IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Swieczko v. Nehme,*
2016 BCSC 399

Date: 20160308
Docket: M130175
Registry: Vancouver

Between:

Dawid Swieczko

Plaintiff

And

Hanaa Nehme

Defendant

Before: The Honourable Madam Justice Koenigsberg

Reasons for Judgment

Counsel for the Plaintiff:	Timothy H. Pettit Amanda N. Koralewica
Counsel for the Defendant:	Mark C. Killas
Also appearing for a limited purpose – counsel for the Plaintiff Hanaa Nehme in Action No. VA M136835:	Jordana Dhahan R. Bath (A/S)
Also appearing for a limited purpose – counsel for the Defendant David Swieczko in Action No. VA M136835:	Anthony Urquhart
Place and Dates of Trial:	Vancouver, B.C. January 11-15, 2016
Place and Date of Judgment:	Vancouver, B.C. March 8, 2016

INTRODUCTION

[1] This is a claim for damages for personal injuries that the plaintiff suffered in a "T-bone" motor vehicle accident that occurred at around 7:00 p.m. on October 29, 2011 (the "Accident").

[2] Liability is a major issue. Ms. Nehme is suing Mr. Swieczko for this same accident in a separate action, Vancouver Registry No. 136835 (the "Second Action"), which is set for trial in the fall of 2016.

[3] At the opening of trial, counsel for Ms. Nehme in the Second Action, against Mr. Swieczko, and counsel for Mr. Swieczko as defendant in the Second Action, sought to be heard on liability by written submissions at the end of this trial. It was agreed that barring extraordinary circumstances, the finding of liability in this trial would be binding on all parties.

[4] After a significant discussion, I agreed to some form of submissions – oral or written – from counsel in the Second Action at the close of submissions in this trial. Ms. Nehme and Mr. Swieczko both, through counsel, and in Ms. Nehme's case, directly to the Court, agreed that they understood that this Court's finding on liability would be binding on them barring extraordinary circumstances. Extraordinary circumstances were agreed to be defined as matters which must become apparent during this trial and if such circumstances were apparent this Court would entertain an application for a mistrial.

[5] This agreement was put on the record and, thus, I agreed that counsel in the Second Action could remain during the trial and could, if they chose, make submissions in some form at the end of the trial. Counsel in the Second Action did remain throughout the trial and Ms. Dhahan, on behalf of Ms. Nehme, chose to make oral submissions on liability. Mr. Urquhart did not.

LIABILITY

[6] The Accident occurred at the intersection of No. 4 Road and Westminster Highway in Richmond, British Columbia. At this intersection, Westminster Highway

has three lanes of traffic in either direction, with each side having two through lanes and a left turn lane.

[7] There is no dispute that the defendant was travelling westbound in the curb lane on Westminster Highway when her vehicle struck the passenger side of the plaintiff's vehicle, while the plaintiff was turning left from the eastbound left turn lane on Westminster Highway to go north on No. 4 Road.

[8] The issue in dispute is the proportion of liability that should be borne by the plaintiff and the defendant for the Accident. Each of the parties claim the other is 100% at fault.

Positions of the Parties

Plaintiff

[9] The plaintiff submits that he arrived at the intersection while the lights on Westminster Highway were at a stale green. He came to a stop at the white stop line and then proceeded into the intersection while the light was still at a stale green, and his left turn indicator was on at all times.

[10] The plaintiff waited in the intersection for oncoming traffic to pass so that he could make his left turn. The Westminster Highway light turned amber, and westbound vehicles continued to pass on the early amber, preventing the plaintiff from making his turn. As the amber light became stale, two westbound vehicles in the inside lane came to a stop and the plaintiff began his left turn. He likely did not see the defendant's vehicle as he made his turn because his view was blocked by the two stopped vehicles in the inside lane.

[11] The Westminster light turned red shortly after the plaintiff began making his turn. For a few critical seconds, the lights in all directions at the intersection remained red (the "all-red"). Late in the all-red, the plaintiff was finishing his left turn onto No. 4 Road. At that moment, the plaintiff's wife, Ms. Kelsey Phillips, who was sitting in the front passenger seat of the plaintiff's vehicle, looked to her right and saw the defendant's minivan approaching the middle of the intersection at speed.

She uttered a warning to the plaintiff, but it was too late for the plaintiff to react or avoid the collision.

[12] The plaintiff says the defendant entered the intersection while her light was red. The front of her minivan struck the passenger side of the plaintiff's vehicle, with the force of the collision sending her minivan into a vehicle driven by Mr. Alexander Albrich, who was stopped in the southbound inside lane on No. 4 Road, waiting to go straight through.

Defendant

[13] The defendant submits that she was traveling at a safe speed of roughly 55 km/h when she entered the intersection. The Accident happened after she had entered the intersection, while the light was changing from green to amber. She could not bring her vehicle to a safe stop when the light turned amber, because she was already into the entrance to the intersection. There, she was the dominant driver and had the right of way.

Findings of Fact

[14] In making my findings of fact, I considered the evidence given by the following witnesses, all of whom were present at the time of the Accident and testified on matters relevant to the liability issues in this case:

a) the plaintiff, Mr. Dawid Swieczko, who was turning left from the eastbound left turn lane on Westminster Highway to go north on No. 4 Road;

b) the plaintiff's wife, Ms. Phillips, who was riding as a passenger in the front seat of the plaintiff's vehicle;

c) the defendant, Ms. Hanna Nehme, who was driving through the intersection while westbound on Westminster Highway in the curb lane;

d) the defendant's son, Mr. Humaam Hamado, who was sitting in the front passenger seat of the defendant's minivan;

e) Mr. Albrich, who was the driver of a vehicle that was stopped and waiting to go straight through in the southbound inside lane of No. 4 Road; and

f) Ms. Diana Lee, who was the driver of a vehicle that was stopped and waiting in the westbound left turn lane on Westminster Highway to turn left onto No. 4 Road.

Colour of the Westminster Hwy. Light when the Accident Occurred

[15] I find that the evidence establishes on a balance of probabilities that the Westminster Highway light was in the early red or all-red stage when the Accident occurred.

[16] I note that the plaintiff testified that he did not see the light turn red while he was making his turn. However, his evidence that he began his turn while his light was in the late amber stage was consistent and credible, and, when combined with the fact that he would have had to cross two lanes of traffic to have been in front of the westbound curb lane where the collision occurred, strongly supports the inference that the light was in the all-red stage at that time.

[17] This inference is buttressed by the evidence of Ms. Phillips, who credibly testified that she saw the light turn red before the Accident occurred. In general, I give significant weight to the testimony of the plaintiff and Ms. Phillips, whose accounts I find to be reliable, credible and unshaken on cross-examination.

[18] My finding is also consistent with the testimony of the two independent witnesses, Mr. Albrich and Ms. Lee. Mr. Albrich initially testified that, immediately prior to the Accident, he saw that the Westminster Highway lights were green. However, on cross-examination, he admitted he may have been in error, and the

green light that he saw may have in fact been a south-facing light, meaning that it was a green light for the northbound traffic on No. 4 Road.

[19] If Mr. Albrich's evidence on this point is correct, it logically follows that there was a red light for the traffic on Westminster Highway at the time of the Accident. Even if his observation in this regard is mistaken, his testimony that he had been waiting for a while at the intersection before the Accident occurred is consistent with my finding as to the colour of the lights.

[20] Ms. Lee testified that she was waiting to turn left in the westbound left turn lane on Westminster Highway when the Accident occurred. She said that her light had already turned red when she saw the defendant's vehicle approaching into the intersection at speed. She said that she noticed that the defendant was not slowing for the red light, and she knew a collision was imminent. Ms. Lee testified that the defendant entered the intersection while the light was red. In a prior statement, Ms. Lee indicated that the plaintiff's vehicle was traveling northbound on No. 4 Road at the time of the Accident, but admitted that she was in error on this point and had mistakenly presented an assumption as an observation.

[21] Ms. Lee testified that she saw the Accident and immediately called 911 while she was still stopped in the left turn lane on the westbound side of Westminster Highway. She then made her turn onto No. 4 Road and pulled over onto the shoulder to await emergency services, which quickly arrived on the scene. She did not give a statement to the police at that time because it appeared that they had everything under control, and she had spoken to the 911 operator.

[22] While I find Ms. Lee to be candid, forthright and fair as an independent witness, I give less weight to her testimony than that of the other witnesses because she did not provide a statement about her observations until more than two years after the Accident occurred. I do, however, accept that she saw the Accident happen while she was stopped and waiting in the westbound left turn lane on Westminster Highway, and I find that her account in this regard was uncontradicted by the other witnesses.

[23] The fact that prior to the Accident Ms. Lee had come to a stop in the left turn lane and had not proceeded into the intersection to make her turn, supports the inference that the Westminster Highway light was in the late amber, all-red, or early red stage at that time. This inference provides further reinforcement for my finding that the light was in the all-red or early red stage at the time of the Accident, which would have occurred shortly after Ms. Lee came to a stop in the left turn lane.

[24] I am unable to rely on the defendant's testimony as to the colour of the light when she entered the intersection. Her account in this regard was unreliable and inconsistent. In a statement taken on November 2, 2011, just four days after the accident, she said that the light was yellow as she entered the intersection. However, at trial, she testified that the light was green when she entered the intersection.

[25] The defendant's November 2, 2011 statement is problematic in other respects. She claims that as she approached the intersection, traveling at 50-60 km/h, she could see the plaintiff's vehicle stopped at the white line in the eastbound left turn lane. She said that she entered the intersection and suddenly the plaintiff began to make his left turn. The defendant then hit her brakes but was unable to avoid colliding with the plaintiff's vehicle.

[26] I find this account of the Accident to be unreliable. As I mentioned above, the defendant was traveling in the westbound curb lane, so the plaintiff's vehicle had to have crossed two lanes of traffic to have been "T-boned" by the defendant's minivan. The evidence clearly establishes that this was what occurred. The idea that the plaintiff would have been able to move into this position from a full stop in the same amount of time that it took the defendant's vehicle, moving at 50-60 km/h, to travel the width of the pedestrian crosswalk and perhaps one lane of traffic is unlikely and unsubstantiated by the weight of the evidence.

[27] Although he presented as a forthright witness and reasonable young man, I am likewise unable to rely on the testimony of the plaintiff's son, Mr. Hamado. He testified that the Westminster Highway light changed from green to yellow while the

defendant's minivan was entering the intersection, which is inconsistent with the weight of the remainder of the evidence, as I have set out above. He was not an experienced driver at the time of the Accident and had only recently obtained his learner's permit. His recollection of what had happened just before the collision is no doubt coloured by the fact of the collision and his mother's statements. However, I wish to be clear that his evidence reflected his sincere beliefs about what occurred and his observations may have been subject to misunderstandings about which lights he was seeing and his ability to judge distances.

[28] I should not leave this assessment of conflicting evidence without further comments. The defendant, Ms. Nehme, gave her evidence through an interpreter. She does speak English; however, she apparently finds it difficult to express herself fluently in that language. There were many inconsistencies in her evidence, both in relation to what she said at her examination for discovery and also her statement closer to the time of the accident, in relation to her evidence at trial. More problematic, however, she appeared to be quite unresponsive to clear questions while giving her testimony in court. This happened several times. I am unable to determine whether she is simply an unreliable and stubborn witness or if the problem is one of difficulty with the English language or perhaps both. In the result, her evidence of the colour of light as she approached or just entered the intersection was worthy of little weight. The Court is left with trying to determine the colour of the light as she approached and entered the intersection on the basis of other evidence and logical deduction.

[29] In summary, I find that the probabilities of the evidence upon which I can rely establish that the Westminster Highway light was in the all-red or early red stage at the time of the Accident. I also find that the light was in the late amber stage as the plaintiff began his left turn. I therefore find that the light was in the late amber or early red stage as the defendant entered the intersection. Thus, the light had turned amber when the defendant was well before the intersection and she should have had enough time to safely stop.

Proportion of Liability

[30] The applicable sections of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, are:

> **Yellow light**
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> **128** (1) When a yellow light alone is exhibited at an intersection by a traffic control signal, following the exhibition of a green light,
>
> > (a) the driver of a vehicle approaching the intersection and facing the yellow light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, unless the stop cannot be made in safety,
> >
> > …
>
> **Red light**
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> **129** (1) Subject to subsection (2), when a red light alone is exhibited at an intersection by a traffic control signal, the driver of a vehicle approaching the intersection and facing the red light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, and subject to the provisions of subsection (3), must not cause the vehicle to proceed until a traffic control signal instructs the driver that he or she is permitted to do so.
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> …
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> **Yielding right of way on left turn**
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> **174** When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

[31] Madam Justice Warren succinctly sets out the law concerning liability for a collision between a left-turning vehicle and a straight-through driver in *Lozinski v. Maple Ridge (District)*, 2015 BCSC 1277 at paras. 70-71:

> However, in a case involving a left-turning driver and a straight-through driver who collide in a traffic-light controlled intersection, it is the colour of the lights that determines which of the drivers has the right of way and, accordingly, which is dominant: *Miller v. Dent*, 2014 BCCA 234. Where the left-turning driver has entered the intersection without breaching traffic signals and the straight-through driver enters the intersection on a red light, the left-turning driver is dominant and the straight-through driver is servient: *Miller,* at paras. 14 and 16; and, *Henry v. Bennett*, 2011 BCSC 1254 at para. 73.
>
> In such a case, the left-turning driver is entitled to proceed on the assumption that oncoming traffic will act in accordance with the law and, in particular, will

> stop for a red light, absent any reasonable indication to the contrary and provided he or she acts with reasonable care: *Kokkinis v. Hall* (1996), 19 B.C.L.R. (3d) 273 (C.A.). See also *Uyeyama (Guardian ad litem of) v. Wittenberg*, [1985] B.C.J. No. 1883 (C.A.); *Henry*; and, *Lee v. Tse*, 2013 BCSC 1740 at para. 49. This does not mean that a left-turning driver is entitled to treat a red light as a guarantee of safe passage. The left-turning driver is entitled to assume that oncoming traffic will stop at a red light but must also react reasonably to manifest hazards: *Tejani v. Greenan*, 2001 BCSC 803 at para. 29.

[32] My findings concerning the colour of the light at the time of the Accident and at the time the plaintiff began his turn and the defendant entered the intersection are set out above, and inform the analysis that follows.

[33] In my view, the plaintiff in this case acted with reasonable care in making his left turn. He entered the intersection on a green light and as the light turned amber, he waited and watched for the westbound traffic to come to a stop. He did not make his turn until he saw that two vehicles had stopped in the westbound inside lane, and from his view at that point, the curb lane was clear. He could not reasonably have been expected to remain stopped in the intersection as the light continued to turn from late amber to all-red, and then to early red. He was therefore entitled to proceed on the assumption that oncoming traffic would act in accordance with the law.

[34] The defendant, on the other hand, was required under the *Motor Vehicle Act* to stop her vehicle before entering the intersection. As I have found above, the evidence establishes that she entered the intersection on a late amber or all-red. Had she been as responsive to the light as she was obligated to be by ss. 128 and 129 of the *Motor Vehicle Act*, I find that she would have had sufficient time to stop her vehicle safely before entering the intersection. This finding is supported by my findings as to the late stage of the Westminster Highway light, and the fact that several vehicles had already come to a stop in the other two westbound lanes before the defendant entered the intersection.

[35] Citing *Pacheco (Guardian ad litem of) v. Robinson* (1993), 75 B.C.L.R. (2d) 273 (C.A.), and the cases that follow it, the defendant argues that the plaintiff is

responsible for the Accident because he failed in his obligation not to make his left turn until it could be done safely. Even if the light had turned red, the defendant argues that the plaintiff did not make his turn safely because the defendant's vehicle was there to be seen and was so close as to constitute an "immediate hazard".

[36] This argument is untenable. Taken to its logical conclusion, it would create a legal stranglehold that would make left-turning drivers always completely at fault for red and yellow light collisions, which would be directly contrary to the clear wording of s. 174 of the *Motor Vehicle Act*. I accept as credible the plaintiff's account that the defendant's vehicle was not visible to him as an immediate hazard because his view was obstructed by the stopped cars in the inside westbound lane. As I have noted above, he was entitled to assume that any traffic still present in the curb lane would follow the rules of the road. The difficulty faced by left-turning vehicles in busy intersections is discussed in *Henry v. Bennett*, 2011 BCSC 1254 at para. 66:

> The chief argument advanced by the defendant on appeal was that the plaintiff's entitlement to assume that other traffic (i.e. the defendant) would obey the law did not relieve her of the obligation to act reasonably and not proceed into the collision where it is apparent, or should be, that the other driver is not going to yield the right-of-way. Newbury J.A. confronted that difficult issue at para. 10 in the following terms:
>
> > I must say this argument has given me pause; but ultimately I resolve it by asking whether in law [the plaintiff] should be faulted for diverting her attention momentarily from oncoming traffic to check cross traffic at the point in time in question, i.e., as she prepared to start her turn – to see if any of those cars had jumped the light or were going to pose a threat to her turn. Was this an unreasonable or careless thing to do? I think not, given both the realities of the situation (which of course occurred over only a few seconds) and past decisions of this Court that have imposed on left-turning drivers the duty to be aware not only of oncoming traffic, but also of cross traffic, pedestrians, and whatever else may be present in the intersection. To say that the plaintiff can be found at fault because she relied on the assumption that [the defendant] would stop, and because she checked cross-traffic, would in my view subvert the duty on [the defendant] to bring his vehicle to a safe stop at the amber light as the other traffic did. An amber light is not, as the current witticism suggests, a signal to accelerate or to pass traffic that is slowing to a stop. Indeed, as Mr. Justice Esson noted in *Uyeyama*, in a busy city like Vancouver and at a busy intersection like 25th and Granville, an amber is likely the only time one can complete a left turn. Drivers approaching intersections must expect that this will be occurring. Putting a burden

> on a left-turning driver to wait until he or she sees that all approaching drivers have stopped would, in my view, bring traffic to a standstill. We should not endorse such a result.

[37] The fact that a moment before the plaintiff first saw the defendant's vehicle, Ms. Phillips saw it as it was bearing down upon them does not change my opinion in this regard. By this point, the plaintiff had nearly completed his turn and had appropriately turned his attention to No. 4 Road in front of him. It was too late for the plaintiff to avoid the collision even if he had seen the defendant's vehicle at the same time as Ms. Phillips did. The plaintiff reacted reasonably to the hazards before him, as required by the common law: *Lozinski* at para. 71.

[38] I therefore find, pursuant to the analysis set out in *Lozinski* and *Miller v. Dent*, 2014 BCCA 234, that the plaintiff, as the left-turning driver, was dominant, and the defendant, as the straight-through driver, was servient. The defendant was thus obliged under s. 174 of the *Motor Vehicle Act* to yield the right of way to the plaintiff. As a result of her failure to do so, and to stop her vehicle safely before entering the intersection, I find that the defendant should bear 100% of the liability for the Accident.

DAMAGES

[39] It is not contested that Mr. Swieczko was significantly injured in this severe collision. His spouse was even more significantly injured which, in relation to increasing Mr. Swieczko's housekeeping and parenting tasks, is a factor that is relevant to consider.

[40] Mr. Swieczko suffered significant soft tissue injuries as a result of the accident. The clear medical evidence from the plaintiff's orthopedic surgeon, Dr. G.M. McKensie, is that Mr. Swieczko's soft tissue injuries are now chronic and permanent, presenting as moderate to severe pain in the neck, mid-back and lower back with persistent flare-ups as a result of overtime work, attempts at physically interacting with his growing one-year-old daughter and attempts to reintegrate previously enjoyed recreational activities. His prognosis is poor. Dr. McKensie

testified that while there are some positive prognostic indicators, such as the likelihood that his function will improve with an appropriate pain/activity program; these are outweighed by the negative indicators, such as length of time Mr. Swieczko has experienced pain and the fact that his body has become sensitized to it.

[41] Dr. Ashleigh Stelzer-Chilton, Mr. Swieczko's general practitioner, testified that Mr. Swieczko will never return to his pre-accident baseline. She believes he can improve his function and in that sense she hopes for a decrease in his pain with some activities.

[42] Mr. Swieczko was 27 years old at the time of the Accident. He is now 31. He has been engaged in the video game industry for close to nine years. He began as a "quality assurance" tester. This is a sedentary job, essentially playing games to ferret out problems before the games are released to the public. It requires concentration and repetitive tasks. It was described as being a form of detective work. The work often requires overtime as projects reach launching time; that is, 10- to 16-hour days. This career is generally somewhat insecure, as most of the employment is on contract. Mr. Swieczko has been laid off and re-hired several times.

[43] Mr. Swieczko's ambition has been to be a game designer and currently he has landed his dream job. Mr. Swieczko is obviously a talented, hard-working, ambitious young man. He appears to have an above average ability to get re-hired as needed at his places of employment and lately has been promoted. However, all of the medical evidence indicates that he will have difficulty maintaining and progressing in his career to the extent that it relies on individuals having the stamina to intermittently work long days. Mr. Swieczko has on occasion been unable to work the required overtime and when he has done so, he can only do it for a day or so without resorting to strong pain medication such as Tylenol 3s. Further, Mr. Swieczko has been at risk in the past of medicating himself with alcohol, although he appears at this point to have that risk under control.

[44] Mr. Swieczko and his partner, Ms. Philips, have a child who is just over one year old now. While providing both of them a great deal of joy, this has resulted in two complicating factors because each is suffering from chronic pain from the Accident. The first is that, given Mr. Swieczko's demanding career, which requires that he must utilize (at this point) all of his stamina to maintain, he has become more limited in what time and activity he can devote to his daughter. However, the evidence is clear that Ms. Philips has been and still is unable to do several necessary tasks associated with housekeeping and child care – such as physically lifting and holding their child. Thus, up to now Mr. Swieczko has shouldered more of those tasks than he would have, which apparently limits the downtime his neck and back need to recover from strain. This in turn has required more pain medication and led to frustration.

[45] It must be recognized that this state of affairs is costing Mr. Swieczko psychologically. He is far less able to socialize and enjoy family get-togethers – or physical activity that he enjoyed before the Accident. Thus, Mr. Swieczko is struggling with frustration and emotional despondency from time to time as he contemplates the immediate future, wherein he may not be able to be an active participant in his daughter's physical recreational life. It was clear from Mr. Swieczko's evidence that he was taken aback by receiving his poor prognosis in relation to living relatively pain-free and being able to do what he did before. In particular, he had ambitions of participating in such physical activities as karate with his daughter as she matures. He is now very unlikely to be able to do this.

[46] Thus, Mr. Swieczko's general enjoyment of life has been severely impacted by the Accident. He does appear to be a fairly resilient and determined individual and is likely to engage in any program available to him to increase his function and potentially reduce the pain he endures from forcing himself to work long hours or look after his daughter through pain – but it is likely going to take him several years to ameliorate his current situation.

[47] Mr. Swieczko had no pre-existing symptomology, and no physical restrictions on either his ability to work at either a medium to heavy laboring job or a sedentary one, such as the job he held at the time of the Accident in October 2011.

[48] The evidence is clear from the three expert reports filed by: Dr. McKensie; Dr. Stelzer-Chilton; and Jodi Fischer, a registered occupational therapist; that Mr. Swieczko is no longer capable of engaging in the heavier-strength work categories that he used to rely on when in his early 20s, and which tided him over when he could not get or keep jobs closer to his dream job.

[49] Mr. Swieczko has worked almost continuously since the Accident, except when laid off (a not infrequent occurrence) and when he took paternity leave.

Non-Pecuniary Damages

[50] The plaintiff and defendant have provided several decisions to assist the Court in the assessment of non-pecuniary damages. The cases provided by the defendant place Mr. Swieczko in the $40,000 to $50,000 range. I find that, compared to the present case, three specific cases relied on and outlined by the defendant were significantly less serious in the impact the ongoing pain and discomfort reported had and would have on the lives of the plaintiffs.

[51] The cases relied upon by the plaintiff seem closer to Mr. Swieczko's actual situation. The plaintiff referred to several cases in which non-pecuniary damages ranged around $90,000. *Stapley v. Hejslet*, 2006 BCCA 34, set out a list of considerations in assessing general damages. They are:

> [46] …
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> (a) age of the plaintiff;
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> (b) nature of the injury;
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> (c) severity and duration of pain;
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> (d) disability;
>
> (e) emotional suffering;
>
> …
>
> …

(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 …

The most significant factor in this case making the assessment of general damages suggested by the plaintiff more appropriate than that suggested by the defendant is the severity and chronicity of pain, which combines with Mr. Swieczko's increasing emotional struggle over the impairments to his family, marital and social relationships. Adding to this is Mr. Swieczko's stoicism, which, in this case, has meant he has and continues to work longer and harder to achieve his career goals, but at a significant cost in pain and resort to strong medications.

[52] I assess his non-pecuniary damages at $90,000.

Past Income Loss and Special Damages

[53] The parties agree to past income loss at $2,766.45 net.

[54] The parties agree to special damages in the amount of $2,709.47.

Future Care

[55] The parties are $4,000 apart on future care. The defendant accepts some of the recommendations of Ms. Fisher and agrees to sessions with a kinesiologist at a cost of $1,000, but makes no submissions on the need for an Obusform back support and significant medication costs. In my view, the plaintiff's submissions on these costs are reasonable on the evidence; that is, replacing the Obusform every four to five years to age 75 and medication costs over that period, which, after considering a deduction for present day valuation, I award $5,000.

Loss of Housekeeping Capacity

[56] There is no doubt that since the Accident, Mr. Swieczko has had to assume most of the housekeeping tasks involving lifting, bending, doing dishes, or bathing the couple's daughter because of Ms. Phillips' injuries. This has caused him to feel

more pain, take more medications, and feel more helpless because he cannot always do what needs to be done. Before the Accident, Mr. Swieczko split housekeeping chores with Ms. Philips and was very helpful to his mother with things like moving. Now, the couple is unable to keep their home as clean and tidy as it was before the Accident. In addition, as in the case of just before they brought home their baby daughter, Mr. Swieczko's mother came and cleaned the apartment.

[57] In my view, much of this issue should be dealt with in Ms. Philips action for her loss of housekeeping capacity. I have factored the problem of the physical and emotional toll of the loss of housekeeping capacity on Mr. Swieczko into the award for general damages.

[58] However, dealing with just the need for family help with heavier parenting and housekeeping chores in the future, I award $6,000.

Future Loss of Earning Capacity

[59] The principles to be applied in assessing loss of earning capacity were articulated by the British Columbia Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140 at para. 32:

> A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa.* But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
>
> [Emphasis by Garson J.A.]

[60] A very useful discussion of several of the cases most often cited in relation to an analysis of loss of earning capacity once it is determined to be substantially possible is also to be found in *Perren* at paras. 11 and 12:

Kwei v. Boisclair (1991), 60 B.C.L.R. (2d) 393, 6 B.C.A.C. 314, was cited by Finch J.A. in *Pallos*. In *Kwei*, where it was not possible to assess damages in a pecuniary way as was done in *Steenblok*, Taggart J.A., speaking for the Court, held that the correct approach was to consider the factors described by Finch J., as he then was, in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353. Mr. Kwei had suffered a significant head injury with significant permanent sequelae that impaired his intellectual functioning. However, both before and after the accident, he worked at a variety of low paying jobs, thus making it difficult for him to demonstrate a pecuniary loss. Mr. Justice Taggart cited the *Brown* factors with approval:

> [25] The trial judge, as I have said, referred to the judgment of Mr. Justice Finch in *Brown v. Golaiy*. Future loss of earning capacity was at issue in that case. It stemmed from quite a different type of injury than the injury sustained by the plaintiff in the case at bar. But I think the considerations referred to by Mr. Justice Finch at p. 4 of his reasons have application in cases where loss of future earning capacity is in issue. I refer to this language at p. 4 of Mr. Justice Finch's judgment:
>
> > The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment 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.

These cases, *Steenblok, Brown,* and *Kwei*, illustrate the two (both correct) approaches to the assessment of future loss of earning capacity. One is what was later called by Finch J.A. in *Pallos* the 'real possibility' approach. Such an approach may be appropriate where a demonstrated pecuniary loss is quantifiable in a measurable way; however, even where the loss is assessable in a measurable way (as it was in *Steenblok*), it remains a loss of capacity that is being compensated. The other approach is more appropriate where the loss, though proven, is not measurable in a pecuniary way. An obvious example of the *Brown* approach is a young person whose career path is uncertain. In my view, the cases that follow do not alter these basic propositions I have mentioned. Nor do I consider that these cases illustrate an inconsistency in the jurisprudence on the question of proof of future loss of earning capacity.

[61] I am satisfied that the evidence establishes a real and substantial possibility that the plaintiff will suffer a future loss of income as follows:

a) The plaintiff has a significant level of chronic pain, which centers around sitting and bending.

b) His current job and career path require a great deal of concentration and significant overtime from time to time. His job is essentially sedentary.

c) The plaintiff now takes significant amounts of pain medication, including Tylenol 3, especially when needing to do prolonged overtime. As a matter of ordinary human experience and common sense, a person's ability to tolerate chronic pain diminishes with age.

d) There was medical evidence in this case that the effectiveness of small doses of pain medication also diminishes overtime. This accords with this judge's understanding gained from hearing such evidence in several similar personal injury/chronic pain cases.

e) The plaintiff will not be able to work at the more physically demanding jobs that he once did – to fill in when laid off from working in his current industry. His current industry is marked by low job security and high turnover.

[62] All of these factors lead to a real and substantial possibility that the plaintiff will not be able to sustain his current employment. He may lose his current job or have to quit because his chronic pain and increased pain medication make him less able to be as successful as he has been. He has been, from time to time, unable to do as much overtime as required.

[63] In addition, he has other commitments that are of great importance to him; for example, being a committed and present parent, which requires activities that increase his pain and take a toll on his endurance.

[64] He is far less able than he would have been, had the Accident not occurred, to balance his parental obligations and significant work obligations. All of this is exacerbated by the fact that the plaintiff has had to assume many housekeeping and parental duties that he would have been able to share with his spouse, but she is significantly more injured than him. Absent the accident, he might have expected that from time to time when he needed to work prolonged overtime his spouse and co-parent could pick up the slack. That option is now less available than it would have been.

[65] Overall, the plaintiff is far less able to weather the vicissitudes of available employment opportunities with both different jobs and those in his current career, than before the Accident.

[66] However, I consider that the plaintiff appears to be resourceful, motivated and hard-working, such that he is unlikely to remain unemployed in the near future and could also retrain should he need to. He has shown an ability and willingness to do this in the past, including after the Accident.

[67] With respect to assessment, the plaintiff submits that the appropriate approach is the "loss of capital asset" approach rather than the earnings approach. I accept that the evidence puts the plaintiff in the category of plaintiffs for whom the capital asset approach to measuring loss of earning capacity is appropriate. This is because the plaintiff's future loss, although proven, is not easily measurable: *Perren* at paras. 12 and 32.

[68] To determine a loss of future earnings using this approach, I must consider the four factors from *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.):

> …
>
> 1. [Whether] the plaintiff has been rendered less capable overall from earning income from all types of employment;
> 2. [Whether] the plaintiff is less marketable or attractive as an employee to potential employers;

> 3. [Whether] 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. [Whether] the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market;
>
> …

[69] The approach set out in *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), is appropriate in assessing losses that are not otherwise easily measurable. In the circumstances of a young plaintiff who may be limited by chronic pain throughout his working lifetime, the assessment of "something between one or two years' annual salary" is appropriate: *Carlisle v. Vanthof*, 2015 BCSC 2427 at para. 172. In *Davidge v. Fairholm*, 2014 BCSC 1948, the Court assessed a plaintiff in arguably similar circumstances with a loss of capacity award based on two years' income.

[70] The plaintiff submits that two years annual salary is an appropriate measure of Mr. Swieczko's loss. In 2013, the plaintiff earned $44,569. The plaintiff submits, and I accept, that a loss of capacity claim in the amount of $88,000 is fair and reasonable in light of Mr. Swieczko's young age and the severity and likely permanence of the chronic pain condition he has suffered.

[71] In summary, I award the following:

Non-pecuniary damages	$	90,000.00
Past income loss	$	2,766.45
Special damages	$	2,709.47
Cost of future care	$	5,000.00
Loss of housekeeping capacity	$	6,000.00
Loss of future earning capacity	$	88,000.00
TOTAL	**$**	**194,475.92**

[72] Costs follow the event.

KOENIGSBERG J.