaintiff has also failed to mitigate his damages by not pursuing recommended treatment vigorously as Dr. Low prescribed to him.

**163** While it is conceded that the plaintiff suffered some soft tissue injury in the accident, it is submitted that the injury was mild and only a modest award for non-pecuniary damages of \$25,000-\$30,000 is justified, reduced further by 20% to allow for the failure to mitigate.

**164** For past wage loss it is submitted that the evidence does not support any award as there is no evidence of any effort by the plaintiff to work in the years 2010-2011 at the lumber mill or anywhere else.

**165** It is submitted that there should be no award for future loss of income-earning opportunity either on the basis that the plaintiff can still become a heavy-duty mechanic which only requires light strength, or a trucking dispatcher that he excelled at when he took the course.

**166** It is submitted that there is no evidence that the accident has impaired the plaintiff's ability to obtain a trade certificate or diploma following high school.

**167** It is submitted there should be no award for loss of housekeeping capacity when there is no evidence the plaintiff is unable to perform housekeeping work and housekeeping work can't be any heavier than the medium-strength work that the plaintiff is still capable of carrying out.

**168** The defence agrees with the claims for past physiotherapy costs and prescription costs but says there is no basis for any award for assistance in finding a job when other high school students who are not injured need the same assistance.

**169** His submission is that this is an expense that flows from being a high school student in today's world and not from any injuries in the accident.

### **Analysis and Decision**

#### **Non-Pecuniary Damages**

**170** In my view the assessment of the plaintiff's non-pecuniary damages for pain and suffering depends to a large extent on a determination of whether the opinion of Dr. Purtzki is to be preferred that the disc bulge at L4/5 and disc protrusion at L5/S1 are likely caused by the motor vehicle accident, or whether the opinion of Dr. Sovio is to be preferred that the MRI results are not of any significance as some disc bulging is a typical finding.

**171** I accept that the plaintiff sustained soft tissue injuries to his neck and back area, with accompanying headaches, in the motor vehicle accident. I also accept that initially he had symptoms of post-traumatic stress, difficulty falling asleep and hypervigilance, although those problems quickly resolved.

**172** I conclude however that physically the plaintiff is not as injured as counsel makes out. He is able to swim regularly and work out with weights in the gym.

**173** After the accident he was able to return to his sports of soccer, basketball and volleyball, albeit not at the same level of performance.

**174** At his examination for discovery on July 22, 2010 he said he was only feeling back symptoms once or twice a week.

**175** It is also a fact that initially he did not accept the recommendations of Dr. Low that he work harder at recovery although he has improved his effort as time has gone on.

**176** I accept the opinions of Dr. Purtzki that the plaintiff has evidence of allodynia and hyperalgesia and seems to experience non-painful stimuli as painful and mildly painful stimuli as more painful, as a generalization to the area of pain. This is commonly seen with ongoing chronic pain complaints. At the same time she says he may experience gradual improvement of pain in the next few years.

**177** I also accept her opinion that it is more likely than not that the motor vehicle accident is the cause of the disc protrusion which is most symptomatic at L5/S1. Her analysis of the medical literature indicates that in a young man such as the plaintiff disc herniation is much less likely to occur without trauma and the plaintiff's low back complaints here arose following the motor vehicle accident.

**178** I do observe however that there is no nerve root impingement as Dr. Sovio points out.

**179** Dr. Purtzki says that she would be quite conservative in her recommendation for surgery until the general pain component has been addressed and she suggests a surgical opinion from a spine surgeon may be helpful while saying she strongly recommends this therapeutic opinion.

**180** To my knowledge this referral has never taken place so it is unknown whether any kind of surgery would be beneficial to the plaintiff's back pain.

**181** She recommends in her report of September 27, 2010 that exploration of psychological factors contributing to pain is advisable.

**182** In her report of July 8, 2011 she says that the plaintiff's signs of generalized pain and hyperalgesia require treatment with medication and cognitive behavioural therapy and she says that his signs of generalized pain and hyperalgesia may be related to the chronicity of back pain and is now an additional impairment that requires treatment.

**183** I acknowledge the observation of the personal trainer Mr. Jones that the plaintiff was verbally reporting pain even before contact was made during his assessment.

**184** No medical evidence was presented at trial of any psychological treatment having been given to the plaintiff and what the results might be for his generalized pain and hyperalgesia.

**185** I acknowledge the findings of Dr. Jaworski and Dr. Sovio of Waddell signs present on examination of the plaintiff although I conclude as did Dr. Jaworski that these are behavioural expressions of pain, non-organic signs signifying a psychological complaint and are not signs of malingering.

**186** All of this confirms to me that the plaintiff is in need of psychological assessment and treatment.

**187** I accept that with the plaintiff's disc herniation he cannot do any heavy lifting but as I understand the report of Dr. Purtzki if he does not do any heavy lifting, her concern about further herniation of the disc will abate.

**188** I have reviewed the cases supplied to me by both parties.

**189** I agree with defence counsel that the injuries the plaintiff sustained in the case of *X. v. Y.* bear no resemblance to the injuries sustained by the plaintiff in this case.

**190** I consider the defendant's cases to be more helpful than the plaintiff's cases, although still somewhat on the low side.

**191** I consider an appropriate figure for general damages for this plaintiff, in the absence of any evidence from a spine surgeon and any prognosis for the psychological problems, to be \$40,000.

#### **Past Loss of Earning Capacity**

**192** This claim was made on the basis that the plaintiff could have returned to work at the lumber mill in 2010 and 2011 at \$12 per hour, if he had not been injured. That is the evidence of Mr. Tut who also says that the plaintiff made approximately \$44,500 for the summer of 2009.

**193** The plaintiff was only 15 years old in 2010 and I expect that he may not have had much of a chance of finding a job elsewhere than in the family business. At the same time there is no evidence he made any effort to find another job.

**194** I am prepared to accept this claim in the amount of \$2,500 on the basis that his injuries would have reduced his chances of obtaining employment to a certain extent.

#### **Future Loss of Income-Earning Capacity**

**195** The plaintiff was only 12 at the time of this accident and absent the accident his future income potential at that time must be considered as highly speculative.

**196** Unrelated to the accident the "experts" appear to believe that the plaintiff does not have the academic abilities to go on to a post-secondary university education.

**197** While I question how that can be determined before there is any effort made to obtain it or even apply for it, I do accept it unlikely with the plaintiff's family background of work, that he would have gone on to seek a post-secondary university education regardless of the motor vehicle accident.

**198** I do not see any reason, however, even now why he cannot obtain a trade certificate in some trade that does not involve heavy lifting that would probably pay him as much as he would make in a job requiring heavy lifting.

**199** I do not consider it appropriate in the circumstances to assess his loss on the basis of a loss of an income stream.

**200** I view it as more appropriate to assess his loss on the basis of his loss of capital asset, that being his loss of the ability to engage in occupations that require a strong back.

**201** Even an assessment of his loss of capital asset is somewhat speculative bearing in mind my conclusion that it is presently uncertain how long the plaintiff's back will continue to bother him if he gets the surgical opinion and psychological assistance that he needs.

**202** In *McFadyen (Guardian Ad Litem of) v. Dean*, [\[2006\] B.C.J. No. 1164](#), [2006 BCSC 779](#), Cullen J. (as he then was) ordered damages for personal injury of a 13-year-old sustained in a motor vehicle accident in 1999.

**203** The plaintiff suffered pain to his right hip and pelvis, his upper, middle and lower back, and to his neck. The accident left him with residual injuries involving pain to his neck, mid back and more significantly his low back from which he felt daily pain.

**204** The plaintiff was an average student who worked hard but was very athletic, mainly playing soccer but also basketball, baseball, volleyball and bike-riding. He played soccer at the gold level, the highest competitive level for his age group at the time of the accident.

**205** The plaintiff had an ongoing chronic pain condition in his back from the accident for which there had been no substantial improvement in the previous four or five years and the Court accepted that his condition could be expected to continue.

**206** The Court also found that the accident had diminished the plaintiff's opportunities for employment and occupations involving the medium and heavy strength categories.

**207** In considering the future loss of income-earning opportunity claim, the Court said that it was a case in which the plaintiff was involved in the accident long before he could be expected to have established a career path and it was therefore difficult to assess with any measure of certainty what, in the absence of the accident, he would have taken up as a vocation.

**208** The plaintiff advanced the proposition he would likely have followed in his father's footsteps and entered a trade such as a fabricator or a plumber with a certain income stream reduced by negative contingencies.

**209** The Court accepted that the plaintiff had a capacity to earn income impaired by the accident in occupations in heavy and medium categories that have been foreclosed or limited to him and that represented an impairment of his earning capacity.

**210** The Court cited *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393, where the Court quoted with approval from *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, where the following considerations were taken into account:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

**211** *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 was also referred to where Madam Justice Southin said words to the effect that even for a plaintiff who

apparently is able to earn as much as he could have earned if not injured a loss of opportunity has to be compensated for because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not impair his income-earning ability.

**212** Applying those principles the Court in *McFadyen* said the quantum of the plaintiff's entitlement was not ascertainable by reference to specific occupations but whatever course of training, study or apprenticeship the plaintiff chooses to pursue will be conditioned by his physical limitations and his ability to compete for jobs in the occupation of his choice will be impaired by the effects of the accident.

**213** It was said that the fact the plaintiff was limited in certain physical activities and suffered from chronic pain would likely have an ongoing long-term effect on his ability to earn income, whatever its source.

**214** He was awarded \$100,000 to reflect the diminution in his capacity to earn income over the course of his working life and to assist him in receiving training in areas that would be less affected by his physical limitations.

**215** Taking into account that it has been recommended that the plaintiff obtain a surgeon's opinion and take psychological counselling, and that he has not done that to date, and therefore no prognosis can be given as to what results those would bring about in terms of his back condition, I assess his loss of future income-earning capacity at \$75,000.

### **Loss of Housekeeping Capacity**

**216** The plaintiff gave some limited evidence of his inability to do housekeeping work and his mother said that he used to help her a lot with the dishes and the laundry.

**217** Plaintiff's counsel seeks an award in the order of \$55,000, relying upon the case of *McTavish v. MacGillivray*.

**218** The distinction in this case from other cases considering the loss of housekeeping capacity is that this case concerned a teenage boy who lives at home with his parents. It does not concern someone who has primary responsibilities at home to do certain housekeeping duties that have to be taken up by other members of the family or done by outside help.

**219** It is simply a situation where the plaintiff carried out some housekeeping duties in assisting his mother but there is little evidence of how much he did or, put another way, how much his mother or anyone else in the family had to do to make up for housework the plaintiff did not do.

**220** As a consequence, it becomes difficult to assess the value of this claim and any award must be very modest.

**221** In the circumstances I award \$5,000 for this claim.

### **Special Damages**

**222** Special Damages will be awarded in the amount of \$2,312.84. This includes the physiotherapy fees and the prescription costs as well as the 30 hours of services recommended for a job developer.

**223** The difference between the plaintiff and any other high school student coming out of grade 12 is that the plaintiff is physically impaired to a certain extent in seeking employment and considering his present limitations physically it would be of assistance for him to have someone search out appropriate employment for him to consider.

**224** This being an assessment of damages, the plaintiff will have his costs throughout.

J.D. TRUSCOTT J.