

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cyr v. Randhawa*,
2023 BCSC 67

Date: 20230116
Docket: M193523
Registry: Vancouver

Between:

Reginald James Cyr

Plaintiff

And

Sukhjot Singh Randhawa

Defendant

- and -

Docket: M213354
Registry: Vancouver

Between:

Reginald James Cyr

Plaintiff

And

Marie Jose Ferron

Defendant

Before: The Honourable Justice Francis

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial:

Vancouver, B.C.
October 24–27 and 31, 2022

Place and Date of Judgment:

Vancouver, B.C.
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Introduction

[1] Reginald Cyr is a 50-year-old pharmacy assistant who was injured in two separate motor vehicle accidents on September 18, 2018 and on June 20, 2019 (collectively, the “Accidents”). Liability has been admitted by the defendants and Mr. Cyr seeks damages for his pecuniary and non-pecuniary losses arising from his Accident-related injuries.

[2] Mr. Cyr suffered from a number of health conditions at the time of the Accidents, which complicates the assessment of damages in this case. The plaintiff submits that, but for the Accidents, he would have continued with a mostly pain free life and suffered neither pecuniary nor non-pecuniary losses as a result of physical disabilities. The defendants submit that Mr. Cyr’s multiple co-morbidities were likely to progressively worsen with time had the Accidents not occurred, and that his quality of life and earning potential are both primarily impeded by non-Accident related conditions and injuries.

Background Facts

Before the Accidents

[3] In his youth, Mr. Cyr was active and athletic. He played league hockey, soccer, and did BMX racing. Most of these activities had subsided by the time he was in his early 30s. Notwithstanding his active lifestyle, Mr. Cyr has been overweight his entire adult life.

[4] Mr. Cyr dropped out of high school after Grade 11. He worked low wage jobs in the service sector, primarily in fast food pizza restaurants, and worked his way up to manager by the time he was in his 20s. During the 2010 Olympics, he had a temporary job at GM Place. After that, he took an educational program to qualify as a pharmacy assistant. His first job as a pharmacy assistant was at City Pharmacy (now called Bell Pharmacy) which is owned by a pharmacist named Iraj Zehtab. Mr. Cyr continues to work for Mr. Zehtab to this day.

[5] Mr. Cyr's job consists of counting pills, getting prescriptions ready, entering prescriptions, and some lifting and carrying of boxes and supplies. He also makes deliveries for the pharmacy, which has been an increasing part of his weekly work routine in recent years.

[6] Mr. Cyr has three children. His eldest daughter was born in 1992. In 2015, Mr. Cyr and his present common law spouse, Charlene Ubias, had a daughter, and in August 2019, their son was born.

[7] After the birth of his daughter in 2015, like many parents of small children, Mr. Cyr ceased regularly participating in sports and recreational activities. However, between working full time and parenting an infant, he had a busy and active life at this time.

[8] Mr. Cyr's right knee has caused him pain and mobility issues for most of his adult life. He injured his right knee as a young man and had surgery. In recent years, he has suffered from arthritis in both knees which causes him a serious amount of pain and mobility problems. He testified that prior to the Accident, his right knee pain was something he had learned to live with. He said it had always been an issue for him, but didn't stop him from doing things he wanted to do.

[9] Prior to the Accidents, Mr. Cyr was prescribed citalopram, an anti-depressant. He testified that he took anti-depressant medication to assist him with anger management.

[10] Mr. Cyr's friend, Andre Messier, testified at trial. Mr. Messier and Mr. Cyr have been friends since high school. He described Mr. Cyr as active and athletic, prior to the Accidents. Mr. Cyr's sister, Nicole, also described the active lifestyle Mr. Cyr had before the Accidents.

[11] Ms. Ubias testified that, before the Accidents, Mr. Cyr assisted her with heavy work around the house and was able to play actively with their child.

The First Accident

[12] On September 18, 2018, Mr. Cyr was delivering prescriptions in the course of his workday. He was stopped at a traffic light when another vehicle collided with the rear of his vehicle (the “First Accident”). Mr. Cyr’s vehicle was not significantly damaged in the First Accident, but he testified that he started feeling stiff shortly after the collision. He finished his deliveries but his discomfort became worse as the day progressed.

[13] Mr. Cyr described the pain as starting in his mid-low back and progressing upwards. He had stiffness in his neck and shoulders, but mostly in his back.

[14] Mr. Cyr took a couple of days off work immediately after the First Accident.

After the First Accident

[15] In the first few months after the First Accident, Mr. Cyr’s stiffness began to subside, but his pain became worse. His doctor put him on gabapentin to assist with the pain. He did physiotherapy and saw a chiropractor. His mood became worse as the pain made him irritable and angry. His doctor increased his dosage of anti-depressants, and he saw a counsellor.

[16] Mr. Cyr’s employer was able to make some accommodations for him at work. He started doing more computer work, which allowed him to adjust his back during the day with the use of a sit/stand desk. His boss allowed him to come in late and leave early as needed. This accommodation was still being made for him at the time of trial.

The Second Accident

[17] Mr. Cyr’s vehicle was rear-ended a second time on June 20, 2019 (the “Second Accident”). Once again, Mr. Cyr felt pain almost immediately after the collision. The pain was in his lower back, neck, and shoulders. He asked for an ambulance and was taken to the hospital, where he was examined and sent home. He took a day off work.

After the Second Accident

[18] Mr. Cyr’s lower back pain has not improved since the Second Accident.

[19] Mr. Cyr testified that he does not feel that his back pain is improving. The physical pain is always there and distracts him from “everything”.

[20] At the time of trial, Mr. Cyr was seeing a chiropractor twice a week and was doing active rehabilitation once or twice a week. These treatments assist a bit with his pain for a couple of days, but do not have a long-lasting impact. He takes gabapentin and Tylenol daily for his pain.

[21] Mr. Cyr’s right knee continues to cause him pain. He has been advised that he needs a full knee replacement. He will only be eligible for knee replacement surgery if he can lose a considerable amount of weight.

Expert Opinions

[22] Dr. Zeeshan Waseem is a physiatrist who prepared an expert report on behalf of the plaintiff. Dr. Waseem appeared for cross-examination at trial. He opined that Mr. Cyr sustained soft tissue injuries to the left shoulder and lumbar spine as a result of the First Accident and then re-injured these areas in the Second Accident. He opined that these injuries have resulted in chronic multi-directional lower back pain and chronic left shoulder pain. He opined that Mr. Cyr is unlikely to be pain free at any time in the future.

[23] Dr. Waseem noted that Mr. Cyr also suffers from pre-existing right knee pain that has worsened unrelated to the First Accident or the Second Accident.

[24] Sandra Hale is an occupational therapist who performed a functional capacity evaluation of Mr. Cyr. She was cross-examined at trial. Ms. Hale opined that Mr. Cyr demonstrates the capacity to partially meet the physical demands of his pre-collision occupation as a pharmacy technician and pharmacy manager, and that he requires accommodations. She opined that Mr. Cyr has reduced capacity for longer periods of standing and walking, reduced capacity for repetitive access to stooped body

positions, reduced ability for sustained static positioning, and reduced capacity for sustained sitting during driving or computer work.

Causation

[25] The defendants concede that Mr. Cyr's lower back pain was caused by the Accidents. However, the thrust of the defendants' position is that non-Accident related factors are primarily responsible for Mr. Cyr's pain and functional limitations. Mr. Cyr's right knee pain, which is ongoing, degenerative, and unrelated to the Accidents, is particularly debilitating to him in his day-to-day life. Further, the defendants submit that Mr. Cyr's chronic weight issues are a significant contributing factor to his various co-morbidities that have impacted his life both before and after the Accidents. The defendants submit that Mr. Cyr suffers from attribution bias, failing to recognize the non-Accident related factors that impact his health and well-being.

[26] The test for causation is the "but for" test. In determining whether there is a causal link between a defendant's negligence and a plaintiff's injuries, the court must consider whether, but for the defendant's acts, the plaintiff's damages would have been incurred. The governing principle is that the defendants need not put the plaintiff in a better position than their original position, and should not compensate the plaintiff for any damages they would have suffered anyway: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

[27] The plaintiff must establish on a balance of probabilities that a defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury. As long as a defendant is part of the cause of an injury, the defendant is liable, even though their act alone was not enough to create the injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 466-67, 140 DLR (4th) 235.

Back Pain

[28] The defendants admit that Mr. Cyr’s lower back pain was caused by the Accidents.

Knee Pain

[29] The parties disagree about the causal relationship between the Accidents and Mr. Cyr’s chronic right knee pain. While the plaintiff’s own expert opined in his report that Mr. Cyr’s knee pain has worsened “unrelated to the subject accidents”, on cross-examination, he stated that Mr. Cyr’s post-Accident weight gain has increased pressure on Mr. Cyr’s knees, exacerbating the long-standing degenerative knee condition from which he suffers. On the basis of this evidence, the plaintiff submits that there is a causal connection between the Accidents and Mr. Cyr’s significant knee pain.

[30] I do not find that the evidence supports a causal connection between Mr. Cyr’s worsening knee pain and the Accidents, primarily because the evidence does not support the conclusion that Mr. Cyr has gained weight as a result of the Accidents. Mr. Cyr’s weight has fluctuated throughout his entire adult life, and there is no time in his adult life where he has not been overweight.

[31] The medical records provide some evidence about Mr. Cyr’s weight fluctuations. In May 2002, Mr. Cyr’s weight was recorded as 372 pounds. In September 2014, the medical records record his weight at 380 pounds. In March 2019, just before the Second Accident, he was prescribed Ozempic, a weight loss medication. By October 2019, he weighed 303 pounds. He went off the Ozempic and his weight was back up to 348 pounds in August 2020. His peak post-Accident weight as recorded in the medical records was 380 pounds. He testified at trial that he is presently approximately 335 pounds.

[32] Counsel for Mr. Cyr argued that it is not open to me to conclude that Mr. Cyr’s weight has fluctuated over the years, or that he was as heavy before the Accidents as he was at his peak post-Accident weight. He submits that the weights recorded in

the historical medical records are not reliable evidence of Mr. Cyr's weight at any particular point in time. This submission conflicts with the case authorities referred to in the plaintiff's own written submissions. It is well accepted that doctors' observations in clinical records are admissible as facts without further proof: *Findlay v. George*, 2021 BCCA 12 at para. 69; *Seaman v. Crook*, 2003 BCSC 464 at para. 14. The weights recorded by doctors and other medical professionals in the clinical records are therefore admissible evidence of Mr. Cyr's weight at the time those records were created.

[33] The evidence does not support the conclusion that Mr. Cyr has gained weight as a result of his inability to exercise after the Accidents. Mr. Cyr's pattern of weight loss and gain after the Accidents, is very similar to the pattern before the Accidents. Mr. Cyr has struggled with his weight all his life and testified that the only weight loss program he has ever successfully employed has been to severely reduce his carbohydrate intake. There is no evidence that physical activity has ever been helpful to him as a weight loss strategy. It follows, therefore, that his inability to exercise as a result of his back pain has not caused him to gain weight, resulting in increased pressure on his knees, as posited by Dr. Waseem in cross-examination. While I accept Dr. Waseem's opinion that Mr. Cyr's excess weight contributes to his knee pain, the causal connection between Mr. Cyr's current excess weight and the Accidents has not been established on the evidence.

[34] Mr. Cyr's knee injury causes him significant functional impairment. At his functional capacity assessment, his knee popped out in the course of the assessment. His pain in his knee was self reported to be 5/10 at the start of the assessment and 10/10 at the end. Mr. Cyr's knee pain is severe, degenerative, and presently interfering with his functional capacity at work. It is also completely unrelated to the Accidents.

Psychological Injuries

[35] Mr. Cyr was taking anti-depressant medications prior to the First Accident. He has increased his dosage of these medications since the Accidents. He testified that his mood has deteriorated since the Accidents.

[36] Mr. Cyr has a history of depression. While his spouse was pregnant with their daughter in 2015, Mr. Cyr saw his family doctor for a mental health review. He was prescribed fluoxetine. On December 24, 2015, it was recommended that he engage in cognitive behavioural therapy.

[37] The first time, post-Accidents, that Mr. Cyr sought medical assistance with respect to his mood was about a year after the Second Accident, in July 2020. This was in the midst of the pandemic, as well as a number of other life stresses for Mr. Cyr, including having two very small children at home, and his mother being recently diagnosed with cancer. The defendants argue that the constellation of stressors in Mr. Cyr’s life makes it impossible to discern a causative connection between Mr. Cyr’s depression and the Accidents.

[38] I disagree. While life stress and his pre-existing mood issues may have made Mr. Cyr more vulnerable to depression and low mood, his testimony established a clear connection between his lower back pain and his poor mood. He testified that for him, after the Accidents, “the more pain, the more anger.” I am therefore satisfied on a balance of probabilities that Mr. Cyr’s mood problems are causally connected to the Accidents.

Other Health Conditions

[39] Mr. Cyr suffers from a range of other health conditions including sleep apnea, hypertension, diabetes, and stomach and bowel problems. In closing submissions, the plaintiff did not argue that any of these conditions were caused by the Accidents. If such arguments had been advanced, I would have found that the evidence did not support causation with respect to these conditions. As a result, I have not considered them further.

[40] Dr. Waseem opined that Mr. Cyr suffers from a left shoulder injury caused by the Accidents. In his testimony, Mr. Cyr made no mention of currently having shoulder pain. To the extent he injured his left shoulder in the Accidents, that injury appears to have resolved itself in advance of trial.

Non-Pecuniary Damages

[41] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. In assessing non-pecuniary damages, the court may look to awards made in analogous cases. However, each case must turn on its own unique facts. No two personal injury claims are identical and awarding damages involves an exercise of judgment: *Kapelus v. Hu*, 2013 BCCA 86 at para. 16.

[42] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal enumerated the factors to be considered in assessing non-pecuniary damages. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of family, marital, and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism.

[43] The plaintiff seeks an award of non-pecuniary damages in the amount of \$220,000. He relies on the following cases: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 (\$180,000, adjusted for inflation to \$213,400); *Kallstrom v. Yip*, 2016 BCSC 829 (\$180,000, adjusted for inflation to \$213,400); and *Grant v. Ditmarsia Holdings Ltd.*, 2020 BCSC 1705 (\$140,000, adjusted for inflation to \$156,157).

[44] On reviewing the plaintiff's cases, I find that the plaintiff in *Grant* is most similarly situated to the plaintiff in this case, insofar as his physical and psychological injuries have permeated every aspect of his working, familial, and recreational life. The plaintiffs in *Pololos* and *Kallstrom* suffered from psychological injuries far more severe than Mr. Cyr. Further, none of the plaintiff's cases involved plaintiffs with the extensive pre-existing conditions that Mr. Cyr had at the time of the First Accident.

[45] The defendants submit that an award of \$75,000 to \$85,000 is the appropriate measure of damages. This would constitute an award of \$100,000 with a 15–20% deduction to account for the loss of enjoyment of life that the plaintiff would have suffered in any event of the Accidents. The defendants rely on the following cases: *Sharma v. Chui*, 2019 BCSC 2115 (\$80,000); *Danroth v. Dufresne*, 2021 BCSC 864 (\$100,000); and *Fatin v. Watson*, 2020 BCSC 1880 (\$100,000).

[46] The defendants' cases provide helpful examples of the assessment of non-pecuniary damages for plaintiffs who, irrespective of the accident, would have likely suffered a significant loss of enjoyment of life from other injuries or conditions. However, the plaintiffs in those cases were not as seriously disabled from their accident-related injuries as Mr. Cyr. The plaintiff in *Danroth* continued to enjoy an active social life, the plaintiff in *Sharma* was not nearly as disabled, and the plaintiff in *Fatin* did not suffer from psychological injury in the manner of Mr. Cyr.

[47] However, like the plaintiffs in *Sharma*, *Danroth*, and *Fatin*, Mr. Cyr would likely suffer some measure of pain and consequent loss of enjoyment of life irrespective of the Accidents.

[48] I am satisfied that Mr. Cyr's lower back pain alone, which was uncontroversially caused by the Accidents, has caused a significant diminishment in his loss of enjoyment of life. I must assess the general damages that arise from that injury, and not Mr. Cyr's knee problems, in order to ensure that the plaintiff is put in the same position as he would have been in if the Accidents had not occurred.

[49] Mr. Cyr's back pain impedes most aspects of his life at work and at home. It takes all his energy to get through the work day and this means he has very little left for his family at the end of the day. He is unable to do any housework, leaving his wife to bear the burden of looking after the home and taking care of their two small children.

[50] Mr. Cyr testified that his relationship with his wife has been negatively impacted by his lower back pain. Ms. Ubias testified that she sees him more as a

roommate now, or just another person she needs to take care of. They are rarely intimate with one another and they fight regularly.

[51] Mr. Cyr has no social or recreational life anymore. When he is not working, he is on the couch or in bed resting. He no longer sees friends he used to visit with on a regular basis.

[52] Mr. Cyr testified that he feels like he is not the same person that he was before the First Accident, and that he hates the person he has become.

[53] The *Stapley* factors militate in favour of a high award to Mr. Cyr given the profound impact of his injuries on his day-to-day enjoyment of life. However, I must consider the position Mr. Cyr would be in had the Accidents not occurred, and the likelihood that Mr. Cyr's non-Accidents related knee problems are and will continue to be responsible for a significant loss of his enjoyment of life, irrespective of his Accident-related back pain. In the circumstances, I am of the view that a fair and reasonable assessment of non-pecuniary damages is \$120,000.

Loss of Income Earning Capacity

Facts Relevant to Loss of Income Earning Capacity

[54] There has been some fluctuation in Mr. Cyr's income since he started working as a pharmacy assistant for Mr. Zehtab in 2013. The below table sets out his income during those years:

2013	\$53,162
2014	\$56,034
2015	\$56,491
2016	\$42,722
2017	\$39,845
2018	\$55,593
2019	\$72,628
2020	\$88,367
2021	\$52,109

[55] Mr. Cyr explained in his testimony that his income in 2016 and 2017 dropped because Mr. Zehtab shut down his pharmacy operation for a period of time and then moved to a new location. During this period, Mr. Cyr was only working part time for Mr. Zehtab. Mr. Cyr's income jumped significantly in 2019 and in 2020. He testified that at each of these points, he was asked to take on more responsibility at the pharmacy and this was reflected in an increase in wages.

[56] At the end of 2020, Mr. Zehtab cut Mr. Cyr's salary significantly. Mr. Cyr testified that he and Mr. Zehtab had a conversation about this. Mr. Zehtab explained to him that, because Mr. Cyr was no longer able to do the work required of him, he could not continue with the same salary.

[57] Mr. Zehtab testified at trial. He testified that there was not much change in Mr. Cyr's condition immediately after the First Accident but about a year after the First Accident, he noticed a significant deterioration in Mr. Cyr. Mr. Cyr is no longer capable of working full days, and he frequently needs to take breaks. Prior to the Accidents, Mr. Cyr was working 10 hours a day.

[58] Mr. Zehtab explained his reasons for cutting Mr. Cyr's salary at the end of 2020. He explained that Mr. Cyr was no longer capable of doing the job as before. As he put it, "he is the same person but his body is giving up on him".

[59] Mr. Zehtab also testified that he would like to sell the pharmacy but hasn't yet found a buyer prepared to pay the right price. It is not clear whether a new pharmacist would keep Mr. Cyr employed if Mr. Zehtab were to sell.

Legal Principles

[60] The same principles govern past and future income loss awards. In *Falati v. Smith*, 2010 BCSC 465 at paras. 40–41, aff'd 2011 BCCA 45, this Court set out certain principles which inform the assessment of loss of earning capacity:

1. The amount of damages for loss of earning capacity may involve a consideration of hypothetical events;
2. The standard of proof is not the balance of probabilities. The plaintiff need only establish a real and substantial possibility of loss;
3. The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong; and
4. The court must undertake an assessment of damages for loss of earning capacity, rather than take a purely mathematical approach to the issue.

Past Loss of Income Earning Capacity

[61] There are differences in how the loss of income earning capacity is assessed before trial and after trial. To the extent past loss of capacity relies on facts which are capable of proof, those facts must be proven on the balance of probabilities. To the extent past loss of capacity relies on hypothetical facts, the court must be satisfied that there is a real and substantial possibility of such facts occurring. The court may assess the likelihood of such hypothetical facts occurring, and discount or increase an award to reflect such contingencies: *Hartman v. MMS Homes Ltd.*, 2021 BCSC 2165 at para. 123.

[62] The award for lost income before trial is the loss of value of the work the plaintiff would have done but for the injuries.

[63] Mr. Cyr seeks an award of \$45,000 for past loss of income. His claim is based on the evidence that, in late 2020, Mr. Zehtab reduced Mr. Cyr's salary because he was having difficulty keeping up with the work. His salary was reduced from \$88,367 to \$52,109. Mr. Cyr seeks the difference between his 2020 salary and his actual salary for 2021 and the months of 2022 up until the date of the trial. He calculates these gross losses as \$65,661.74. Assuming a marginal tax rate of 29.7%, he estimates his loss at \$46,160.20 and asks for a loss of income award of \$45,000.

[64] The defendants calculate the difference between Mr. Cyr's anticipated earnings if he continued at his 2020 salary of \$88,367 a year and his actual earnings somewhat differently, but they end up with a gross number that is close to the plaintiff's: \$66,473. However, the defendants argue that it would be speculative to award Mr. Cyr damages for past income loss on the basis of his 2020 salary continuing but for the Accidents. They submit that there were a number of factors that may have contributed to Mr. Cyr's salary reduction at the end of 2020, including Mr. Cyr's growing young family and absenteeism from work in the fall of 2020 due to being sick and his ongoing and worsening knee problems.

[65] Mr. Zehtab's evidence about his reason for cutting Mr. Cyr's salary was clear: Mr. Cyr is no longer able to do work he was capable of doing even a few years ago. He cannot work long hours, cannot stand for lengthy periods of time, and cannot lift.

[66] Therefore, I do not accept the defendants' submission that Mr. Cyr's 2019 and 2020 salary increase was possibly temporary, or at least was unsustainable given the other circumstances in his life including the birth of a second child. I find Mr. Zehtab's evidence to be unambiguous with regard to the 2019 and 2020 raises and the 2021 salary cut: Mr. Cyr received performance-based salary increases that were cut back when it became apparent that he was no longer capable of performing the work required for his job.

[67] However, I accept that the evidence establishes a real and substantial possibility that, but for the Accidents, Mr. Cyr would have experienced a decrease in salary as his knee issues progressed. In November 2020, Mr. Cyr attended the Emergency of Ridge Meadows Hospital because of a locked right knee. Three weeks later, he was referred to an orthopedic specialist, who noted advanced arthritis in Mr. Cyr's right knee and recommended complete knee replacement. He is not a candidate for knee replacement because of his excessive weight. For a period of time in the fall of 2020, Mr. Cyr was unable to tolerate walking without significant pain and had a cane. At his functional capacity evaluation on August 5, 2022,

Mr. Cyr's right knee was the most significant source of pain and clearly impacted some of his functional limitations.

[68] Given the seriousness of Mr. Cyr's knee pain and the functional impairments associated with it, there is a real and substantial possibility that, but for the Accidents, he would still be functionally impaired from doing all his job duties, and Mr. Zehtab would have been compelled to reduce his salary in late 2020. I assess the probability of this happening at approximately 50%. Therefore, I apply a contingency deduction of 50% to the past wage loss claim. Mr. Cyr's past wage loss claim is assessed at \$33,000, less income tax assessed at the tax rate proposed by the plaintiff of 29.7%, for total assessed damages under this heading of \$24,000.

Future Loss of Earning Capacity

[69] Future loss of income earning capacity is the most significant issue in contention in this case. Helpfully, counsel acceded to the Court's request to frame their submissions on this point in accordance with the recent trilogy of cases from our Court of Appeal: *Rab v. Prescott*, 2021 BCCA 345; *Dornan v. Silva*, 2021 BCCA 228; and *Lo v. Vos*, 2021 BCCA 421. While I have not wholly accepted the analysis proposed by either party, it was of great assistance to the Court for the submissions on this issue to be framed in accordance with the prevailing authorities in this province.

Positions of the Parties

[70] Counsel for Mr. Cyr calculates his future income loss as follows:

- a) Mr. Cyr's without-accident future earnings are \$1,545,174. This amount is based on an annual income of approximately \$90,000, and a likely future 20 years of working to age 70, calculated with reference to the discount rate of 1.5% and the *Civil Jury Instructions [CIVJI]* multiplier, which is 17.1686.
- b) Mr. Cyr's with-accident future earnings are \$312,064.71. This amount is calculated by taking Mr. Cyr's current salary of \$52,109, assuming an 80%

probability of Mr. Cyr having to go to part-time work and a 20% probability that Mr. Cyr will lose his job. The plaintiff calculates the annual residual earnings as being \$41,687. The plaintiff further submits that Mr. Cyr is likely to only be able to work for another eight years. The plaintiff used the *CIVJI* multiplier for eight years, which is 7.4859, to reach the sum of \$312,064.71.

- c) The plaintiff estimates the net loss before contingencies as: $\$1,545,174. - \$312,064.71 = \$1,233,109.29$ (I note that the plaintiff states in his submission that this sum equals \$1,380,905.31, but the plaintiff's math appears to be incorrect so I have summarized his analysis here without repeating his mathematical error).
- d) The plaintiff accedes that there should be a deduction for general and specific contingencies in the amount of 15%: $\$1,233,109.29 - (.15 \times \$1,233,109.29) = \$1,048,142$ (once again, I note that this sum is different than what the plaintiff states in his written submission, because I have sought to describe the plaintiff's methodology without compounding the initial calculation error at step (c) above).
- e) Looking at overall fairness and reasonableness, the plaintiff submits that an award of \$1,000,000 for loss of future earning capacity is fair.

[71] The defendants suggest that Mr. Cyr's future income loss should be assessed in the following manner:

- a) Mr. Cyr's total without-accident income has a present value of \$524,977 to \$620,917, calculated with reference to:
 - i. the multiple significant health problems that were likely to curtail his working life such that he was unlikely to work past age 60, or alternatively 62, in any event;
 - ii. his average income over the last nine years which is \$56,538; and
 - iii. a discount rate of 9.2854 (10 years) or 10.9823 (12 years).

- b) A 20% reduction in working hours due to part-time work would amount to a loss of between \$105,000 (10 years) and \$125,000 (12 years). A 40% reduction in working hours would amount to a loss of between \$210,000 (10 years) and \$250,000 (12 years).
- c) There are numerous negative contingencies that ought to reduce this award. In any case, a 20% general contingency must be applied.
- d) The defendants ultimately suggest that an award of \$75,000 to \$125,000 would be appropriate.

Legal Authorities

[72] An award for future loss of earning capacity necessarily involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened. As such, the appropriate analytical framework is to compare the plaintiff's likely future working life with and without the accident: *Dornan* at paras. 156–57.

[73] In *Rab*, the Court of Appeal articulated a three-part test for assessing damages for future loss of income earning capacity:

[47] . . . The first [step] is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring...

[Emphasis in original.]

[74] As a final step in the damages assessment process, the court must determine whether the damage award is fair and reasonable: *Lo* at para. 117.

[75] Where no economic opinion evidence is provided, it is appropriate for this Court to apply the multipliers found at Appendix E of the *CIVJI* in order to quantify

the present value of future loss: *MacGregor v. Bergen*, 2019 BCSC 315 at para. 116 (note 1); *Dunn v. Heise*, 2021 BCSC 754 at paras. 202–03.

Analysis

Step 1: Does the evidence disclose a potential future event that could lead to a loss of capacity?

[76] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, Mr. Justice Harris discussed the importance of step 1 in those cases in which the plaintiff has not, at the time of trial, suffered a significant diminution in income, but their capacity to earn income in the future has been impeded:

[11] With respect to the first step, I note two considerations as outlined in *Rab* at paras. 29–30. First, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.

[12] Second, with respect to the second set of cases, that is, situations in which there has been no clear loss of income at the time of trial, the *Brown* factors, as outlined in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), come into play. The *Brown* factors are, according to *Rab*, considerations that:

[36] ... are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.

[37] If there has been a loss of the capital asset, the question then becomes whether there is a real and substantial possibility of that impairment or diminishment leading to a loss of income.

[13] For ease of reference, the *Brown* considerations set out at para. 8 of that decision include whether:

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.

[14] Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Rab; Perren v. Lalari*, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the *Brown* factors, and thus demonstrates a loss of earning capacity, this does not necessarily mean they have made out a real and substantial possibility this diminished earning capacity would lead to a loss of income in their particular circumstances. This is where the second step comes in.

[77] In this case, I find that Mr. Cyr's ongoing chronic lower back pain has the potential to lead to a future loss. It is clear from the evidence of the witnesses, particularly Dr. Waseem and Ms. Hale that, as a result of his chronic injury, Mr. Cyr is less capable from earning income from all types of employment, is less marketable, has lost the ability to take advantage of job opportunities, and is less valuable to himself as a person capable of earning income. The first step in the *Rab* test has been met.

Step 2: Is there is a real and substantial possibility that the future event in question will cause a pecuniary loss?

[78] The standard of proof for a real and substantial possibility "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

[79] There is clearly a real and substantial possibility that Mr. Cyr's Accident related injuries will lead to further income loss. Specifically:

- a) Dr. Waseem noted that the demands of Mr. Cyr's occupation make his physical condition worse;
- b) Dr. Waseem noted that, as Mr. Cyr ages with pain and has less resilience and stamina, there is a real and substantial possibility that he may be unable to tolerate the physical demands of both full-time work and other

responsibilities, causing him to reduce normal work hours or transition to sedentary work; and

- c) In her functional capacity report, Ms. Hale noted that Mr. Cyr has reduced capacity for standing and walking, reduced ability for sustained static positioning, and reduced capacity for sustained sitting during driving and for computer work and administrative tasks. Mr. Cyr is currently accommodated at his job. Without accommodations, he would not be able to meet the physical demands of his occupation.

[80] While I agree with the defendants that Mr. Cyr's functional capacity is also impeded by his knee, I find that, consistent with the findings of Dr. Waseem and Ms. Hale, Mr. Cyr's Accident related lower back pain specifically impairs his capacity to work. I am satisfied on the evidence that Mr. Cyr has proven a real and substantial possibility of the following events occurring:

- a) Mr. Cyr's resilience and ability to work through his lower back pain will diminish as he ages such that he will be required to move to part-time hours, or cease working altogether prior to normal retirement age; and
- b) Mr. Zehtab will sell the pharmacy, in which case Mr. Cyr will be required to find employment, either at the pharmacy with new owners or somewhere else, in circumstances where he is less competitively employable than he was prior to the Accidents.

[81] As such, I find that step 2 of the *Rab* test has been met.

Step 3: Assessing the value of the possible future loss

[82] In *Plosken-Ciesla*, Harris J.A. stated the following with respect to step 3:

[16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the “earnings approach” or the “capital asset approach”: *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.

[17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[83] In this case, I find that the capital asset approach is more appropriate. While I have found that Mr. Cyr did suffer some income loss between the time of the Accidents and trial, there are multiple uncertainties and contingencies at play that make calculating his future loss uncertain. These, among other things, include his non-Accident related health issues, most particularly his right knee condition, and the possibility of the pharmacy being sold and Mr. Cyr losing his job. In my view, the number of positive and negative contingencies at play in this case call for a capital asset approach. As Harris J.A. noted in the passage quoted above, such an approach allows the court to take a more holistic view of a plaintiff's potential future where that future is uncertain.

[84] In order to value the impairment of the capital asset, I must first consider Mr. Cyr's likely without-accident career path. I do not agree with the plaintiff that Mr. Cyr would likely make \$90,000 a year to age 70 absent the Accidents. Rather, given his multiple non-Accident related health issues, particularly his knee which even now renders him functionally unable to do many required workplace tasks, in my view it is most likely that Mr. Cyr would only work to a maximum of age 65. Further, it is not realistic to assume that his salary would continue at the absolute maximum it had ever been for the duration of his career. While I accept Mr. Zehtab's evidence that he cut Mr. Cyr's salary in 2021 because Mr. Cyr was not capable of doing all the tasks assigned to him due to his injuries, I find that, absent the Accidents, Mr. Cyr's knee problem would almost certainly have prevented him from doing work-related tasks and resulted in some decrease in his salary in any event. Bearing in mind that this exercise is an assessment and not a mathematical calculation, I would assess Mr. Cyr's without-accident income as being half way between his 2020 salary of \$88,367 and his 2021 salary of \$52,109, or \$70,000, to

age 65. This amounts to a capital asset valuation, using the *CIVJI* tables, of \$934,024 (70,000 x 13.3432 multiplier).

[85] I next must determine the loss to that earning capacity that has been suffered by Mr. Cyr by reason of the Accidents. In assessing the reduction in earning capacity suffered by Mr. Cyr, I have considered the following positive and negative contingencies:

- a) Over the course of his remaining career, Mr. Cyr will likely have to reduce his hours of work due to decreased resilience in managing his ongoing Accident related pain;
- b) There is a real and substantial possibility that Mr. Cyr will need to stop working before age 65 due to his Accident related injuries;
- c) The pharmacy may be sold, in which case Mr. Cyr will not be competitively employable with a new pharmacist and could well end up unable to secure employment due to his lack of competitive employability; and
- d) There is a real and substantial possibility that Mr. Cyr would have had to reduce his hours of work or retire early even absent the Accidents due to his degenerative knee condition.

[86] Weighing the above positive and negative contingencies, I assess a 30% diminution in the capital asset of Mr. Cyr's future income capacity as a result of the Accidents. Thirty percent of his assessed without-accident lifetime income is $\$934,024 \times 30\% = \$280,207.20$. I award Mr. Cyr \$280,000 for future loss of income earning capacity.

Cost of Future Care

[87] Mr. Cyr claims \$95,000 for future care costs. This is comprised of annual costs for ongoing massage therapy, chiropractic care, pain control medication, and mileage in the amount of \$4,226.50 a year. Mr. Cyr also makes a one time claim for 20 sessions of kinesiology in the amount of \$1,560.

[88] The defendants consent to a future cost of care award in the amount of \$12,201, which covers some intermittent sessions of chiropractic care and massage.

[89] The purpose of an award for future care is to compensate a plaintiff for costs that reasonably may be expected to be incurred to preserve and promote the plaintiff's mental and physical health: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30.

[90] The test for assessing future care costs is well-settled and asks whether: (i) the costs are reasonable; and (ii) the items are medically necessary: *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 62.

[91] The quantification of damages for the cost of future care is an assessment and not a precise accounting exercise. Adjustments must be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Prempeh v. Boisvert*, 2012 BCSC 304 at para. 108.

[92] Where there is an evidentiary link between (i) a physician's assessment of a plaintiff's level of pain and injury incurred and (ii) the treatment and care recommended by an occupational therapist, the evidence of an occupational therapist may be used to establish the future care needs of a plaintiff without the need for a physician to testify to the necessity of every item of care claimed: *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 at para. 182, 133 DLR (4th) 377 (S.C.), quoted with approval in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 36-39.

[93] With respect to pain management medication, massages, and chiropractic treatment, the defendants admit that these treatments are recommended. However, they note that Dr. Waseem only recommended that these treatments be "intermittent" and Mr. Cyr has claimed 26 treatments of each per year for 30 years. Mr. Cyr's claim is for constant and continuous treatments for the rest of his expected life span, not intermittent treatment at all. I agree with the defendants on this point.

Mr. Cyr should only be compensated for treatments that are medically recommended. I accept the defendants' position that it is more consistent with the medical recommendations for Mr. Cyr to have 24 sessions of chiropractic care and 24 sessions of massage over the next two years, tapered down to 12 sessions of each over the next three years. This would result in 84 sessions of massage (at \$89.25 a session) and 84 sessions of chiropractic treatment (at \$56 a session) for a total of \$4,704 for chiropractic care and \$7,497 for massage—a total of \$12,201 for both treatments.

[94] The defendants did not address Mr. Cyr's ongoing need for pain medication. Since this claim is supported in Dr. Waseem's report, I am prepared to allow it on an ongoing basis. Using the *CIVJI* multiplier employed by the plaintiff in his submissions for 30 years, this would be calculated as $\$50 \times 22.3965 = \$1,120$ (rounded).

[95] I am also satisfied that the one time series of 20 sessions with a kinesiologist complies with Ms. Hale's recommendation and is reasonably necessary to promote Mr. Cyr's health. The plaintiff submits that this will cost \$1,560.

[96] Mr. Cyr is therefore awarded \$14,881 for future care costs.

Loss of Housekeeping Capacity

[97] Loss of housekeeping capacity may be compensated by a pecuniary award, or it may be considered as part of the assessment of non-pecuniary damages: *McTavish v. MacGillivray et al.*, 2000 BCCA 164 at para. 73.

[98] Where a plaintiff suffers an injury that would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work, a pecuniary damages award may be appropriate. Where the loss is more in keeping with a loss of amenities, or increased pain and suffering, the loss may be more appropriately addressed as part of a non-pecuniary damages award: *Quigley v. Cymbalisty*, 2021 BCCA 33 at para. 72.

[99] In this case, Mr. Cyr and his wife both testified that he does almost nothing around the house anymore. He used to assist with housecleaning and actively participated in caring for the couple's two small children. Now, when he is not at work, he is either lying on the couch or in bed. Mr. Messier testified that the state of Mr. Cyr and Ms. Ubias' home has deteriorated in recent years. They don't have friends over anymore because their house is so messy.

[100] As noted by Justice Huddart in *McTavish* at para. 63:

When family members have gratuitously done the work the plaintiff can no longer do and the tasks they perform have a market value, that value provides a tangible indication of the loss the plaintiff has suffered and enables the court to assign a specific economic value in monetary terms to the loss. This does not mean the loss is that of the family members or that they are to be compensated. Their provision of services evidences the plaintiff's loss of capacity and provides a basis for valuing that loss. The loss remains the plaintiff's loss of economic capacity.

[101] Ms. Ubias testified that, earlier in their relationship, the housekeeping responsibilities were split between the two of them as they both worked full time. Post-Accidents, Ms. Ubias testified that she does "the majority of everything around the house."

[102] The housekeeping services presently performed by Ms. Ubias, that were previously performed by Mr. Cyr, have an economic value. Therefore, I find that a pecuniary award is appropriate.

[103] No evidence was tendered as to the value of the housekeeping services that were once performed by Mr. Cyr. Counsel for Mr. Cyr submits that the loss of housekeeping award should be assessed at four hours a week, at \$30 an hour, for the next twenty years, for a total present value claim of \$100,000.

[104] In my view, given the significant functional limitations attributable to Mr. Cyr's knee, there must be a discount applied to any loss of housekeeping services award to account for the fact that even absent the Accidents, Mr. Cyr would be unable, because of his knee, to do much of the heavier housework around the house than

he once did. For example, he specifically mentioned in testimony that he can no longer scrub the bathtub. Based on the functional capacity report, his knee problems are such that, irrespective of the Accidents, he will likely never scrub a bathtub again. This is not something the defendants are responsible for.

[105] Nevertheless, Ms. Ubias was a compelling witness who provided detailed evidence of the heavy household burden she has borne as the only physically capable parent of two small children. Mr. Cyr used to be able to take part in looking after the family home. Now he is not.

[106] In my view, a fair assessment of Mr. Cyr’s loss of housekeeping capacity attributable to the Accidents is \$50,000.

Special Damages

[107] The parties agree that Mr. Cyr is entitled to \$5,487.87 in special damages.

Conclusion

[108] I assess the damages payable by the defendants to Mr. Cyr at:

Non-Pecuniary Damages	\$120,000.00
Past Loss of Income Earning Capacity	\$ 24,000.00
Future Loss of Income Earning Capacity	\$280,000.00
Cost of Future Care	\$ 14,881.00
Loss of Housekeeping capacity	\$ 50,000.00
Special Damages	\$ 5,487.87

[109] If the parties are unable to agree on costs of the trial, they may make arrangements with Supreme Court scheduling to appear before me to address costs.

“Francis J.”