Bhullar v. Logan

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

K.W. Ball J.

Heard: April 12-16, 2021.

Judgment: June 3, 2021.

Docket: M214997

Registry: New Westminster

[2021] B.C.J. No. 1217 | 2021 BCSC 1060

Sukhcharan Singh Bhullar, Plaintiff, and Cody Shawn Whitecap Logan and Kirsten Amber Sahlstrom, Defendants

(95 paras.)

Counsel

Counsel for the Plaintiff: B. Mohan, G.S. Kang .

Counsel for the Defendants: S. Grewal.

Reasons for Judgment

K.W. BALL J.

Introduction

1 These are reasons for judgment in a motor vehicle accident case in which the plaintiff seeks damages, including: general damages; damages for past wage loss; damages for loss of future earning capacity; damages for loss of housekeeping capacity; and special damages.

The Accident

2 The accident, which is the subject of this case, occurred at approximately 9:00 pm on August 14, 2017, on the eastbound lanes of Highway 1, slightly west of the Mt. Lehman interchange, near Abbotsford, B.C. The plaintiff was employed as a long-haul flat-deck truck owner-operator and had recently returned from a long-haul trip. After returning his flat-deck truck and cab to a storage yard and picking up his personal vehicle, a Toyota Corolla SUV (the "Toyota"), he began heading for his home in Abbotsford. The evidence before the Court was that he entered Highway 1 at the 264th Avenue interchange and drove continuously from that location to the scene of the accident at a speed of 90 to 100 km/h. The plaintiff testified that the left rear quarter panel of his vehicle was struck at high speed with significant force by a Jeep Grand Cherokee (the "Jeep"), the vehicle then driven by the defendant, Cody Shawn Whitecap Logan.

3 Because of the force of the collision, the Toyota rolled over several times and ended up in a roadside ditch. Despite significant damage to the Jeep, the defendant continued driving for some distance along the highway. Good Samaritans assisted the plaintiff out of his overturned vehicle, where he laid on the highway awaiting attendance by emergency health services. A bystander provided a blanket to cover the plaintiff. The plaintiff was in intense pain from broken ribs, a broken wrist, and a torso injury caused by the force of the accident exerted on his seatbelt.

4 The plaintiff was transported by ambulance to the Abbotsford Regional Hospital, where records indicate he was examined by trauma staff and was found on radiological examination to have: a fractured ulnar styloid in his right wrist; multiple bilateral fractured ribs; fractured ribs on the right side at numbers 1, 5, 6, 7 and 8; and fractured ribs on the left side at numbers 2, 3, and 4. As a result of the rib fractures, the plaintiff had intense pain when coughing, sneezing, or with thoracic movement. He was given Naproxen to reduce the effect of pain, but was shortly thereafter given a prescription for Gabapentin because of the significance of the pain in his ribs. The plaintiff's right wrist was placed into a splint.

5 When his situation was reviewed by the emergency health unit, the splint was removed and there was noted swelling at the right ulnar styloid (wrist). The plaintiff was encouraged to continue to exercise the wrist to maintain range of motion.

6 Both vehicles involved in this accident were written off.

Pre-accident Physical Condition

7 Prior to the accident, the plaintiff was a strong, 41-year-old, long-haul truck driver who drove his truck around North America for approximately 70 hours-a-week and 23 to 24 days per month. He had no physical issues. He was diagnosed earlier with high blood pressure and diabetes, but neither of these conditions contributed to the sequalae of the accident. Dr. Lail, the plaintiff's long-time family doctor, confirmed the pre-accident good health of the plaintiff.

8 For reasons which are not clear, the defence brought to the Court's attention the fact that, pre-accident, the plaintiff had diabetes and high blood pressure. At the same time, the defence provided no reason nor explanation for attention to those conditions. Clearly, those conditions had nothing to do with the injuries suffered by the plaintiff which give rise to the damages in this case.

9 Truck driving included mandatory brake and tire checks before each use of the truck and trailer. These checks were conducted by Mr. Bhullar crawling under the axels of the truck and using a heavy hammer to check tire pressures.

10 The plaintiff was considered by a friend, also a long-haul flat-deck driver, as a very hard worker who cheerfully assisted other drivers with the placing of tarps and hold down of chains and straps.

11 Mr. Bhullar performed household duties, including buying groceries, cleaning bathrooms, vacuuming, and preparing vegetables for cooking, among other activities. Mr. Bhullar was not involved in sporting activities *per se*, but spent time playing with his son and going for walks with his family.

12 He and his wife had a happy marriage, with an active social life that included a wide circle of friends who met regularly for meals and social interaction.

Causation

13 The defendants denied liability for the accident, but also did not call any evidence relating to liability or causation.

14 The plaintiff called evidence from an independent civilian witness, Colton Baker, who observed the defendant's vehicle driving at a high speed towards his own vehicle from the rear. He observed the defendant's vehicle, at a speed which he estimated was over 130 km per hour, and which was frequently changing lanes in a dangerous manner. Mr. Baker was so concerned with the driving of the defendant, Mr. Logan, that he changed lanes from the centre lane to the curb lane. Mr. Baker attempted to keep pace with the vehicle driven by Mr. Logan, but was unable to do so due to its speed. Prior to reaching the scene of the accident, Mr. Logan observed several vehicles in the lane ahead of him, which included Mr. Bhullar's vehicle. Mr. Baker saw the defendant's vehicle suddenly change lanes toward the curb lane and then observed a cloud of dust resulting from the collision between the defendant's vehicle and the plaintiff's vehicle. Mr. Logan stopped his vehicle near the accident scene and rendered what assistance he could. He noted the highway was fully closed because of the accident, with persons stopping to render assistance and later because of the attendance of emergency personnel and vehicles.

15 Mr. Colton was not subjected to any cross-examination by defence counsel.

16 The plaintiff also called Cst. Halliday, a long-serving member of the Chilliwack RCMP, who described his investigation of the accident scene to which he was dispatched shortly after its occurrence. He reported on the seriousness of the accident and that Highway 1 was closed for several hours. Cst. Halliday conducted interviews with a number of witnesses at the scene and read reports from other police officers whom he ordered to conduct interviews or investigations at the accident scene. This Court appreciates that information received by Cst. Halliday was, in whole or in part, hearsay or double hearsay, but that information was also consistent with the physical evidence presented at the scene of the accident.

17 As a result of information received by Cst. Halliday, under his authority as a peace officer, he issued a series of violation tickets to Mr. Logan under the provisions of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MVA*], including alleged violations of s. 144(1)(a) [driving without due care and attention]; s. 148(1) [driving at a speed which exceeds the posted speed limit by more than 40 km/h]; and s. 158(2)(a) [unsafe passing]. Cst. Halliday testified that, to his knowledge, none of the alleged violations in those tickets were disputed.

18 The Court is reluctant to rely on an opinion provided by Cst. Halliday, not as a result of any disrespect to Cst. Halliday, but because he was not called by the plaintiff as an expert witness. No objection to the proffered opinion of Cst. Halliday was made by defence counsel.

19 Again, no questions were put to Cst. Halliday in cross-examination.

20 With respect to the violation tickets, Mr. Logan, during his examination for discovery which took place on March 15, 2021, and which was read into the record in this trial, stated that he did not dispute the tickets and did not pay the fines attached to the violation tickets. Under the provisions of the *MVA*, violation tickets which are not disputed within 30 days are deemed to be admitted by the recipient.

21 The evidence given by Mr. Baker, the admissions made by Mr. Logan during his examination for discovery and by his failure to dispute the violation tickets written by Cst. Halliday, taken together with the undisputed evidence of the plaintiff as to the occurrence of the accident, amount to overwhelming evidence that the defendants were completely responsible and liable for the accident. The defendants are therefore 100% liable for the damages which flow from injuries suffered by the plaintiff in this excessive-speed, high-impact, rollover accident.

The Chronology of Medical Treatment of the Plaintiff

22 Mr. Bhullar, as noted above, experienced immediate pain and described himself as "screaming" because of the pain in his chest, ribs, and wrist. On August 17, 2017, the plaintiff re-attended the Abbotsford Regional Hospital emergency facility and was noted to have seatbelt bruising on his chest, scattered abrasions on his legs, and significant pain in his right wrist. He

also noted pain on his sternum, as well as pain and swelling of his right wrist. On that date, a half-cast was reapplied to his right wrist. The plaintiff was given morphine for pain, as well as a referral to the trauma clinic. A report of medical imaging of his right wrist included the following findings: "acute minimally displaced transverse ulnar styloid fracture is observed in the ulnar styloid base with a 1 mm fracture distraction. Proximal and distal radial ulnar joints appear congruent. No other acute fracture is identified. Well corticated remote triquetral fracture is observed." The record continued that a "dedicated wrist radiograph should be performed on follow-up".

23 On August 28, 2017, Mr. Bhullar attended the Abbotsford Regional Hospital where a CT scan of his chest showed multiple bilateral rib fractures, including fractures on the right side of his ribs at numbers 1, 5, 6, 7, and 8 and on the left side at numbers 2, 3, and 4. At that time, a fracture of the sternum was not detected. He complained of significant bilateral anterior chest pain exacerbated by cough, sneezing, or thoracic motion. The splint on his wrist was removed and swelling was noted around the distal ulna. He was encouraged to begin exercising the wrist.

24 The plaintiff continued during the remainder of 2017 to experience: pain in his sternum and chest wall; considerable right wrist pain; lower back pain; headaches; and reduced or interrupted sleep. Records filed demonstrated he had eight or nine appointments with Dr. Lail, in which there were continued references to tenderness and pain on palpation of the right wrist, swelling in the hand, and pain and palpation over the sternum, ribs, and the front of the chest. Attempts at flexion and extension of the lower back produced pain. Dr. Lail recommended the plaintiff start physiotherapy.

25 Results of a subsequent X-ray of the right forearm on September 26, 2017 caused Dr. Lail to refer Mr. Bhullar to an orthopedic surgeon, Dr. S. Patel, who evaluated Mr. Bhullar on September 28, 2017. Dr. Patel recommended that Mr. Bhullar should be fitted with a removable forearm splint. Due to persistent wrist pain, a further X-ray was conducted on November 2, 2017. That X-ray displayed a result believed to be a partial union of the wrist fracture. A further CT scan was ordered and completed on November 24, 2017 at the Abbotsford Regional Hospital, which revealed non-united fractures of the remote ulnar styloid tip and remote dorsal triquetral. It was Dr. Patel's opinion, at the time, that surgery was not required.

26 Due to continued chest pain on multiple days, Mr. Bhullar attended at the Abbotsford Regional Hospital where he was diagnosed with costochondritis of his chest. Costochondritis is an inflammation of the cartilage that connects a rib to the breastbone (sternum). Dr. Lail prescribed an X-ray of the sternum of the plaintiff, the results of which were reportedly consistent with a non-displaced fracture.

27 Throughout 2018, Mr. Bhullar continued to see Dr. Lail, complaining on a regular basis of ongoing pain in the chest wall, sternum, ribs, right wrist, and low back. Headaches and sleep disturbance were also a frequent complaint during this period. During the same timeframe, the

plaintiff experienced various radiological examinations, including: a radioisotope [a bone scan]; multiple X-rays of the chest, sternum, and ribs; and a CT scan and MRI of the chest wall on September 21, 2018 at the Surrey MRI Clinic. The Surrey MRI report confirms focal costochondritis in the left fourth costal cartilage which "could produce prolonged symptoms".

28 The plaintiff attempted to return to work in November 2018, but his pain symptoms were aggravated, so he took further time off until February 2019. At an appointment on March 12, 2019 with Dr. Lail, Mr. Bhullar reported he found the pain was stressful. Dr. Lail diagnosed the plaintiff with anxiety and prescribed Cymbalta.

29 Treatment for Mr. Bhullar included 20 sessions of physiotherapy which commenced on October 9, 2017, and stopped after an appointment on December 7, 2017. An active rehabilitation program of 15 therapy sessions followed at the Apollo Clinic for the period from December 22, 2017, up to and including March 12, 2018. Active rehabilitation continued at the Infinity Health Clinic under the supervision of Steven Ahujla, a kinesiologist, with 55 therapeutic sessions from April 2018 to April 2019. This active rehabilitation program was accompanied by massage therapy treatments at Apex Physiotherapy from January 2019 to June 2019.

30 By the fall of 2019, Mr. Bhullar was experiencing considerable ongoing pain in his wrist, ribs, and lower back. Pain from the lower back was also radiating down into his right leg. At the end of 2019, Dr. Lail diagnosed the source of the lower back pain being experienced by Mr. Bhullar as a disc protrusion or herniation at L5-S1, which "minimally contacts the right descending S1 nerve root" with "right greater than left bilateral foramen narrowing". This diagnosis was based on a medical imaging report dated September 2, 2020, received by Dr. Lail from the Fraser Health Authority.

31 On the same date, a medical imaging report of the plaintiff's right wrist confirmed a chronic high-grade triquetrum tear. In clinical notes dated December 3, 2020, directed to Dr. Patel regarding the plaintiff, Dr. Perey, a specialist in orthopaedic trauma and upper extremity reconstruction, confirmed a complex tear of the triangular fibrocartilage ("TFCC") on the ulnar side of the right wrist of the plaintiff, and recommended a wrist arthroscopy along with a likely ulnar shortening osteotomy. The doctor noted that if the unstable TFCC tear was confirmed, then a concomitant repair of the fibrocartilage would be performed which would require immobilization of the plaintiff's forearm for approximately six weeks after surgery. The plaintiff was awaiting this investigation and surgery at the time of trial.

Credibility and Reliability of the Plaintiff

32 As is generally the case in personal injury actions, the most important witness is the plaintiff. Once an assessment of credibility and reliability of the plaintiff's evidence is made, the court, in most cases, is in a position to determine causation, often with the assistance of opinion evidence from qualified medical experts.

33 A plaintiff who accurately describes symptoms and circumstances before and after a motor vehicle or other accident, without minimizing or embellishing those symptoms or circumstances, can reasonably anticipate that the court will find their evidence to be credible and reliable.

34 Counsel for the defendants did not contest the credibility of the plaintiff, nor "the pain Mr. Bhullar says he is in today or how his physical condition has deteriorated since the Accident". The defendants agree that Mr. Bhullar is entitled to reasonable compensation for the damages he has experienced.

35 As noted in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna]* at para. 11, the test of the truth of the testimony of a witness is whether that testimony is in harmony with the preponderance of the probabilities which a practical and informed person would recognize as reasonable in that place and in those conditions.

36 In *R. v. H.C.*, 2009 ONCA 56, Watt J.A. addressed the distinction between credibility and reliability with the following statement:

> [41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
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> i. observe;
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> ii. recall; and
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> iii. recount
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> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at 526 (C.A.).

37 The Honourable Madam Justice Dillon described a useful process for credibility assessments in the well-known decision of *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the

> ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*,[1952] B.C.J. No. 152 (B.C.C.A.) [*Farnya*]; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

38 In several cases, including *Ahmadi v. West*, 2014 BCSC 2050, the Court has embraced the comments of Dillon J., particularly when assessing credibility and the impact of medical evidence where a plaintiff's testimony is rejected by the trier of fact.

39 In *Pacheco v. Antunovich*, 2015 BCCA 100, the Court of Appeal overturned a trial judge's conclusions on a plaintiff's credibility. The Court focused on the comments in *Faryna* to better inform itself on how to deal with the credibility and reliability questions. The Court said:

> [42] However, this passage must be viewed in the context of the balance of that decision, in which O'Halloran J.A. went on to eloquently explain the factors to be considered in such an assessment:
>
> > [11] ... Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
> >
> > [12] The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.
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> ...The House, Lord Atkin presiding, came to that conclusion because it was satisfied that the evidence of the witnesses disbelieved by the trial Judge was entirely

> consistent with the probabilities and the business conditions proved to be in existence at the time.

> [16] Commenting on the *Unilever* case in *Yuill v. Yuill*, Lord Greene said that it showed how important it is that a trial Judge's impressions on the subject of demeanor should be carefully checked by a critical examination of the whole of the evidence, and added that, if the trial Judge in the *Unilever* case had done so, as was done in the House of Lords, then he could not have disbelieved the witnesses as he did.

[Emphasis added.]

40 The defence highlighted several aspects of the plaintiff's evidence that they submit are "several possible discrepancies in the evidence that should be noted". For example, the plaintiff told Dr. Lail that he was discussing aspects of his recovery with his lawyer. One wonders how discussions between the plaintiff and his lawyer, on any subject within the ambit of this litigation, could properly become the subject of inquiries by the defendants without a breach of the doctrine of solicitor and client privilege: *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at p. 875; and *Zein v. Canada*, [1990] B.C.J. No. 2843 (S.C.).

41 Next, the defendants raised the topic of whether the plaintiff had been diagnosed with depression. It was clear on the evidence that the plaintiff was diagnosed on more than one occasion with anxiety or depression concerning his ability to work or earn a sufficient income to support his family in the future. This submission of the defendants was based on a failure to properly analyze the statements of Drs. Lail and Nagaria. The submission is without merit.

42 A further submission of the defendants was that the Court should take into account that the plaintiff paid a 10% commission or fee to an agent company, Moh Trucking Ltd., for securing loads to be transported by the plaintiff. The defendants' submission was that the plaintiff's wife, operating her own company, was being paid the same rate of 10% when securing loads to be transported by the plaintiff. The foregoing facts do not give rise to any circumstance which would adversely affect the credibility or reliability of the plaintiff. The plaintiff's wife provided a valuable service to the plaintiff by obtaining "no touch loads" for which the plaintiff was paid to transport at a time when he was suffering from an incompletely diagnosed TFCC wrist injury, which prevented him from loading and unloading trucks as he had done before the accident. The wife was entitled to be paid for the services she provided, at a rate which began at 8% and increased to 10%. The latter was a rate charged by Moh Trucking Ltd., in effect, a competitor of the wife's company.

43 The defendants also submitted that the loss of income when the plaintiff could not work between August 2017 and November 2018, testified to by the plaintiff and his wife, was somehow inconsistent with the plaintiff purchasing a Volvo truck and Dry Van the following year. The

evidence was that the plaintiff had previously driven a flat-deck truck which requires the driver to load and unload the flat-deck trailer using considerable strength. Following the accident, he could not perform that work. The purchase of a truck and a Dry Van allowed him to continue transporting "no touch loads" for income, albeit at a reduced income because the flat-deck loads are paid at a higher rate than the "no touch loads". The defendants' submission on this point actually supports the plaintiff's case and in no way damages the credibility or reliability of the evidence of the plaintiff.

44 The defendants submitted that the plaintiff ought to have made renovations or alterations to his home or truck due to the significant physical limitations that he suffered and the injuries to his right wrist, lower back, and chest. The defendants called no evidence from an expert witness, such as a functional capacity evaluator, concerning any renovations or alterations which might have addressed the injuries referred to above. Given that there was no evidence of any renovations, it follows that the plaintiff could not produce receipts for renovations or alterations to the home or truck of the plaintiff. This submission is completely without substance.

45 Finally, in the defendants' written submissions, there are comments made about the evidence of Ms. Bhullar concerning the loading or unloading of the plaintiff's Dry Van. The first point to note is that Ms. Bhullar testified that the purpose of the purchase of the Dry Van was to give the plaintiff the ability to transport "no-touch loads". The no-touch loads were necessary because the plaintiff, because of the accident and the injuries suffered thereafter, had no ability to load or unload heavy loads as he had done before the accident. The evidence of the wife concerning the change in the plaintiff's work activities was supported by all of the other evidence. Ms. Bhullar was not an expert witness, and as noted by Mr. Hasan Lakhani, the mathematics used by defence counsel as to the earnings of the plaintiff in the first part of 2017 do not properly account for annual expenses nor provide a basis for comparison of the plaintiff's income. These submissions again have no substance in relation to the claim of the plaintiff.

46 The Court approaches all evidence with care, but the suggestions made by the defence, as noted above, were unhelpful.

47 Based on the evidence which was presented at trial and the submissions of counsel, as well as the cases cited above, I am satisfied that the plaintiff and Ms. Bhullar were unsophisticated individuals who gave evidence in a forthright and clear manner. Both are considered, particularly in light of the lack of any evidence to the contrary, to be credible and reliable witnesses.

Expert Medical Evidence

Dr. Grover

48 Dr. Grover conducted two independent medical examinations of Mr. Bhullar on March 14, 2019 and September 23, 2020. Dr. Grover is qualified as a fully-certified specialist orthopaedic

surgeon, licensed to practice orthopaedic surgery in British Columbia. He began working as an orthopaedic surgeon in the United Kingdom in 1999 and in British Columbia in August 2007. Dr. Grover's credentials as an expert in orthopaedic medicine were conceded by the defence.

49 Dr. Grover's first report dated March 17, 2019, which was filed as Exhibit 4, noted that Mr. Bhullar had no previously-existing conditions or injuries which caused disability or pain. Dr. Grover also noted that, as a result of the accident, Mr. Bhullar suffered: multiple rib fractures in his left and right rib cage; a fracture of the sternum; post-traumatic osteochondritis which was revealed in a bone scan; a fractured right ulnar styloid; a tear in the TFCC of the right wrist, which was identified in a MR arthrogram of the right wrist; vertebral disc protrusion at the L5-S1 level with right S1 nerve root symptoms; myofascial injuries to the lower back with chronic lower back pain; healed abrasions, bruises and lacerations; and chronic pain syndrome.

50 In the second report of Dr. Grover, prepared September 26, 2020 and filed as Exhibit 5, recovery of Mr. Bhullar was incomplete but had come to a halt. Chronic pain experienced by Mr. Bhullar was likely permanent, as was his vocational disability which may end his career as a truck driver at an early date.

Dr. Mian

51 The plaintiff also called as an expert witness, Dr. Mian, who was qualified by the College of Physicians and Surgeons of British Columbia in the field of pain medicine, and as a physiatrist (physical medicine and rehabilitation) as of 2016. His qualifications were conceded by the defence.

52 Based on a document review and a personal examination of the plaintiff by Dr. Mian, he opined that Mr. Bhullar suffered the following injuries caused by the accident:

> Rib fractures at ribs 1,5,6,7 and 8 on the right side and left sided rib fractures at ribs 2, 3, and 4 with pressure allodynia suggestive of costochondritis secondary to chronic chest inflammation; Lumbar WAD-II injury with development of chronic mechanical lumbar pain; right leg tensor fasciae latae/iliotibial band syndrome and mysofascial pain syndrome; right wrist ulnar styloid fracture and high- grade triangular fibrocartilage complex (TFCC) tear; Chronic insomnia; and mood dysfunction which relates situational anxiety around driving and post-MVA feelings of nervousness, anxiety, worry and depression.

53 Dr. Mian prognosticated that Mr. Bhullar would suffer chronic pain for the remainder of his life. He also concluded that subsequent treatments, such as injections, would not remove the pain he experiences or change his vocational or functional status as a truck driver, which has been diminished in intensity and duration by the injuries and the painful sequalae leading to an early retirement.

Damages

Non-pecuniary Damages

54 Applying the factors referred to in *Stapley v. Hejslet*, 2006 BCCA 34, the plaintiff is 45 years old and has suffered a number of serious and life-altering injuries. Most significantly, he faces a serious TFCC injury to his right wrist, which will require surgery to alleviate pain. However, the surgery will result in a loss of range of motion, costochrondral pain, and pain in his rib, chest, and back radiating into his right leg. The plaintiff has also been treated for anxiety with a sad mood and prescribed medication for that condition. His family life and social life have been reduced by injuries, including a diminution of his relationship with his wife and son. He cannot participate in housekeeping, heavy household chores, or cleaning. He transports goods in his Dry Van with discomfort, and is no longer able to provide loading or unloading strength required for the flat-deck truck business.

55 The plaintiff has cited and relied upon the following cases in support of a claim for $225,000 for non-pecuniary damages: *Dikey v. Samieian*, 2008 BCSC 604; *Mossop v. Hogg*, 2019 BCSC 1552; *MacLeod v. Whittemore*, 2018 BCSC 1082; *Sandhu v. Peloquin*, 2019 BCSC 1333; *Gill v. Apeldoorn*, 2019 BCSC 798; and *Pololos v. Cinnamon-Lopez,* 2016 BCSC 81.

56 The plaintiff's counsel submits that Mr. Bhullar should receive a higher award than the cited cases above as the injuries suffered by Mr. Bhullar are more significant, complex, and of a longer duration than some of the cases cited. Each of the cases referred to above has been reviewed with care.

57 The defence advanced several cases in support of a submission that Mr. Bhullar should be awarded non-pecuniary damages in an amount between $90,000 and $100,000. The first case, *Ishii v. Wong*, 2015 BCSC 922 [*Ishii*], involves a claim for damages by the plaintiff in two separate motor vehicle accidents: one in 2010, a motor cycle/vehicle accident; and the second in 2012, where the plaintiff alleges that no physical injury occurred. The injuries claimed in the second accident were psychological injuries with rather unique circumstances involving the use of bear spray and the throwing of an axe by the defendant, which were said to be caused by the occurrence of a diagnosed vehicle passenger anxiety. The circumstances of the second accident are quite unique and certainly do not arise in the case at bar.

58 In the 2010 accident, Mr. Ishii presented a fracture in his right arm and left scaphoid bone, as well as a fracture in his right leg. In the reasons for judgment, the injuries were later referred to as to broken wrists and a broken right femur. Following surgical treatment, the plaintiff in that case was released from hospital approximately 10 days after the accident. He was released using a wheelchair and accommodations, and renovations were made to his mother's home to assist with the use of a wheelchair, including the installation of a ramp.

59 About one month later, with physiotherapy, including aqua therapy, his left wrist and right hamstring had healed. He graduated from a wheelchair to a walker and then to a cane. Internal hardware installed in his right wrist was removed in August 2011 to aid healing. Liability was found against the defendant in the first accident. In the second accident, the plaintiff and the second defendant were found equally liable.

60 Ultimately, an award for non-pecuniary damages was fixed at $150,000.

61 The *Ishii* case is distinguishable from the case at bar in a number of ways, including the nature of the injuries involved and the duration of healing periods.

62 The second case cited by the defendants is *Ackermann v. Pandher*, 2017 BCSC 880 [*Ackermann*], which involved the passenger in a motor vehicle colliding first with a semi-trailer truck and then with a rock wall. The principal injury was a perilunate dislocation of his wrist, a soft tissue injury which caused significant ligamentous disruption within the wrist.

63 An issue which required considerable court time in *Ackermann*, that the plaintiff was not wearing a seat belt, does not arise in the case at bar. As noted above, Mr. Bhullar sustained a recognizable and painful bruise on his torso from the seatbelt in his vehicle.

64 Another distinguishable feature in the *Ackermann* case is that the plaintiff suffered from a principal injury, described above, with the other less serious injuries healing within a month. The *Ackermann* case is therefore distinguishable because the injuries in that case are far less significant or fewer in number than those experienced by Mr. Bhullar. Mr. Bhullar's injuries included: a fracture in the right wrist; a TFCC injury in that same wrist causing extreme pain over a long duration since the accident, and was still unresolved at the time of trial; numerous broken ribs on both sides of his chest; and musculoskeletal lower back injuries which caused significant pain. The award for non-pecuniary damages in the *Ackermann* case, which had less serious injuries than the case at bar, was $90,000.

65 Based on the submissions of the parties and the case cited therein, together with my review of the evidence, I conclude that the award of non-pecuniary damages in this case is $197,000.

Past Loss of Income

66 Following the accident, Mr. Bhullar did not return to work for approximately 15.5 months. Further aggravation of symptoms resulted in additional time off of work until late December 2018.

67 The flat-deck truck had been parked for the entire period of time that the plaintiff was unable to work, and that equipment decayed somewhat during that period. As Mr. Bhullar was no longer

able to meet the physical demands of a flat-deck truck driver and because his flat-deck truck had suffered decay during the time he was off work, the plaintiff began working on Dry Van trailers. The only evidence produced was that driving Dry Van loads resulted in a 30 to 35% reduction in income when compared to flat-deck trucks. Flat-deck trucks are designed to take loads of equipment and materials and are required to be fastened to the flat-deck with chains, ropes and straps, and covered with tarps which can weigh as much as 50 pounds each. While loading a Dry Van trailer is less physically arduous and less time-consuming than loading a flat-deck trailer, the loading of a Dry Van trailer requires some physical effort in moving goods fixed to pallets or otherwise prepared for shipping into and out of the interior of a Dry Van. The plaintiff realized that in order for him to support his family and continue his business as a truck driver, he was obliged to move towards the transport of "no touch" loads which did not require any effort beyond driving the truck with its load.

68 The evidence presented by the plaintiff in support of a claim for past income loss was in the form of an expert report prepared by Mr. Hasan Lakhani. The defendants did not call any evidence from an expert to answer or to critically evaluate the report prepared by Mr. Lakhani. The report of Mr. Lakhani was filed as Exhibit 2 in these proceedings. Table 1 of the report had originally been presented for an earlier trial date, and a revision was prepared which indicated that the past income loss was $161,428, net of income taxes and EI premiums, but prior to accounting for the calculation of ordered interest.

69 Mr. Lakhani's report set forth an estimate of Mr. Bhullar's past income loss as the difference between what Mr. Bhullar would have earned had the accident not occurred, and what Mr. Bhullar did earn subsequent to the accident. Mr. Lakhani calculated Mr. Bhullar's 2014 to 2017 earnings, which he expressed in Table 2 in 2017 dollars, and adjusted the average weekly wage rate in 2017 dollars as well. Mr. Bhullar's income for the years 2017 to 2019 was derived from his income tax returns which were filed as exhibits. Mr. Lakhani removed the sum of $28,000 "recovery of lease expense" from Mr. Bhullar's 2019 gross income, as the amount of $28,000 was related to the sale of the flat-deck trailer in 2019, which was treated as a one-time gain not repeated in the subsequent year.

70 Past wage loss is the amount of income that the plaintiff would have earned during the time that he was unable to work following the accident up to a reference date: *Rowe v. Bobell Express Ltd.,* 2005 BCCA 141 at paras. 29-30. The reference date is fixed to allow calculations of past income loss and future loss of opportunity to earn income. When Mr. Lakhani prepared his first report, he arbitrarily choose a reference date because the trial date was yet to be scheduled. The second report of Mr. Lakhani fixed and explained the choice of a new reference date as the date of trial. When the new date was chosen, the past loss was calculated over a longer period of time and the future loss of opportunity to earn income would necessarily be calculated over a shorter period of time. The defendants submit that the adjustment of the reference date, which also resulted in a change in income multipliers, somehow caused Mr. Lakhani's reports to become "not properly reliable". This submission is completely without merit, and if Mr. Lakhani had not made the

adjustment to the reference date and corrected the underlying calculations of his opinion, the Court would have had to complete the same calculations making the same adjustments to calculate the past loss of opportunity.

71 Mr. Lakhani also demonstrated during cross-examination that calculations made by the defence, upon which Mr. Lakhani was asked to comment, were factually incorrect and mathematically unsound due to the deduction of post-accident expenses from pre-accident income. The defence submissions artificially reduced the plaintiff's income received from work done by the plaintiff prior to the accident in 2017.

72 Defence counsel also quarrelled with Mr. Lakhani over the treatment of variable and fixed expenses, and would simply not accept the sound explanations provided by Mr. Lakhani. I found Mr. Lakhani's approaches to the issues in his report sound and accept the same as reliable. Based on the second report of Mr. Lakhani, I award the plaintiff the sum of $158,018 under the heading of past loss of income.

Future Loss of Income Earning Capacity

73 With respect to the future loss of opportunity to earn income, the parties are in agreement that the plaintiff has met the threshold of a real and substantial possibility of a future event leading to an income loss: *Perren v. Lalari*, 2010 BCCA 140.

74 The plaintiff submits that the evidence clearly demonstrates Mr. Bhullar has lost and will continue to lose income due to injuries suffered in the accident, including the need for repair of the unresolved TFCC in his right wrist and his overall chronic pain.

75 After a review of authorities such as *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8 [*Golaiy]* and *Reilly v. Lynn*, 2003 BCCA 49 at para. 101, the plaintiff submits that the loss of future earning capacity should be assessed using the "earnings" approach because the plaintiff has a history of working and because of his inability to work as a flat-deck transport driver and other evidence of the likely reduction of his potential future as a truck driver.

76 The plaintiff submits the Court should grant an award of $750,000 under this head of damages.

77 The submission of the defendants was the award for loss of future income should be 1.5 to 2 times the plaintiff's 2017 income, which the defendants calculated as $74,306, or an award of damages between $101,459 and $148,612.

78 The defendants' submissions as to the quantum of impaired earning capacity appear to be based on the decision of *Golaiy*.

79 In *Golaiy*, the plaintiff experienced a fracture of the medial condoyle of the right knee, which injury developed into chondromalacia and crepitus in the knee joint with a loss of leg strength. The injury limited the plaintiff's ability to drive a truck and he changed careers from a truck driver to a car salesman. Vigorous physical sports, which the plaintiff in that case enjoyed, would cause knee pain, arthritis, and likely future surgery.

80 A number of quantum cases dating from 1984 and 1985 were considered by the trial judge, which varied in awards from $15,000-$40,000. The evidence at that trial was that the plaintiff's income as a truck driver was about $20,000 per annum.

81 It is difficult to determine whether the type of truck driving performed by Mr. Golaiy was similar or different from the flat-deck, long-haul trucking performed by Mr. Bhullar. Certainly, the quantum of income is substantially different and therefore the case is distinguishable. It is also distinguishable because Mr. Bhullar does not have a robust command of the English language and therefore his opportunities for employment are significantly different from those of Mr. Golaiy.

82 The late Mr. Justice Finch writing in *Golaiy* discussed four factors to consider in making the assessment of this type of loss of income. Those four factors are:

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.

83 Mr. Bhullar has demonstrated that he is less capable of earning income from employment as a flat-deck truck driver. He attempted to drive Dry Van trucks and found that the amount of physical prowess required to load and unload such trucks was beyond his ability. As such, "no touch" loads became his business.

84 He requires surgery at this time for a TFCC fracture of his right wrist, which will require some months of convalescence and will result, in all likelihood, in a reduced range of motion in his dominant right wrist, which will likely have a further detrimental effect on employment opportunities.

85 Mr. Bhullar, with a limited range of wrist motion and chronic pain in his back, is clearly less marketable or attractive as an employee to potential employers. He has very limited abilities to

choose other jobs, due to his lack of language skills and is clearly less valuable to himself as a person capable of earning income in a competitive labour market.

86 It must also be noted that, as described by Dr. Grover in his second medical legal report dated March 17, 2020, the plaintiff is unable, while working as a truck driver in any capacity, to take medication to alleviate the pain which he suffers as he must remain in an appropriate state of alertness to legally drive a vehicle. Dr. Mian opines that, given the development by the plaintiff of a "true chronic pain syndrome with a vicious cycle of sleep and mood dysfunction coexisting", the plaintiff will not be able to return to his pre-accident vocational activities. Dr. Mian agrees with Dr. Grover that the plaintiff's career is less durable and will likely be shortened because of the injuries leading to early retirement.

87 The report prepared by Mr. Lakhani, referred to above, does not appear to consider either positive or negative contingencies in the case at bar. There are perceived negative contingencies of a significant nature which are outlined above. The extent of which are partially unknown, but that extent will include a significant reduction in the use of the plaintiff's right wrist. Taking those considerations into account, I am satisfied that the award under this head of damages for loss of opportunity to earn income in the future should be $550,000.

Loss of Housekeeping Capacity

88 In *Moon v. Yaranon*, 2021 BCSC 818, Crerar J. states at paras. 67-68:

> [67] After an expansive review of the authorities, *Kim v Lin*, 2018 BCCA 77 concludes:
>
> > [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
> >
> > [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary

> damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.

[68] The injuries have not rendered the plaintiff incapable of doing housework, but have only rendered those activities more painful: just as she is able to work, albeit with adaptations and treatments, she is able to do housework. I reach the same conclusion on this head of damages as I recently reached in *Warnock v Weijdeman*, 2021 BCSC 553 at para 122:

> As set out above, it is more appropriate to consider and compensate the effects of the accidents on the plaintiff's housekeeping ability, under the heading of general or non-pecuniary damages. The accidents did not render the plaintiff incapable of doing housework: only more slowly and with adaptations. Her husband's additional housework is that which might be expected of a spouse in sickness and in health. The inclusion of this consideration has increased the non-pecuniary damages award above.

89 In light of the above, I am satisfied that the award for housekeeping capacity is included under the heading for non-pecuniary loss and therefore I make no additional award for loss of housekeeping capacity.

Costs of Future Care

90 A cost of future care award is intended to provide a plaintiff with medical care to ameliorate their health as a result of injuries: *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244. The claim must be medically justified and reasonable and the court must consider positive and negative contingencies: *Morlan v. Barrett*, 2012 BCCA 66 at para. 76; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 64-72. The standard of proof for an award of future care is the determination of the real and substantial future possibilities: *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 209.

91 With respect to costs of future care, it is clear the plaintiff has required and will continue to require physical treatment, including physiotherapy and massage therapy, required for his wrist and to improve the circumstances of pain in his chest and low back. The defendants' submissions did not reply to this claim. The plaintiff claims $25,000 under this heading and I am satisfied that is an appropriate award.

Special Damages

92 The plaintiff has claimed special damages totalling $4,250.35, which include:

a) treatments at Mount Lehman physiotherapy, which total $420;

b) treatments at the Apollo clinic, which total $340.03;

c) treatments at Apex physiotherapy, which total $243.40;

d) medical notes prepared by Dr. Harajit S. Lail, in the amount of $100;

e) parking at hospitals, in the amount of $6.50;

f) truck parking paid to Moh Trucking Limited, in the amount of $1,400;

g) prescriptions for Apo-diclofenac, Ketorolac and Cymbalta, which total $90.82;

h) medical supplies in the form of a wrist brace, totalling $55;

i) membership fee at Matsqui Recreation Centre, $55.50; and

j) invoices for imaging for arthrograms of the right wrist and MRI chest wall, which total $1,539.10.

93 That sum has been accepted by the defendants as a reasonable sum and that is the award under this heading.

Summary of Damages Awarded

94 Based on the above, Mr. Bhullar is awarded damages as follows:

Non-Pecuniary Damages: $197,000.00

Past Income Loss: $158,018.00

Future Loss of Earning Capacity: $550,000.00

Cost of Future Care: $25,000.00

Special Damages: $4,250.35

Total: $934,268.35

Costs and Disbursements

95 The plaintiff is entitled to his costs and disbursements for this trial and the preparation thereof, pursuant to Appendix B of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 as a matter of ordinary difficulty. The parties have leave to apply if there is any issue as to costs which they are unable to resolve between them.

K.W. BALL J.

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