IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mason v. Narvaez,*
2023 BCSC 709

Date: 20230501
Docket: M35973
Registry: Chilliwack

Between:

James William Michael Mason

Plaintiff

And

Eduardo Jose Narvaez

Defendant

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Plaintiff:	J. Upper
Counsel for the Defendant:	A.D.S. Batra I.S. Gill
Place and Date of Trial:	Abbotsford, B.C. February 27–28, 2023 March 1–3 and 6, 2023 Port Coquitlam, B.C. March 7, 2023
Place and Date of Judgment:	Chilliwack, B.C. May 1, 2023

Table of Contents

INTRODUCTION

[1] The plaintiff, James Mason seeks damages for injuries suffered in a motor vehicle accident (the "accident") that occurred on July 24, 2018 in Chilliwack (the "accident").

[2] Mr. Mason was driving a pickup truck when a vehicle driven by the defendant turned left in front of him. Unable to stop in time, Mr. Mason t-boned the defendant's vehicle. Liability and causation of injuries are admitted.

[3] Mr. Mason instantly felt pain in his right knee after the accident. He claims that he still suffers right knee pain, even after surgery and physiotherapy. As a result of the injury Mr. Mason says that he is restricted in what he can do physically which impacts what jobs he can do (both remunerative and non-remunerative) and his recreational activities.

[4] Mr. Mason is now 40 years of age. He is a single father of three children. At the time of the accident he was married and was working at Westeck windows and doors ("Westeck") as a supervisor. His marriage ended after the accident as did his employment at Westeck. He has had a series of jobs since.

ISSUES

[5] The task of this court is to determine the appropriate awards under the following heads of damage:

1) Non-pecuniary damages;

2) Past income loss;

3) Loss of earning capacity;

4) Cost of future care;

5) Loss of housekeeping abilities; and

6) Special damages.

[6] I will consider the issues in turn.

ISSUE 1: NON-PECUNIARY DAMAGES

The Law

[7] An award of non-pecuniary damages does not depend upon the seriousness of the injury. Instead, the quantum of a damage award is the amount necessary to ameliorate the victim's suffering, considering their particular situation. An appreciation of the individual's loss is the key to determining such an award. There is no "tariff". An award will vary in each case to meet the specific circumstances of the individual case: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637.

[8] In *Gohringer v. Hernandez-Lazo et al*, 2009 BCSC 420, Justice Russell outlined the factors to be considered by the court in assessing non-pecuniary damages:

> [81] The purpose of non-pecuniary damage awards is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": ***Jackson v. Lai***, 2007 BCSC 1023, B.C.J. No. 1535 at para. 134; see also ***Andrews v. Grand & Toy Alberta Ltd***., [1978] 2 S.C.R. 229; ***Kuskis v. Tin***, 2008 BCSC 862, B.C.J. No. 1248. While each award must be made with reference to the particular circumstances and facts of the case, other cases may serve as a guide to assist the court in arriving at an award that is just and fair to both parties: ***Kuskis*** at para. 136.
>
> [82] There are a number of factors that courts must take into account when assessing this type of claim. Justice Kirkpatrick, writing for the majority, in ***Stapley v. Hejslet***, 2006 BCCA 34, 263 D.L.R. (4th) 19, outlines the factors to consider, at para. 46:
>
> > The inexhaustive list of common factors cited in ***Boyd*** [***Boyd v. Harris***, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
> >
> > (a) age of the plaintiff;
> >
> > (b) nature of the injury;
> >
> > (c) severity and duration of pain;
> >
> > (d) disability;
> >
> > (e) emotional suffering; and
> >
> > (f) loss or impairment of life;
> >
> > I would add the following factors, although they may arguably be subsumed in the above list:

> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: ***Giang v. Clayton***, [2005] B.C.J. No. 163, 2005 BCCA 54 (B.C. C.A.)).

The Evidence

The Plaintiff, Mr. Mason

Before the accident

[9] Mr. Mason was 35 at the time of the accident and was by his report, “pretty happy” all the time. He was in good health. He had no physical limitations and specifically had never had problems with his right knee. He enjoyed an active lifestyle—hiking, camping, skiing and cycling. He was a “big runner” and worked out regularly at the gym. His favourite activity was and still is fishing. Before the accident, Mr. Mason and his friends would fish in remote areas (fewer people, more fish) that involved hiking into rivers, scaling down steep hill sides, walking along rocky river banks and standing for hours.

[10] Shortly before the accident, Mr. Mason and his now ex-wife Crystal had reconciled after a relatively short separation. He enjoyed a good relationship with his children and spent lots of time with them playing sports in the park.

[11] At the time of the accident Mr. Mason, Crystal, and his children shared a house with Mr. Mason’s mother. Mr. Mason was in charge of all outdoor tasks—gardening, mowing the lawn, trimming the trees, shovelling snow, washing windows and cleaning gutters. As Mr. Mason’s mother had limited use of her hands following a car accident, Mr. Mason performed heavy chores in the home as well, including scrubbing bathtubs and toilets.

After the accident

[12] As soon as Mr. Mason got out of the car following the accident, he felt a sharp pain in his right knee. He subsequently felt pain in his left shoulder, right hip and slight pain in the back of his neck. He was assessed by paramedics at the scene and sent home. The next day his right knee was swollen and he continued to feel pain in his right hip, neck and left shoulder. He went to the hospital.

[13] The pain in Mr. Mason's left shoulder, neck and right hip resolved in a few weeks. The pain in his right knee progressively got worse and began mechanical catching where the knee would lock in or out of place so Mr. Mason could not bend it. It made it hard for him to walk. Mr. Mason saw his family doctor who told him to take Tylenol and ice it. It did not help. The mechanical catching happened at least once a day. The swelling, pain and stiffness persisted. The right knee was aggravated by going up or down stairs and ladders and kneeling. Finally, Mr. Mason's GP referred him to an orthopaedic surgeon. In around the spring of 2019, the surgeon injected Mr. Mason's knee with cortisone. Instead of helping the injection made the symptoms worse including a constant sharp pain. Mr. Mason could not walk at all and had to take a week off from work.

[14] On July 26, 2019, Mr. Mason underwent surgery on his right knee. Following surgery, he was in "lots of pain" and his whole right leg was swollen. After a couple of weeks, he was able to walk with crutches, and about two weeks after that with a cane. He was unable to bend his knee fully. Although he returned to work on November 18, 2019, he was still in considerable pain. According to Mr. Mason it was not until about June or July 2020 before he could do any household chores. He could not engage in his usual recreational activities. He tried to fish but was unable to stand for too long.

[15] Mr. Mason attended physiotherapy with physiotherapist Luke McKerrow for about eight months following surgery. When Mr. McKerrow left on a lengthy leave, Mr. Mason tried another physiotherapist. As the other physiotherapist did not do the

same exercises Mr. McKerrow was doing, Mr. Mason decided to just follow the McKerrow program himself. He continues to do so.

[16] Today Mr. Mason continues to have a low dull constant pain in his right knee that increases with activity. His knee still clicks and swells and continues to impact his physical activity. He is no longer able to play with his children as he once could or hike into remote areas to fish. He can ride his bicycle and work out at the gym but if he does too much he will suffer later with increased pain and swelling in his knee. He can not lift the amount of weight he could pre-accident and is limited in his repetitions. Running is too hard on his knee.

[17] Mr. Mason is unable to help out around the house like he once could. After five or ten minutes of mowing the lawn, weed eating or shovelling he needs to rest as his knee acts up. He is unable to go down on his right knee making gardening and heavy scrubbing difficult.

[18] Although stoic, it is clear from his evidence that the injury to his knee has taken a toll on Mr. Mason's emotional state. He got choked up when he testified about the impact it has had on his relationships. He can no longer play with his children. The constant pain takes a toll; he is impatient and has less energy. His enjoyment of sex has decreased because it causes his knee to hurt. The lack of intimacy was a major factor in the downfall of his marriage.

[19] I accept Mr. Mason's evidence regarding his injury. While there are difficulties in his evidence regarding dates, his evidence regarding his injuries is consistent with all of the other evidence. I do not find that the defendant's videotaped surveillance showing Mr. Mason shovelling, raking and cycling or the video clips of Mr. Mason lifting weights cast doubt on his evidence regarding the impact of his injury.

Karen Kellett

[20] Karen Kellett, Mr. Mason's mother, testified to the changes in her son since the accident. Before the accident he had no physical limitations, and was active, "open and happy'. Since the accident he:

1) is stoic and closed off;

2) is always in pain. He limps and is constantly rubbing and icing his knee;

3) is unable to do things he loves like play sports with his children and go camping;

4) does not go fishing as often (his favourite activity);

5) goes to the gym but his knee is “really sore’ when he returns home; and

6) is less happy.

Joel Crabe

[21] Joel Crabe describes Mr. Mason as his “number one best buddy”. They have known each other since grade 4. Before the accident, they saw each other every two or three weeks, fishing as often as possible, having coffee or enjoying a barbeque.

[22] When they fished before the accident, Mr. Mason was the “leader of the pack”. They would start early in the day and fish for hours. Mr. Crabe had trouble keeping up with the “agile” Mr. Mason as they hiked and scaled down embankments to get to remote fishing spots.

[23] Before the accident, Mr. Mason spoke to Mr. Crabe of his goal to be a paramedic: “that was his big focus”.

[24] Since the accident they see each other about once a week. Mr. Mason has changed. They do not fish as much. When they do it is in “simpler’ spots that do not require hiking or climbing. Mr. Mason needs to take breaks and sit down which frustrates him. Mr. Crabe notices Mr. Mason often grimacing in pain and stretching his knee out. He massages his knee a lot. He sometimes complains about his knee locking up. Mr. Mason is a little less patient and gets frustrated more quickly than before. His stamina has changed considerably. He needs to take breaks; in fact, he now needs more breaks than Mr. Crabe. He does not enjoy fishing as much. He is unable to chase the fish down the river. He is limited physically.

Joseph Rivard

[25] Mr. Rivard met Mr. Mason when Mr. Mason started working at Westeck. Mr. Mason was Mr. Rivard's supervisor.

[26] Before the accident, Mr. Mason worked long hours including regularly working overtime. He had no difficulty with the physical aspects of the job—stairs, moving things. Mr. Rivard describes Mr. Mason as one of the best supervisors he has had. Mr. Rivard went fishing with Mr. Mason a couple of times. They hiked into remote spots, set up camp and fished for hours. Mr. Mason had no physical limitations at work or fishing and never complained of pain.

[27] When Mr. Mason returned to work after the accident he limped and rubbed his knee a lot. He had trouble going up and down stairs. Mr. Rivard went up stairs to get things for him so he would not have to. Mr. Mason was no longer able to do the physical aspects of the job.

[28] Since the accident Mr. Mason fishes in places that are easier to get to that do not involve hiking or climbing. Mr. Rivard does not enjoy fishing in those spots as they are more crowded and have less fish. As a result, he does not see much of Mr. Mason anymore.

[29] Mr. Rivard saw Mr. Mason in passing when Mr. Mason returned to Westeck in 2022. He noticed that Mr. Mason's knee was causing him pain.

Luke McKerrow, Physiotherapist

[30] Physiotherapist Luke McKerrow treated Mr. Mason from August 12, 2019 to April 21, 2020. The last time he saw Mr. Mason in person was February 11, 2020 as thereafter therapy was delivered remotely due to the pandemic. In total Mr. McKerrow saw Mr. Mason about 22 times.

[31] When Mr. McKerrow first saw Mr. Mason, he was unable to bend or straighten his knee and he did not have full strength in it. Mr. McKerrow gave Mr. Mason an exercise program including eccentric exercises, which Mr. Mason followed. In a

progress report dated October 1, 2019, Mr. McKerrow noted that Mr. Mason was suffering ongoing soreness in his right knee and that during exercises Mr. Mason's knee would lock and then was stiffer and sorer. He also noted that Mr. Mason's knee clicked. Over the course of his treatment, Mr. McKerrow noticed a "definite improvement" in Mr. Mason's knee.

[32] According to Mr. McKerrow, cycling is a good physical activity for Mr. Mason's knee.

Chris Nguyen, Functional Capacity Evaluator

[33] On August 26, 2021, functional capacity evaluator Chris Nguyen assessed Mr. Mason's functional capabilities in order to evaluate his physical strength, functional limitations and feasible employment.

[34] Mr. Nguyen found that Mr. Mason demonstrated a diminished functional capacity which will likely adversely affect his ability to perform household/ yard chores and the more strenuous recreational activities Mr. Mason previously enjoyed.

[35] Regarding employment, in Mr. Nguyen's opinion, Mr. Mason is unable to perform physically challenging jobs that require more than occasional standing, walking, stooping, bending and kneeling. He lacks sufficient physicality to perform the job of paramedic.

Dr. Ollie Sovio

[36] Dr. Sovio, a "more or less retired" orthopedic surgeon, was retained by the defendant to give expert evidence as to the diagnosis, treatment and prognosis of Mr. Mason's injuries. Dr. Sovio has not performed surgery in about 10 years. He still does consultations, about 40 per month at the rate of 20 per day, and independent medical examinations such as this. Dr. Sovio firmly holds the belief that "75% of patients do not require surgery".

[37] By his own admission Dr. Sovio is retained "almost entirely" by insurance companies because of his beliefs that "you do the most with what you have" and that

most people have limitations and they simply need to maximise what they have. Dr. Sovio defines success as a patient returning to their activities with some discomfort.

[38] Dr. Sovio assessed Mr. Mason on February 16, 2022, and completed his report the same day. He spent approximately one hour with Mr. Mason, 30 minutes of which was consumed with a physical examination.

[39] In his report, Dr. Sovio proffered the following opinions:

1) Mr. Mason is “very functional”— “he jogs 5 km every second day and attends the gym daily doing muscle building exercises”;

2) eccentric exercise would “be very beneficial” in relieving Mr. Mason’s ongoing symptoms;

3) there is no indication that Mr. Mason should limit his activities—work or recreational;

4) there is nothing to suggest that Mr. Mason has to limit his career opportunities. In particular there is nothing on a physical basis that would limit him from being a paramedic.

[40] In cross-examination, Dr. Sovio’s opinion changed in several material ways, including:

1) He admitted that once a patient undergoes debridement it could increase his risk of developing osteoarthritis;

2) He conceded that Mr. Mason’s reports that his knee clicks and is swelling more often and in a larger area on his right knee is likely an indication that his knee is worsening;

3) He conceded that Mr. Mason’s prognosis for full resolution is poor given that his pain is ongoing;

4) He conceded that if Mr. Mason is unable to run for more than 10 minutes once or twice a week (rather than 5 km every other day as Dr. Sovio noted) his conclusion regarding Mr. Mason's function would change; and

5) He conceded that it is possible the accident caused Mr. Mason's condyle injury.

[41] In my view, Dr. Sovio's opinions were clouded by his preconceived belief that everyone is fine. As mentioned above, by his own admission that is why he is exclusively retained by the defence. Dr. Sovio gave opinions on matters outside his expertise, for example Mr. Mason's suitability for paramedic. On many occasions in cross-examination he refused to make reasonable concessions, such as that a functional capacity evaluator would be better positioned to reach conclusions on whether Mr. Mason could fulfill job requirements. As noted above, on several occasions in cross-examination he eventually made concessions that were contrary to his initial opinions. At times he did not answer questions directly, for example whether he refers patients with chronic pain to other specialists. His report is lacking in detail. Some notations are inaccurate such as that Mr. Mason reported that he runs 5 km every other day. His opinions are contrary to the opinions of other experts and to the evidence as a whole.

[42] For those reasons, I place little weight on Dr. Sovio's evidence. Where his evidence differs with other evidence, I prefer the other evidence.

Dr. Tonya Ballard, Physiatrist

[43] Physiatrist Tonya Ballard examined Mr. Mason twice. The first assessment occurred on February 28, 2020, about seven months after surgery. On that occasion, Dr. Ballard saw Mr. Mason for 100 minutes which included a 30-minute physical examination. The subsequent assessment took place on October 20, 2022 for about 70 minutes and involved a similar physical examination.

[44] In February 2020, Dr. Ballard diagnosed Mr. Mason as having chronic right knee pain secondary to medial femoral chondroplasty and patellar tendon

debridement as a result of post-traumatic chondral defect and patella tendinopathy. Her prognosis for full recovery was guarded.

[45] In October 2022, Mr. Mason told Dr. Ballard that his right knee had improved "60%". He reported a constant pain in his right knee that is aggravated with some activities such as kneeling, running on hard surfaces, and prolonged driving.

[46] In her updated report dated November 14, 2022, Dr. Ballard confirmed her February 28, 2020 diagnosis, set out above, and her opinion that the injury was caused by the accident. She maintains a guarded prognosis for full recovery. In Dr. Ballard's opinion, Mr. Mason will likely suffer persistent pain in the future which will increase with activities such as kneeling, climbing, squatting and jumping—any activity that puts force on the knee. Dr. Ballard opines that Mr. Mason will never be able to engage in physical activities as he did pre-accident. While Mr. Mason is able to do things such as shovelling, raking, weightlifting, he can only do them for a short time and then needs to rest and he will pay for it later with increased pain and swelling in his knee.

[47] Dr. Ballard disagrees with Dr. Sovio's opinion that the osteochondral lesion was an incidental finding and not caused by the accident. Based on Dr. Gillis' findings during surgery that Mr. Mason had a large grade 2 to 3 lesion on the medial femoral condyle which had multiple loose flaps of cartilage that would catch through range of motion (the mechanical catching), Dr. Ballard is of the opinion that the chondral defect was the result of the accident. In coming to this conclusion, she notes that Mr. Mason did not have pain before the accident and had immediate onset after.

[48] Regarding rehabilitation, Dr. Ballard agrees with Dr. Sovio that eccentric rehabilitation is appropriate but points out that Mr. Mason engaged in an eccentric strengthening program with Mr. McKerrow and, while there was some improvement, continues to have chronic pain and symptoms.

Analysis

[49] Mr. Mason seeks an award in the range of $160,000 to $200,000. In support of this range he relies on the following cases: *O'Mara v. Insurance Corporation of British Columbia*, 2019 BCSC 2222 ($205,849); *Cook v. Symons*, 2014 BCSC 1781 ($172,614); *Ratelle v. Barton,* 2022 BCSC 22 ($160,531); *Hubbs v. Escueta*, 2013 BCSC 103 ($161,316); *Ferguson v. Watt*, 2018 BCSC 1587 ($160,500); *Ross v. Dupuis*, 2017 BCSC 2159 ($140,613).

[50] The defendant takes the position that the appropriate award is in the range of $80,000 to $110,000. The defendant relies on *Bernatchez v. Chisholm*, 2022 BCSC 105 ($110,000); and *Sohal v. Singh*, 2017 BCSC 734 ($80,000, not adjusted for inflation).

[51] In taking this position the defendant argues that while Mr. Mason suffered for about two years, he has gradually improved since surgery and has resumed all of the recreational activities he enjoyed pre-accident. He says that the fact that Mr. Mason has not gone for physiotherapy for two-and-a-half years and has not taken any medication indicates that he is better and has no need for them. I disagree.

[52] As above, I find Mr. Mason's evidence regarding the injury to his right knee and the impacts of same to be credible and reliable. His evidence was corroborated by all of the other witnesses save Dr. Sovio. It is also consistent with the way he presented throughout his lengthy testimony: he was continually rubbing his right knee and had to stand up intermittently to relieve the pain.

[53] I find the following as fact:

1) As a result of the accident Mr. Mason suffered injuries to his neck, left shoulder, right hip, and right knee. All injuries aside from his right knee resolved within a few weeks. His right knee got worse. In addition to the constant pain and swelling, the knee started catching or locking;

2) In around the spring of 2019, the surgeon injected Mr. Mason's knee with cortisone. It made the symptoms worse. Mr. Mason could not walk at all and had to take time off work;

3) On July 26, 2019, Mr. Mason underwent surgery on his right knee. Rehabilitation was a long, painful process;

4) Mr. Mason is still in constant pain which increases on exertion, including climbing stairs, crouching, prolonged standing, exercising, and heavy house work;

5) While he can still do activities like shovel, rake, weightlift, he can only do them occasionally and for a short period of time and then will suffer increased pain and swelling in his right knee after. Contrary to Dr. Sovio's note that Mr. Mason jogs 5 km every second day, Mr. Mason is not able to run for more than 10 minutes at a time;

6) The symptoms are chronic and will persist;

7) He is at risk of developing osteoarthritis in his knee;

8) The injury has impacted every aspect of his life. He is no longer able to engage in activities that he enjoys like fishing, camping and playing with his children. Sexual activity causes him pain. The constant pain causes him to be irritable and short-tempered. His relationships have been affected. He is less happy and more introverted; and

9) His goals for the future are no longer attainable and he is floundering to find a new path.

[54] As can be seen from the above findings, I am satisfied that the injury suffered in the accident has had a profound impact on Mr. Mason's life and will continue to do so. Having regard to the cases, I find *Ferguson* and *Hubbs* to be closest factually. Accordingly, I find $160,000 to be an appropriate award for non-pecuniary damages.

[55] Out of an abundance of caution I will address failure to mitigate. While the defendant did not touch on it in their closing, it was mentioned in the trial.

Failure to Mitigate

[56] There is a duty on a plaintiff in a personal injury action to take reasonable steps to limit their loss.

[57] In order to prove a failure to mitigate, a defendant has to prove two things:

1) the plaintiff acted unreasonably in not taking the steps that the defendant says ought to have been taken; and

2) the plaintiff's loss would in fact have been eliminated or reduced, had the step been taken.

See *Rhodes v. Surrey (City),* 2018 BCCA 281 at para. 57; *Karst v. Foster,* 2019 BCSC 1043 [*Karst*] at para. 147.

[58] Whether a plaintiff has acted reasonably in the context of rehabilitation is a question of fact: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202. While it is a plaintiff's right to not prioritise treatment, the defendant should not have to pay for their choice; *Klose v. Chybisov*, 2021 BCSC 333 at para. 105.

[59] As Justice Horsman, as she then was, stated in *Karst*, the court will not readily find a failure to mitigate*:*

> [149] In considering the defence of mitigation, courts are slow to determine that a plaintiff has acted unreasonably in making good-faith decisions about what treatment and employment steps they will take to address an injury. As stated in *Paniccia Estate v. Toal*, 2012 ABCA 397 at para 86, cited in *Gallina* at para. 128:
>
> > … the court only lightly reviews the decision of a person injured to try to mitigate his loss. Courts are extremely slow to criticize good-faith decisions by victims of torts about both whether to take steps in mitigation, or which steps, or how much expense or risk to incur in doing so.

[60] The defendant raised the issue that Mr. Mason acted unreasonably in not continuing with physiotherapy.

[61] Mr. Mason engaged in physiotherapy with Mr. McKerrow for about eight months from August 12, 2019 to April 21, 2020. He continues to do the exercises given him by Mr. McKerrow on his own.

[62] There is no evidence that Mr. Mason acted unreasonably in his rehabilitation. I do not find that he failed to mitigate his losses. The award stands at $160,000.

ISSUE 2: PAST WAGE LOSS

[63] Past wage loss is "a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury": *Rowe v. Bobell Express Ltd*., 2005 BCCA 141 at para. 30. Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a plaintiff is only entitled to recover the net amount of their damages under this heading of damage.

[64] Under this head of damage, Mr. Mason claims $47,957 being the income he lost as a result of the accident in 2018 and 2019. During this period of time he was working at Westeck.

[65] As a result of his injuries, Mr. Mason was off work after the July 24, 2018 accident until September 4, 2018, when he began a gradual return, working four to six hours per day, performing only the less physical aspects of the job. The knee pain continued. Mr. Mason took additional time off work following the cortisone injection (a week), and then again following the surgery (July 26 to November 18, 2019). ICBC paid him $7,300 for this period as a top up to what he was paid from employment insurance ("EI"). Again, it was a gradual return to work performing mostly administrative duties; nothing physical.

[66] The defendant concedes that Mr. Mason should be awarded past wages for the time he missed at Westeck from the date of the accident to September 8, 2018, and the time he missed following his surgery—July 26, 2019 to January 12, 2020. I

agree but add that Mr. Mason should also be compensated for hours lost during the return to work periods when he worked part-time, and the week he was off following the cortisone injection.

[67] Mr. Mason prepared a record of time lost at work which was marked as an exhibit. Although he testified in direct that he prepared it simultaneously then added in the “obvious” overtime, it became clear from all of the evidence that it is inaccurate and over reports lost working hours.

[68] The work week at Westeck was Monday to Thursday, 10-hour shifts, plus, according to both Mr. Mason and Mr. Rivard, they routinely worked Fridays as overtime. Mr. Mason testified that he worked 10 hours overtime every Friday. Mr. Rivard testified that he worked four to six hours of overtime on Fridays and that Mr. Mason, as supervisor might have worked longer than that doing paperwork. As there is no evidence to prove how many overtime hours Mr. Mason would have worked on Fridays, based on Mr. Rivard’s evidence I am satisfied that five hours is reasonable.

[69] I find the hours lost as follows:

Period	Status	Regular hours missed	Overtime hours missed
July 24, 2018–September 7, 2018	Off work	24 days x 10 hours per day = 240	7 Fridays @ 5 hours per day = 35
September 8–30, 2018	Gradual return to work; working an average of 5 hours per day	12 days at 5 hours = 60	
One week in early 2019 after the cortisone injection	Off work	4 days @ 10 hours = 40	1 Friday @ 5 hours = 5
July 26, 2019-November 17, 2019	Off work	59 days @ 10 hours per day = 590	17 Fridays @ 5 hours per day= 85
November 18, 2019 to January 12, 2020	Gradual return to work; working an average of 5 hours per day	30 days @ 5 hours per day = 300	
		1230 hours	125 hours

[70] I calculate past wage loss as $30,830, as follows:

Regular hours: 1230 hours @ $21.75 per hour = $26,752.50

Overtime hours: 125 hours @ $32.62 per hour = $4,077.50

[71] In 2019, Mr. Mason received EI of $11,257 and a top up of $7,300 from ICBC, for the time off following the surgery which must be deducted from the lost wages.

[72] Based on the calculations above, Mr. Mason lost wages of $12,273 due to the accident. Adjusted for taxes (assuming a rate of 20%), the award for past wage loss is $9,818.40.

ISSUE 3: LOSS OF FUTURE EARNING CAPACITY

The Law

[73] The essential purpose of an award for past loss of opportunity and diminished earning capacity is to provide the plaintiff with full compensation for all of their pecuniary losses, subject to rules of remoteness and mitigation: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. It is to restore, as best as is possible with a monetary award, an injured plaintiff to the same position they would have been in had the negligence not occurred. It is the difference between the plaintiff's original position just before the occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission, that comprises the plaintiff's loss: *Athey v. Leonati,* [1996] 3 S.C.R. 458, at paras. 34–35.

[74] Our Court of Appeal restated the principles to be applied in assessing the loss of earning capacity in three recent decisions: *Dornan v. Silva*, 2021 BCCA 228 [*Dornan*]; *Rab v. Prescott*, 2021 BCCA 345 [*Rab*]; and *Lo v. Vos*, 2021 BCCA 421. In *Dornan* at para. 156, Justice Grauer cites *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32, where the Court described the proper approach in these terms:

> An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened…

[75] In *Rab* at para. 47, Grauer J.A. set out a three-step process for assessing claims for loss of future earning capacity:

1) Whether the evidence discloses a potential future event that could lead to a loss of earning capacity, for example, chronic injury;

2) Whether on the evidence there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and

3) If the answer to [2] above is yes, the judge must assess the loss, applying either the earnings approach or the capital asset approach, and assessing the relative likelihood of the possibility occurring.

[76] While Grauer J.A. does not say so expressly in his above formulation of the test, it is well-established that, having engaged in the proper assessment, the trial judge must then determine if the proposed damages award is fair and reasonable.

[77] I will consider the test step by step.

[78] The first step involves a consideration of whether there exists a potential future event that could lead to a loss in the plaintiff's earning capacity.

[79] The second step requires the court to determine whether the evidence discloses a real and substantial possibility that the future event in question will cause a pecuniary loss. "Real and substantial possibility" refers to threshold likelihood. It is the standard of proof for admitting hypothetical events, both past and future, into the evidentiary record as if they already happened. It is a lower threshold than a balance of probabilities but a higher threshold than something only possible and speculative: *Dornan* at para. 94; *Gao v Dietrich*, 2018 BCCA 372 at para. 34.

[80] Factors relevant to determining whether there is a real and substantial risk of pecuniary loss include:

1) The plaintiff's intention to keep working and what they intend to do for work;

2) Where the potential event precludes income from a particular occupation the plaintiff does not intend to pursue, there will not be a real and substantial possibility, because that income would never have been earned;

3) Inability to devote the same energy or hours to their pre-accident occupation;

4) Work history;

5) Medical condition; and

6) The plaintiff's intentions concerning their future lifestyle, and the risk inherent in those plans.

See *Dornan* at paras. 67, and 119–120; *Rab* at paras. 60–62.

[81] The third step is to assess the value of the possible future loss applying either the earnings approach or the capital asset approach.

[82] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, Mr. Justice Voith, as he then was, summarized the legal principles relevant to determining future loss of earning capacity at para. 133:

> a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
>
> b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
>
> c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
>
> d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;

e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;

f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.

g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

Analysis

[83] Mr. Mason seeks an award for loss of future earning capacity in the range of $435,000 to $566,000. He claims that as a result of the injuries, he suffered in the accident, he is unable to pursue his dream career as a paramedic, and must settle for a lower paying job. Alternatively, Mr. Mason claims that he is now precluded from jobs as production and operations manager due to his physical limitations leading to a loss of future earnings.

[84] The defendant takes the position that there should be no award under this heading because there is no evidence other than from Mr. Mason that he cannot become a paramedic or alternatively, work as a manager as he has been doing. I disagree.

[85] Mr. Mason testified that he became interested in becoming a paramedic a number of years before the accident. While he had always enjoyed helping people, his interest was sparked when he and his daughter were involved in a car accident and he helped the driver of the other car. At that point he decided that he wanted to be the person that was in a position to assist medically. He formulated a plan. He took his First Aid level 2 course (he had taken First Aid level 1 in the military). He started upgrading to get his grade 12 equivalency. When offered a job at Westeck, he took only a two-year contract in anticipation of starting down the path to become a paramedic. He started saving money as he would be without income during the paramedic training and he has children to support and bills to pay. He talked about

his aspirations to others. Both Ms. Kellett and Mr. Crabe, testified that Mr. Mason had talked to them about his goal of becoming a paramedic and that he wanted to be that person that was in a position to help others. They corroborated that the accident with his daughter was the impetus.

[86] Vocational consultant, Dr. Colleen Quee Newell assessed Mr. Mason in November 2021. It is her opinion that Mr. Mason has the intellectual capabilities to successfully complete the primary care paramedic program and work as a paramedic. Katherine Redmond from BC Health Services testified about the shortage of paramedics in British Columbia and the push to hire more.

[87] All of the experts, save Dr. Sovio, share the opinion that Mr. Mason is unable to be a paramedic because of his knee injury. In Dr. Ballard's opinion, Mr. Mason will be limited in what he can do employment-wise due to his right knee. Any dynamic job which requires varied positions and physical demands like climbing, lifting, or prolonged standing is not feasible for him. Consequently, being a paramedic is not an option due to his injury.

[88] Functional capacity evaluator, Chris Nguyen, is also of the view that Mr. Mason is unable to perform the tasks required of a paramedic due to the limitations caused by his knee injury. Of note, Mr. Nguyen has experience pre-screening the functional capacity of paramedic candidates so he has first-hand knowledge of what is required physically. In Mr. Nguyen's view, Mr. Mason does not meet the requirements for crucial aspects of a paramedics' job including crouching, squatting, kneeling, climbing, bending and lifting.

[89] Dr. Quee Newell opines that Mr. Mason is precluded from pursuing a career as a paramedic due to his injury.

[90] I accept all of these opinions. I further accept that Mr. Mason's condition has not improved since any of the examinations, and that it will persist.

[91] I do accept that there is a possibility that but for the accident, Mr. Mason would have become a paramedic. However, because the evidence shows that he

has a history of moving from job to job and having plans for businesses that do not come to fruition, I am unable to conclude that it is a substantial possibility. Nor can I conclude that if Mr. Mason did become a paramedic he would have remained at the job for the remainder of his working life.

[92] What is clear is that Mr. Mason's job prospects are now limited by his injury. As a result of the accident, Mr. Mason has lost the ability to take advantage of opportunities. He is less marketable as an employee, as he is limited in what tasks he can perform. From all of the evidence, it is clear that Mr. Mason's many jobs since the accident, although he is a manager or supervisor, involve some physical tasks which cause him difficulty, and have made it impossible for him to remain.

[93] Taking all of the evidence into consideration, I find that the appropriate approach in the circumstances of this case is the capital asset approach as Mr. Mason's earning capacity as a capital asset has been impaired. The task of this court is to try to put a value on it.

[94] Some factors to take into account when assessing the loss or impairment of a capital asset include the following:

> 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.

See *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (BCSC) at para. 8.

[95] In quantifying Mr. Mason's loss of earning capacity all of the factors above apply. Since the accident, Mr. Mason has bounced from one job to the next for various reasons. While I acknowledge that not all of his job changes are due to his injury, I accept that he finds aspects of each job challenging because of his injury. Taking all of the above into consideration, as well as the fact that Mr. Mason is a

relatively young man with likely 25 more working years ahead of him, I assess Mr. Mason's loss of future earning capacity at $200,000.

ISSUE 4: COST OF FUTURE CARE

[96] The goal of an award of damages for future care is to restore the plaintiff, in so far as possible, to the position they would have been in had they not been injured. Restitution is accomplished by restoring to the plaintiff what they have lost, not providing for every possible treatment that may prove some benefit to the plaintiff. See *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29.

[97] The principles that determine an award for the cost of future care were set out by Justice Schultes in *Warick v. Diwell*, 2017 BCSC 68; aff'd 2018 BCCA 53:

> [203] Claims made for future care must be both medically justified and reasonable. An award "should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at paras. 199 and 201; aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.).
>
> [204] This requirement of medical justification, as opposed to medical necessity "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact": *Harrington v. Sangha*, 2011 BCSC 1035, at para. 151.
>
> [205] The question has often been framed as being whether a reasonably-minded person of ample means would be ready to incur a particular expense: *Andrews v. Grand & Toy Alberta Ltd*., [1978] 2 S.C.R. 229 at p. 245.
>
> [206] The evidence with respect to the specific care required does not need to be provided by a medical doctor: *Jacobsen v. Nike Canada Ltd*. (1996), 19 B.C.L.R. (3d) 63, (S.C.) at para. 182. However, there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
>
> [207] Damages for the cost of future care are assessed, not mathematically calculated: *Uhrovic v. Masjhuri,* 2008 BCCA 462 at paras. 28-31. There is an inherent degree of uncertainty and discretion in making such awards. Because awards are made "once and for all" at the time of trial, judges must "peer into the future" and fix the damages "as best they can". This includes allowing contingencies for the possibility 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.

> [208] While no award should be made in relation to an expense that the plaintiff will not actually incur (*Izony v. Weidlich*, 2006 BCSC 1315 at para. 74), the focus of inquiry when a justified item or service was previously unused, is whether it is "likely to be incurred on a going forward basis": *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 251.
>
> [209] A plaintiff is not entitled to an award for that portion of their costs of future care that will be publicly funded. However, the risk that access to public funds may be lost in future is a proper basis to provide a contingency in the award: *Boren v. Vancouver Resource Society for the Physically Disabled*, 2003 BCCA 388 at para. 25.
>
> [Emphasis added.]

[98] Mr. Mason seeks $30,000 under this head of damage for the following:

Sessions with a kinesiologist or physiotherapist, including visco-supplementation and/or PRP to manage residual pain and arthritis	1–2 sessions per year @ $100 per session for 30 years	$7,000	Recommended by Dr. Ballard
Annual gym membership to continue with the strengthening exercises	30 years	$20,280	
Career counselling	12 sessions @ $75–$150 per session	$900–$1,800 plus tax	Dr. Quee Newell

[99] The defendant takes the position that Mr. Mason should be awarded nil under this head of damage as he has not undertaken any treatment since April 2020.

[100] I agree with the defendant in so far as physiotherapy or kinesiology is concerned. Mr. Mason has not sought further treatment of this sort nor did he express an interest in ongoing treatment. Regarding a gym membership, that is something that Mr. Mason had regardless of the accident.

[101] I do agree that career counselling would be helpful to Mr. Mason. As noted above, his value as an employee has been damaged. He is less valuable. He is

unable to work as he did before the accident. Even prolonged standing is difficult. He is floundering regarding what to do next. According to Dr. Quee Newell, career counselling would assist Mr. Mason develop a viable career compatible with his aptitudes, abilities and interests.

[102] In my view, $1,400 for career counselling is a fair award under this heading of damage.

ISSUE 5: LOSS OF HOUSEKEEPING ABILITIES

[103] Mr. Mason and his mother and children live in a house in a rural area. Their property is a quarter acre of grass, vegetable gardens and a greenhouse. Before the accident, Mr. Mason did the gardening and all outside chores. He also performed many chores inside the house. Now, because of his knee he is either unable to do them because he can not kneel on his knee or has difficulty doing them.

[104] Ms. Kellett testified that prior to the accident, Mr. Mason did most of the outdoor work as well as a good deal of the inside work. She estimates that Mr. Mason spent as much time working work at home as he did at work. Since the accident he tries to help but cannot do what he used to do. For example, he can shovel snow for 10 to 15 minutes then has to come in to ice his knee. Before the accident, Mr. Mason trimmed the trees himself; now they have to pay an arborist.

[105] As a result of these difficulties, Mr. Mason says he requires the following assistance:

1) Housekeeping to do the heavier work, six hours per month at $25 per hour; and

2) Outdoor maintenance, 30 hours per year at $25 per hour.

[106] Both Dr. Ballard and Mr. Nguyen corroborate Mr. Mason’s need for intermittent assistance with heavier outdoor work. Mr. Nguyen is further of the view that Mr. Mason requires the assistance of a housecleaner to perform heavier chores

like scrubbing floors and cleaning bathtubs. He recommends bi-weekly assistance plus more a couple of times a year for seasonal cleaning.

[107] Mr. Mason seeks an award of $100,000 under this head of damage. In doing so, he does not use a mathematical calculation, rather he says that the capital asset approach is appropriate. Mr. Mason submits that $100,000 is a modest amount considering that because of the accident he will require some assistance for the rest of his life.

[108] The defendant takes the position that housekeeping capacity should be addressed within non-pecuniary damages. The defendant points out that Mr. Mason testified at his examination for discovery that he did not do inside household chores before the accident, and that Dr. Ballard testified that Mr. Mason is physically able to do outdoor work but he will be sore after.

[109] I disagree that that is what Dr. Ballard said. She said that Mr. Mason can perform outdoor tasks such as raking or shovelling for short periods of time but will then need to rest and will pay for it after with increased knee pain. That does not make him capable of performing heavy outdoor work.

[110] The legal principles pertaining to loss of housekeeping capacity were recently set out by Justice Devlin in *Palidwor v De Vries*, 2021 BCSC 85 [*Palidwor*]:

> [37] A plaintiff's claim for loss of housekeeping capacity may be compensated by a pecuniary or a non-pecuniary award: *Kim v. Lin*, 2018 BCCA 77 at para. 28 [*Kim*].
>
> [38] It is in the discretion of a trial judge whether to address a claim for loss of housekeeping capacity as part of the non-pecuniary loss or as a separate pecuniary head of damage: *Kim* at para. 28 citing *Liu v. Bains*, 2016 BCCA 374. Mr. Justice Gomery in *Nguyen v. O'Neil*, 2020 BCSC 2036 stated the following with respect to loss of housekeeping capacity:
>
> > [104] In *Ali v. Stacey*, 2020 BCSC 465, I considered two recent considered decisions of the Court of Appeal addressing claims for loss of housekeeping capacity; *Kim v. Lin*, 2018 BCCA 77 at paras. 27-37 [*Kim*], and *Riley v. Ritsco*, 2018 BCCA 366 at paras. 96-103 [*Riley*]. I concluded:
> >
> > > [67] Read together, these two judgments establish that a plaintiff's claim that she should be compensated in connection with household

> work she can no longer perform should be addressed as follows:
>
> > a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
> >
> > b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.
> >
> > c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
> >
> > d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.

[111] I find the following:

1) Before the accident, Mr. Mason did all the outside work and assisted his mother with indoor housekeeping;

2) While Mr. Mason's children have been helping out with the chores post-accident, that is a short-term solution. The children, with the exception of the youngest, are all about to move out;

3) Mr. Mason's mother is physically unable to do the work;

4) Mr. Mason is capable of doing some chores but will never be able to do the heavy-duty work inside or outside the home, and will have to pay someone to do it; and

5) The fact that Mr. Mason can do a task for a short-time but then is in pain after, does not mean that he is capable of performing the task.

[112] Applying those facts to the considerations above, I am satisfied that loss of housekeeping capacity is a pecuniary asset, and therefore should be compensated under this separate head of damage. Valuing the loss holistically rather than as a mathematical formula, I am satisfied that $60,000 is an appropriate award under this head of damage.

ISSUE 6: SPECIAL DAMAGES

[113] An injured person is entitled to recover the reasonable out-of-pocket expenses he incurred as a result an accident: *Palidwor* at para. 51.

[114] Mr. Mason claims special expenses of $6,633.06. The defendant agrees to $1,633.06 of that amount but not the rest as it was spent on an arborist that Mr. Mason had to hire annually since the accident.

[115] While I accept that Mr. Mason needs to hire an arborist to perform a task that he can no longer manage, no evidence was put before the court to prove that an arborist was hired every year or the cost of same. Accordingly, I decline to order payment.

[116] I award $1,633.06 for special damages.

CONCLUSION

[117] Mr. Mason is entitled to the following damages:

Non-pecuniary damages	$160,000
Net past wage loss	$9,818.40
Loss of future earning capacity	$200,000
Cost of future care	$1,400

Loss of housekeeping capacity	$60,000
Special damages	$1,633.06
TOTAL	$432,851.46

[118] I leave it to the parties to consider the results of this judgment and address any tax and interest implications. If unable to reach agreement on these matters or costs, a hearing may be scheduled through Supreme Court scheduling.

"The Honourable Madam Justice Murray"