IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lennox v. Karim,*
2012 BCSC 1927

Date: 20121219
Docket: M052368
Registry: Vancouver

Between:

Alan Lennox

Plaintiff

And

Azmal Ahmed-Rumiul Karim

Defendant

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for Plaintiff:	S.J. Turner J.A. Pankiw-Petty
Counsel for Defendant:	T.H. Pettit
Place and Date of Trial/Hearing:	Vancouver, B.C. April 23 – 26, 2012
Place and Date of Judgment:	Vancouver, B.C. December 19, 2012

Introduction

[1] Alan Lennox was injured in a car accident on August 16, 2003, when his car was struck by the defendant's car at the intersection of E 12th Avenue and Fraser Street in Vancouver ("the accident"). The defendant entered the intersection against a red light and hit the front left side of Mr. Lennox's car. Liability for the accident is admitted by the defendant.

[2] Mr. Lennox suffered injuries to his neck, back, right hand/wrist, and right knee. He has been diagnosed with a torn meniscus in the right knee but there is disagreement about the cause of that condition. The defendant recognizes that Mr. Lennox is entitled to damages for soft tissue injuries resulting from the collision but not for the effects of his torn meniscus. The measure of his damages depends largely on whether he suffered a torn meniscus in his right knee in the accident.

[3] Mr. Lennox seeks non-pecuniary damages and an award for past loss of income earning capacity.

[4] This action was commenced on May 30, 2005.

Facts

The Plaintiff

[5] The plaintiff, 51, is a father of three young children and resides permanently in Toronto, Ontario. At the time of the accident, the plaintiff was in a relationship with Mary Vassilio. They lived together from 2002 until 2005. During this relationship Mr. Lennox and Ms. Vassilio had one child. He also has two daughters, ages 4 and 5, from a previous marriage to Deborah Williamson. He shares custody of his two daughters. Mr. Lennox and Ms. Williamson were divorced at the time of the accident and were involved in an ongoing parenting dispute. They had reached an agreement in February 2003 but Mr. Lennox was pursuing other parenting issues. He believed that Ms. Williamson had a substance abuse problem which complicated his ongoing relationship with her. During the summer of 2003 they arbitrated the outstanding

disagreements regarding the children's activities and issues; after the arbitration Mr. Lennox continued to share day-to-day care of his daughters.

[6] Mr. Lennox is active and involved in the children's lives notwithstanding temporary absences from Toronto for his work. He is employed as a camera operator in the film industry.

[7] For many years prior to the accident Mr. Lennox's primary employment was as a steady camera operator in the film industry. A steady camera operator is typically required to carry a 50 pound camera strapped to their body while filming in physically intense and concentrated sessions extending from 30 seconds to 4 minutes. This work requires strength and dexterity.

[8] Mr. Lennox was a painting and interior decorator apprentice from 1979 to 1980. He also worked as a commercial painter and was the proprietor of a painting business in Toronto.

[9] In the late spring of 2003 and through the summer, Mr. Lennox had obtained film work in Vancouver and lived in BC until September 2003 when he returned to Toronto.

The Accident

[10] At the time of the collision Mr. Lennox was travelling at approximately 50 km/h when he struck the defendant's car after it failed to stop at a red light. Mr. Lennox's car was pushed into oncoming traffic but was not hit by other vehicles.

[11] Although Mr. Lennox's car was equipped with head rests and he was wearing a seat belt, his head and right hand struck the steering wheel as a result of the collision. While driving he sat in a position close to the steering wheel. His knee hit the dashboard, but apparently it was not painful at the scene of the accident.

The Injuries

[12] Mr. Lennox did not notice any pain immediately after the collision and could not remember precisely how he felt except to say that at the scene of the accident

he felt shaken up. He does not have a specific memory of that evening but described tightening up and he believes he noticed headaches, soreness and bruising. During the next day he recalls a gradual increase in lower back pain, upper back pain, neck pain, headaches, pain in his right thumb and right knee.

[13] Several days after the accident Mr. Lennox went to a walk-in clinic in Vancouver to obtain medication for his headache. He does not recall the medications prescribed to him. He may have taken a few pills but did not take much of the prescribed medication because he preferred a natural approach to healing. He returned to work and did not seek any further treatment while in Vancouver.

[14] He worked 51 hours the week of August 18, 2003 and 51 hours the following week. He said he was doing lighter work on those days.

[15] His family doctor in Toronto was Dr. Yanofsky. Mr. Lennox did not recall when he first saw Dr. Yanofsky, but he recalled being sent to the Canadian Back Institute ("CBI") for a range of treatments including physiotherapy and massage therapy, in addition to ultrasound treatments on his hand and right knee. He did not go back to his family doctor during this six month period, but he attended the CBI "pretty much" daily. He was doing home exercises and was improving.

[16] Mr. Lennox had a pre-accident history of taking chiropractic treatments for preventative health reasons because of the heavy nature of his steady camera work.

[17] In Toronto, Mr. Lennox exercised "religiously" and his back improved slowly over several months. His back returned to its pre-accident state at about six months after the accident. His neck took longer to improve. By late January or early February 2004, both his neck and back were "okay" and were fully resolved by the first anniversary of the accident. His headaches persisted for the same time as his back discomfort.

[18] The hand/wrist problem he was experiencing did not interfere with his work and resolved within nine months.

[19] The controversial part of Mr. Lennox's claim is the injury to his knee. He attributes the ongoing pain to the possibility of striking his knee on the dashboard.

[20] He could not remember when he was able to resume his film work after he returned to Toronto after accident. He believed his knee was better by February 2004 but noticed that if he was carrying loads of up to 80 pounds he would experience a worsening of his knee symptoms. His memory of the events in months after the accident was poor.

[21] In September 2004, inexplicably Mr. Lennox's knee swelled up. His doctor prescribed oral antibiotics but when that did not solve the problem he was sent to the hospital and placed on a walking intravenous system for six weeks. The swelling subsided. He took further physiotherapy treatments and followed an exercise program. He was advised at that time to have surgery to his knee but a medical absence would have interfered with his work schedule. He chose not to have the procedure.

[22] He was eventually diagnosed with a meniscal tear in his right knee in March 2011. That month the plaintiff had arthroscopic surgery to repair the tear. Since then, he continues to have swelling and discomfort in his knee when he is carrying heavy loads.

Medical Evidence

[23] The most controversial aspect of this case is whether Mr. Lennox suffered a torn medial meniscus as a result of the defendant's negligence. This injury is quite separate and apart from the soft tissue injuries clearly suffered to his neck, upper and lower back, and thumb.

[24] Mr. Lennox obtained his initial medical advice from Dr. Wright at the CarePoint Medical Centre in Vancouver on August 19, 2003. Mr. Lennox had attended Dr. Wright to obtain some treatment for his headaches. Mr. Lennox had a vague recollection of this meeting although he was confident he received a prescription for medications.

[25] His film work in Vancouver was coming to an end in early September and he returned to Toronto. His next medical visit in regard to the injuries from the accident was with Dr. Yanofsky in Toronto on September 2. He saw Dr. Yanofsky once in November and once in December 2003. The records indicate that he continued to see Dr. Yanofsky intermittently throughout 2004.

[26] In October 2004, Mr. Lennox saw Dr. Weiler in reference to his knee complaint. Mr. Lennox could not recall telling Dr. Weiler about the August 2003 accident or any injury to his knee at that time.

[27] He also saw Dr. Goldman in December 2005 but does not appear to have mentioned the accident to him.

[28] Each of the parties tendered opinion evidence on the diagnosis and cause of Mr. Lennox's knee injury. Dr. Stewart (for the plaintiff) and Dr. Leith (for the defendant) provided written opinions. Only Dr. Stewart was cross-examined.

[29] Dr. Stewart and Dr. Leith both reviewed Mr. Lennox's clinical records and relied on them in forming their opinions. These records and reports provide the following medical history:

- In 2000, Mr. Lennox experienced low back pain of sufficient severity that he could not walk. He had also had this type of pain in 1992-1993.
- In 2001, Mr. Lennox was involved in a rear end motor vehicle accident and suffered whiplash injuries that resolved within several months. He took some chiropractic treatments but did not miss any work.
- Mr. Lennox was injured on the job when he pulled down some stairs. He twisted and threw out his back. He received short-term disability benefits for approximately 6 months and after that time returned to full health.
- He injured his right knee when working out at a gym. He tore a muscle in his leg and was referred to physiotherapy. That injury resolved in about three months.

[30] Although Mr. Lennox reported having struck his right knee on the dashboard, the medical records do not confirm this account and it is not until September 2,

2003, that any knee pain is documented. He had no swelling or loss of range of motion in his knee after the accident. The medical records indicate that on October 17, 2003, his right knee was no longer a problem. This was confirmed in February 6, 2004.

[31] Mr. Lennox made a claim to the Insurance Corporation of British Columbia ("ICBC") for Part VII benefits pursuant to the *Insurance (Vehicle) Regulation,* B.C. Reg. 447/83. He signed a document on August 21, 2003, reporting injuries and symptoms to his neck, shoulder and back, as well as whiplash under the heading "Injury resulting from accident". In a separate document prepared by his lawyer for ICBC entitled "Report of Circumstances of Accident", Mr. Lennox wrote:

> I sustained several injuries, including an injury to my neck, shoulders, back, headaches, dizziness, whiplash, nausea and ongoing symptoms.

[32] What is remarkable about these two statements is the absence of any reference to a knee injury or of striking his knee on the dashboard.

[33] In the notes made by Dr. Wright, there is no indication of the plaintiff claiming pain, discomfort or injury to his right knee.

[34] It was not until a meeting with Dr. Yanofsky on September 2, 2003 that knee pain is noted. The records reference upper and lower back pain, neck stiffness, write some injured – strain. There is no reference in the notes from the September 2 meeting regarding a knee injury.

[35] Mr. Lennox confirmed that on February 18, 2004, he had gone skiing with his daughter. He said that to the best of his memory his knee was sore. During that ski trip Mr. Lennox fell over to his right side and over his right knee. He said it was not too comfortable but he did not re-injure himself.

[36] He said that he thought his knee was better by that time but if he carried 80 pounds at work he noticed the knee would worsen.

[37] Mr. Lennox suffered a left knee injury after the accident and shortly before his surgery in March 2011 when he fell on some ice and injured his shoulder; he recovered completely.

Dr. Stewart's Opinion

[38] Mr. Lennox relies on the opinion of Dr. Stewart to support his argument that he suffered a meniscal tear as a result of his knee striking the dashboard of his car at the time of the accident.

[39] Dr. Stewart prefaced her report with this comment:

> Those facts, which I assume to be true, are outlined in the Review of Records section of this report.

[40] It is significant that Dr. Stewart said the following under her review of records:

> According to a report of Dr. R. Rocha of Toronto East General Hospital dated October 1, 2004, Mr. Lennox was referred by Dr. Yanofsky for "right knee cellulitis? septic arthritis."

[41] In that report relied upon by Dr. Stewart, Dr. Rocha said:

> History of Presenting Illness: Mr. Lennox presented to the emergency department on September 20, 2004, with complaints of sudden onset of pain, swelling and arrhythmia over his right knee.
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> ...
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> He had no other signs of any joint inflammation. There was no skin rash. Other than this he felt quite well and his review of systems was non-contributory. There was no preceding history of any trauma. He had no prior history of similar episodes of acute joint inflammation.

[42] Dr. Stewart seems to have reached her opinion that the meniscal tear was caused in the accident because:

- Mr. Lennox told her he had struck his right knee on the dashboard on impact;
- He reported knee pain in the immediate aftermath of the motor vehicle accident;
- He believed he had continued to have knee pain after the accident;

- His stoic nature led her to believe he might have ignored his knee symptoms.

[43] In cross-examination, Dr. Stewart was asked to comment on the CBI records which were referenced in her report and which indicated that Mr. Lennox was seen at CBI on September 3, 2003. The entry reported that Mr. Lennox was observed to have full and active range of motion of the right knee and was pain free. Dr. Stewart did not address this issue in her report because, in the absence of any other injury to the knee before or after the accident, she believed that the accident was the most likely cause of the torn meniscus. She could not explain how Mr. Lennox could have reported no pain at that time while still having a torn meniscus. She speculated that he might have had pain and just did not remember.

[44] Dr. Stewart said she did not review the MRI of Mr. Lennox's knee and relied upon Dr. Weiler's description of the report as indicating a meniscal tear. She did not ask for a copy of the report because she believed the preparation of her opinion was an urgent matter and could not wait for receipt of the report.

[45] She said that the medical records she reviewed showed no other reasonable evidence of the injury. This appeared to be a key element in her conclusion that Mr. Lennox had suffered a meniscal tear in the August 2003 accident.

[46] Dr. Stewart did not describe the mechanism of a meniscal tear, nor did she discuss any other potential causes including aging, overuse, twisting or hyper flexing. She did not respond to Dr. Leith's opinion that Mr. Lennox's pain did not occur in the area of the knee close to where symptoms from a medial meniscus tear would usually occur. She did not comment on Dr. Leith's opinion that a direct blow to the anterior knee is inconsistent with the establishment of a meniscus tear.

[47] Dr. Stewart did not agree with Dr. Leith that age could have been a factor because Mr. Lennox is only 44 years of age. However, defence counsel produced an article indicating that meniscal tears increase with age and are more common in people over 40. Dr. Stewart was asked if developmental degeneration in the knee, including chondromalacia or arthritis can reasonably cause knee pain. The

foundation of Dr. Stewart's opinion regarding causation was the fact that Mr. Lennox did not complain of knee pain before the accident, he hit his knee on the dashboard and he subsequently had knee pain.

[48] She eventually conceded that non-traumatic degeneration could also cause meniscal tears, but insisted that these possibilities did not alter her opinion that the contusion to his knee in the accident caused the tear.

Dr. Leith's Opinion

[49] The defendant obtained a medical legal report from Dr. Leith which was served on the plaintiff pursuant to Rule11-6(4) of the *Supreme Court Civil Rules*. The Leith report contains a critique of Dr. Stewart's report and a contrary opinion.

[50] At page 2, the report reads:

> It is my opinion that based on the review records provided that, from an Orthopedic perspective, Mr. Lennox did not sustain a medial meniscal tear to his right knee as a result of the subject accident.

[51] Dr. Stewart supported his reasoning, explaining:

> 1. Dr. Stewart has failed to acknowledge that Mr. Lennox did not present initially with acute right knee pain that would be consistent with a medial meniscus tear. He did present with delayed onset of right knee symptoms that were located anteriorly over the knee cap. The location of the pain is not at all close to where the symptoms from a medial meniscus tear would occur. Therefore, based on the principle of anatomic location and correlation of symptoms it is impossible that a meniscus tear occurred at the time of the accident.
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> 2. The clinical presentation of Mr. Lennox following the accident was not consistent with an acute injury such as a medial meniscus tear. There was no immediate pain, swelling or mechanical symptoms noted. His presentation to Medical Practitioners was benign in nature with only minor anterior knee pain and a normal physical examination.
>
> 3. The records do not indicate that there was any history of Mr. Lennox's right knee striking the dash on impact but this is the history that Mr. Lennox provided to Dr. Stewart. This mechanism of a direct anterior blow to the knee would result in a contusion to the anterior knee, which is the location of the pain that was documented in the records following the subject accident on numerous occasions. Again, clearly not a medial meniscus tears clinical presentation.

> 4. A direct blow to the anterior knee is not consistent with the establishment of a meniscus tear. Meniscus tears usually occur when the knee is under load and a torsional force is applied such as when standing and pivoting on a planted foot or when deep knee bending or twisting. It is relevant to note that meniscus tears reported on MRI as complex are most often seen in patients over age 40 and are classified as a degenerative type tears rather than traumatic tears which are more often seen in the younger population.
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> 5. It must also be noted that an MRI cannot and does not determine when the pathology reported on that MRI actually occurred. An MRI is only a representative image of the state of the anatomy at the time that the MRI was obtained. To determine when pathology might have occurred it is more important to correlate the MRI findings with the history of a traumatic event and clinical presentation of the individual following the traumatic event along with the mechanism of that trauma. It is clear the clinical presentation and mechanism of the subject accident were not consistent with an acute meniscus tear to the right knee.
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> ...
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> In summary, Mr. Lennox did not suffer a medial meniscus tear as a result of the subject accident for all the reasons outlined. If one considers the clinical context of his presentation following the subject accident, it is clear that he only suffered some minor anterior knee pain that would be consistent with a mild contusion or soft tissue irritation. This would be expected to resolve rather rapidly over a period of a few weeks. The clinical records would support this expected outcome as there was an absence of knee complaints shortly after the subject accident.
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> What has occurred is that Mr. Lennox suffered an independent problem to the right knee well after the accident that was diagnosed as superficial skin infection. This recovered but due to investigations and incidental findings on an MRI, a link to those findings to the accident was made without clinical correlation.
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> It remains that Mr. Lennox did not suffer any internal derangement such as a meniscus tear to the right knee as a result of the subject accident.

[52] Dr. Leith was not cross-examined on his opinion.

Position of the Parties

Plaintiff

[53] The plaintiff says the auto accident caused the meniscus tear in his right knee. He argues that when the collision occurred he was sitting close to the steering wheel and recalls hitting his knee on the dashboard. He says his neck and back pain were palpable in the days after the accident. He claims he first reported the knee

pain to his family doctor in Toronto on September 2, 2003. He also argues that he reported knee pain to the CBI in September 2003.

[54] He says the pain continued in the fall of 2003 and 2004, despite the fact that his predominant concerns were neck and back pain. He argues that he had an immediate sensation in his right knee at the scene of the accident and continued to have issues with his knee afterwards.

[55] Mr. Lennox argues that Dr. Stewart's opinion regarding the causation of his meniscus tear was based on the medical records and their interview which established knee pain in the period immediately following the accident. Mr. Lennox claims he had no knee pain prior to the accident and that any prior issues had resolved.

[56] The plaintiff relies on *Bradhsaw v. Matwick*, 2011 BCCA 111 for the proposition that the absence of evidence of knee pain in the clinical records shortly after the accident does not undermine the physiatrist's opinion that the plaintiff had suffered a meniscal tear.

[57] Mr. Lennox argues that he did not recall the events referred to in the clinical records on which he was cross-examined. He argues that use of the clinical records should be restricted and inadmissible for the purpose of proving he did not strike his knee at the time of the collision or that he did not have knee pain after the accident. Mr. Lennox relies extensively on *Edmondson v. Payer,* 2011 BCSC 118, (affirmed on other grounds in 2012 BCCA 114) where N. Smith J. stated:

> [36] While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.

The Defendant's Position

[58] The defendant argues Mr. Lennox has failed to prove on a balance of probabilities that his meniscus tear was caused by the accident. The defendant

asserts I should accept Dr. Leith's opinion in preference to Dr. Stewart's. He argues that Dr. Leith is an orthopedic surgeon whose specialty is more focused on knee reconstructions and arthroscopic surgery. By comparison, Dr. Stewart appears to have professional experience related to brain injury patients and does not have a particular expertise in the field of knee injuries.

[59] The defendant contends Dr. Leith's opinion is more consistent with the preponderance of evidence collected in the records relied upon by Dr. Stewart. The defendant also argues that Dr. Stewart appeared defensive and lacked objectivity in her uncritical reliance on the plaintiff's assertions in the face of other information available from treating physicians.

[60] The defendant says that meniscal tears are usually associated with bloated torsional forces applied when a person is standing and pivoting. He argues that the location of Mr. Lennox's knee pain is inconsistent with evidence of a meniscal tear having occurred at the time of the accident. There was no evidence that Mr. Lennox reported knee pain to his physicians until more than two weeks after the accident, as well as no evidence of swelling. The defendant notes Mr. Lennox had a full range of motion early in September 2003.

Analysis

Clinical Records

[61] It is necessary to determine which clinical records are admissible, and for what purpose they may be used in determining the issue of causation of Mr. Lennox's meniscus injury.

[62] Defence counsel tendered a series of clinical records relating to the plaintiff's interactions with treating physicians and therapists. The records went into evidence without objection, presumably because these records were relied on by Dr. Stewart and Dr. Leith in forming their opinions.

[63] Mr. Lennox could not remember if he told Dr. Wright about knee pain or hitting his knee on the dash. He could not recall any of the specifics of their meeting.

[64] Mr. Lennox could not recall his discussion with Dr. Weiler or the statements attributed to him at the time of his consultation on October 7, 2004, or May 27, 2005. Mr. Lennox did not remember his meeting with Dr. Goldman on December 27, 2005, nor did he recall specifics of his meeting at the CBI that were fifth 2004.

[65] Mr. Lennox did not remember his interview with Dr. Yanofsky on January 5, 2004, or his application for insurance made on January 14, 2004. He did not remember making an insurance claim with the Dominion of Canada insurance company relating to the auto accident injuries. He could not remember a meeting with his doctor on January 19, 2004, where emotional issues relating to his matrimonial litigation were discussed. He could not remember a conversation recorded in the notes in January 2004 when he complained of back pain but no pain in his knee. Counsel for the plaintiff candidly acknowledged that Mr. Lennox's memory of his physical condition and circumstances after the accident was limited by the passage of almost nine years since the accident.

[66] Dr. Stewart's opinion is based, in part on her review of clinical records from various treating physicians. It was obviously necessary for her to rely on these documents to obtain a thorough history of Mr. Lennox's condition due, in part, to his poor memory of details concerning the immediate aftermath of the accident. The absence of clinical records related to the investigation and diagnosis of his knee injury would have impaired Dr. Stewart's ability to assess the plaintiff.

[67] It is important to recognize the struggles physicians have in opining on injuries that have occurred many years before being examined by an expert (in this case eight years prior). In this case, there are a series of clinical records relating to the plaintiff's interactions with treating physicians and therapists over many years.

[68] The admitted flaws in a party's memory are serious barriers to discerning the reliability of a diagnosis. In *Mazur v. Lucas*, 2010 BCCA 473 the Court of Appeal addressed this issue. The Court of Appeal, quoting the Supreme Court in *R. v. Lavallee,* [1990] 1 S.C.R. 852, noted at paras. 36 and 40:

[36] To resolve the contradiction, he drew a practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise and evidence that an expert obtains from a party to litigation touching a matter directly in issue (at 899-900):

> In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second- or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this Court has taken to the analysis of hearsay evidence in general, exemplified in *Ares v. Venner*, 1970 CanLII 5 (SCC), [1970] S.C.R. 608. In *R. v. Jordan* (1984), 39 C.R. (3d) 50 (B.C.C.A.), a case concerning an expert's evaluation of the chemical composition of an alleged heroin specimen, Anderson J.A. held, and I respectfully agree, that Abbey does not apply in such circumstances. (See also *R. v. Zundel* , 1987 CanLII 121 (ON CA), (1987), 56 C.R. (3d) 1 (Ont. C.A.), at p. 52, where the court recognized an expert opinion based upon evidence "... of a general nature which is widely used and acknowledged as reliable by experts in that field.")
>
> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight.

...

[40] From these authorities, I would summarize the law on this question as to the admissibility of expert reports containing hearsay evidence as follows:

- An expert witness may rely on a variety of sources and resources in opining on the question posed to him. These may include his own intellectual resources, observations or tests, as well as his review of other experts' observations and opinions, research and treatises, information from others – this list is not exhaustive. (See Bryant, *The Law of Evidence in Canada*, at 834-835)
- An expert may rely on hearsay. One common example in a personal injury context would be the observations of a radiologist contained in an x-ray report. Another physician may consider it unnecessary to view the actual x-ray himself, preferring to rely on the radiologist's report.

> - The weight the trier of fact ultimately places on the opinion of the expert may depend on the degree to which the underlying assumptions have been proven by other admissible evidence. The weight of the expert opinion may also depend on the reliability of the hearsay, where that hearsay is not proven by other admissible evidence. Where the hearsay evidence (such as the opinion of other physicians) is an accepted means of decision making within that expert's expertise, the hearsay may have greater reliability.
> - The correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is not to withdraw the evidence from the trier of fact unless, of course, there are some other factors at play such that it will be prejudicial to one party, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction or instruction to a jury.
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> [Emphasis added.]

[69] In creating her report, Dr. Stewart considered the clinical records of Toronto East General Hospital, medical reports in clinical records of Drs. Wright, Yanofsky, Weiler. She also had clinical records from Drs. Wyman and Goldman, reports and records of CBI, records of Toronto East Physiotherapy and Sports Injury Clinic, records of Beaches Chiropractic, and records of a podiatrist Dr. Collis. Finally, she had the history she obtained from Mr. Lennox.

[70] Mr. Lennox could recall very little of the information attributed to him by his treating physicians. Nonetheless, those comments appear to be important factors considered in both Dr. Leith's and Dr. Stewart's opinions.

[71] The salient parts of the clinical records considered by Dr. Leith include:

- Mr. Lennox's initial presentation was of delayed onset of right knee symptoms located anteriorly over the knee cap;
- Mr. Lennox's clinical presentation was not consistent with an acute injury such as a medial meniscus tear;
- There was no immediate pain, swelling or mechanical symptoms in Mr. Lennox's right knee;
- The records did not indicate there was a history of Mr. Lennox's right knee striking the dash on impact. But a direct anterior blow to the knee would result in contusion to the anterior knee, which is the location of the pain that was documented in records following the subject accident

on numerous occasions. Such an impact would provide a mechanism of injury.

[72] The records reviewed by Dr. Stewart revealed the following:

- Following the accident Mr. Lennox complained to Dr. Yanofsky of stiffness in his neck, pain in his upper and lower back and in his right thumb and right knee;
- He had appropriate rehabilitation for his injuries and reported to the physiotherapist at CBI that his right knee pain was no longer a problem early as October 2003;
- The swelling in his right knee in 2004 was attributed to inflammation in the pre-patellar bursa or cellulitis, and a skin infection;
- He was treated with intravenous antibiotics and the swelling gradually subsided;
- Mr. Lennox's orthopedic surgeon, Dr. Weiler, noted that when he saw Mr. Lennox in April 2005 he was still experiencing pain in the knee when performing deep knee bends and was unable to kneel on his right knee;
- Dr. Weiler was uncertain about the diagnosis and Mr. Lennox had not mentioned the injury to his knee in the motor vehicle accident;
- The picture was further clouded by a bone scan result which suggested yet another diagnosis, that of osteochondritis dissecans;
- The MRI scan of the knee on May 7, 2005 showed a complex tear of the medial meniscus.

[73] It is obvious that both Dr. Stewart and Dr. Leith relied on the records as contemporaneous and accurate reflections of circumstances surrounding Mr. Lennox's injury assessment and treatment. It was essential for the two doctors rely on those records, in part, to ground their opinions because Mr. Lennox's memory was not reliable. At trial, Mr. Lennox did not testify on his post accident condition with any degree of clarity or certainty. He could not confirm or deny many of the statements attributed to him in the clinical records. I accept the clinical records mentioned by the experts were relevant and necessary in forming their opinions.

[74] Some of the records reflected the views and opinions of treating physicians. In preparing her opinion, Dr. Stewart accepted the truth of what was communicated in those records in coming to the opinion that the MRI report established Mr. Lennox suffered from a meniscal tear. She did not independently verify that this was the correct diagnosis.

[75] To the extent that these records were relied upon by Dr. Leith and Dr. Stewart, they are admissible as the basis of their assumptions made in forming their opinions. As N. Smith J. said in *Edmondson* at para. 39:

> [39] Clinical records may provide the assumed facts on which an expert may offer an opinion, including diagnosis. For example, statements made by the plaintiff and recorded in clinical records at various times may be relied on by a defence expert in concluding that the plaintiff's current symptoms are the result of a condition that pre-dated the accident. That does not mean that the court can itself use clinical records to arrive at a medical diagnosis in the absence of expert opinion.

[76] I am aware of the risk that the absence of a reference to a symptom in a doctor's notes cannot be the sole basis for any inference about the existence or non-existence of that symptom.

[77] In the circumstances of this case, there is no independent evidence that Mr. Lennox struck his knee in the accident; although he developed some knee pain by September 2. There is no mention of a blow to the knee in the clinical records nor in his statements to the doctors. He spoke to his doctor about knee for the first time in early September. When first presenting to the hospital in Toronto, and subsequently to Dr. Rocha, Mr. Lennox appears to have denied that his knee struck the dashboard.

[78] The statements made by Mr. Lennox to ICBC through his lawyer support the inference from the doctor's notes from late August and early September that Mr. Lennox was not experiencing knee pain and that the blow to his knee had not been severe enough to cause significant symptoms.

[79] The defendant tendered a medical report dated April 29, 2008, from Dr. Yanofsky to plaintiff's counsel. In that report he described Mr. Lennox's condition as follows:

> He suffered low back, neck and upper back and write some injuries.
>
> He was seen at our office by myself on September 2, 2003 with the above complaints. On examination of his C-spine range of motion was normal. L-spine range of motion was normal. He was tender para vertebral thoracic spine and lumbar spine with para vertebral muscle spasm. Straight leg raising was normal. Reflexes were normal as was Babinski reflex with toes down going. Power of legs was normal. Right thumb ROM was normal; no swelling but tender MCP joint was evident. Right knee had normal ROM and no effusion but mild tender anterior patella
>
> Mr. Lennox was diagnosed with lumbar and cervical strains, right knee strain and right 1st finger sprain. He was prescribed physiotherapy at the Canadian Back Institute as well as Robaxacet.

[80] Mr. Lennox saw Dr. Yanofsky in November 2003 through January 2004 for ongoing neck and lower back pain with headaches. There was no mention of knee pain after September 2, 2003.

[81] The defendant also relied on the opinion of Dr. Weiler contained in a report dated December 5, 2008. Among several comments relating to Mr. Lennox's condition, Dr. Weiler said this in response to questions posed by the plaintiff's counsel:

> 6.***Your opinion as to whether or not the accident was a material and contributing cause to Mr. Lennox's current and on-going symptoms.***
>
> Although I have seen and reviewed. Mr. Lennox on 3 separate occasions(twice in 2004 and once in 2005) at no time did he mention that he had been involved in a motor vehicle accident on August 16, 2003. I therefore have no documentation regarding the details of the accident in question. As a result, I am unable to provide an opinion regarding whether or not the accident was a material and contributing cause to Mr. Lennox current and ongoing symptoms.

[82] The clinical records relating to Mr. Lennox's treatment from August 2003 to October 2004 are important to the analysis of the diagnosis and cause of his ongoing knee complaints. Almost eight years passed between the accident and the plaintiff's meeting with Dr. Stewart. The same time gap seems to have eroded his memory at trial. I consider the medical reports of Drs. Stewart and Leith based on

those records in order to test those opinions regarding the cause of Mr. Lennox's torn meniscus.

Causation

[83] The test for causation was described by Major J. in *Athey v. Leonati*, [1996] 3 S.C.R. 458:

> 13. Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contrib*uted to the injur*y: *Snell v. Farrell*, 1990 CanLII 70 (SCC), [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
>
> 14. The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, 1971 CanLII 24 (SCC), [1972] S.C.R. 441.
>
> 15. The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*; 1981 CanLII 27 (SCC), [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board, supra*. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw, supra*; see also *R. v. Pinske* 1988 CanLII 3118 (BC CA), (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd 1989 CanLII 47 (SCC), [1989] 2 S.C.R. 979.
>
> 16. In *Snell v. Farrell, supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

[84] McLachlin C.J.C. noted in *Resurfice Corp. v. Hanke*, 2007 SCC 7:

> 23. The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present. It ensures that a defendant will not be held liable for the plaintiff's injuries when they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell* at p. 327 *per* Sopinka J.

[85] I have concluded that the Dr. Leith's opinion on the issue of Mr. Lennox's torn meniscus is to be preferred. I am not persuaded by Dr. Stewart's opinion, in part

because, I am not satisfied that the information upon which her opinion was based is consistent with her analysis.

[86] Dr. Stewart did not explain how Mr. Lennox could have sustained a meniscal tear without reporting knee pain to his physicians for more than two weeks. Further, she could not explain how his right knee would not have been problematic after October 2003 or February 2004 but become symptomatic later in 2004 and 2005 due to a meniscus tear in August 2003. She did not discuss any implications of the September 2004 event when his knee spontaneously became swollen and disabling and was which was treated with antibiotics.

[87] Mr. Lennox did not recall telling any of his treating physicians about striking his knee in the accident; the first record of his suggestion that he struck his knee was to Dr. Stewart in 2012. I accept that there was evidence of knee pain after Mr. Lennox returned to Toronto, but those symptoms seem to have resolved by October 2003.

[88] In cross-examination Dr. Stewart acknowledged non-traumatic degeneration could also cause a meniscal tear. However, in her analysis she did not appear to have considered non-traumatic origins notwithstanding the absence of evidence that Mr. Lennox had knee pain during the first two weeks after the accident and indeed over several months after October 2003.

[89] Dr. Stewart's opinion rejecting the possibility of a non-traumatic cause of Mr. Lennox's meniscal tear essentially rested on the proposition that since he did not have knee symptoms before the accident, but developed symptoms after the accident, the accident must have been the cause. This is the issue raised by Ehrcke J. in *White v. Stonestreet*, 2006 BCSC 801, when he discussed the possible shortcomings in drawing an inference from a temporal connection: Ehrcke. J said:

> [74] The inference from a temporal sequence to a causal connection, however, is not always reliable. In fact, this form of reasoning so often results in false conclusions that logicians have given it a Latin name. It is sometimes referred to as the fallacy of *post hoc ergo propter hoc*: "after this therefore because of this."

> [75] In searching for causes, a temporal connection is sometimes the only thing to go on. But if a mere temporal connection is going to form the basis for a conclusion about the cause of an event, then it is important to examine that temporal connection carefully. Just how close are the events in time? Were there other events happening around the same time, or even closer in time, that would provide an alternate, and more accurate, explanation of the true cause?

[90] It is my view that Dr. Stewart's analysis suffered from the error highlighted in *White*. She said that the torn meniscus must have been caused by the accident because Mr. Lennox had knee pain after the accident and he did not report any other event that might have explained the injury.

[91] Dr. Stewart did not contradict Dr. Leith's opinion that the absence of acute knee pain was inconsistent with the medial meniscus tear. Further, she did not address Dr. Leith's opinion that:

> [t]he location of the pain is not at all close to where the symptoms from a medial meniscus tear would occur. Therefore, based on the principle of anatomic location and correlation's to symptoms it is impossible that a meniscus tear occurred at the time of the subject accident.

[92] Based on a comprehensive assessment of the two opinions, I prefer and accept Dr. Leith's opinion that Mr. Lennox's torn meniscus was not likely caused by any injury he sustained in the accident. I have concluded Mr. Lennox's torn meniscus was not caused by the same forces that resulted in the pain in his right knee pain for several months after the accident.

[93] Mr. Lennox has not established, on a balance of probabilities that the defendant's negligence caused or materially contributed to his torn meniscus. I am not satisfied on the evidence there is a causal connection between his torn meniscus and the accident. It has not been proven that but-for the accident Mr. Lennox would not have developed the same symptoms: see *Kelly v. Yuen*, 2010 BCSC 1794 at para.121; *Athey* at paras. 13-17.

Compensable Injuries

[94] I accept that Mr. Lennox suffered an exacerbation of a pre-existing lower back condition that was historically related to his work. I conclude that Mr. Lennox

suffered a bruised right knee and injuries to his neck, back, and right thumb and wrist. He experienced headaches associated with this accident.

[95] He reported substantial improvement within six months and complete resolution of all but his knee symptoms within one year of the accident.

[96] The plaintiff did not give any evidence in support of Dr. Stewart's suggestion that he suffered from some depression after the accident due to his injuries. In the absence of evidence on that point, I cannot consider Mr. Lennox as suffering depression caused by the defendant. Further, Dr. Stewart's opinion was that the depression was related to the limitations imposed by the injuries caused by the accident. It seems to me that the most probable of those limitations might have been the difficulty with his knee. As I have concluded that the torn meniscus was not caused by the accident, I do not accept that the plaintiff's psychological problems stem from the defendant's negligence.

Assessment of Damages

Impaired Earning Capacity/Employment and Finances

[97] At the time of the accident, Mr. Lennox was working as a camera operator on a film project in Vancouver. Although his residence is in Toronto, he had been working in BC from the late spring through to the summer of 2003.

[98] Mr. Lennox is a member of Local 667 of the International Alliance of Theatrical Stage Employees ("IATSE"), a union that contracts with movie studios and producers on members' behalf. His union membership allows him to work anywhere in Canada and enables him to accept union work in Vancouver.

[99] Mr. Lennox also has access to non-union work which accounts for approximately 30% of his work opportunities. The union does not provide guaranteed work but offers other benefits and income protection.

[100] Mr. Lennox earned most of his film industry income through two incorporated companies. He owns the shares in 1539600 Ontario Inc. ("Ontario Inc.") and

Rampant Lion Productions Inc. (“Rampant Lion”). His personal income is paid to him by these companies.

[101] Mr. Lennox completed a two-year apprenticeship as a painter decorator. In 2001 - 2002 he created Strokes Painting Inc. (“Strokes Painting”). In 2003, Mr. Lennox continued operating Strokes Painting although there was no evidence of the amount of time he dedicated to painting work as opposed to film work. He did not always keep his film revenues separate from his painting revenues.

[102] During the winter of 2003 - 2004, Mr. Lennox’s painting work increased significantly. His common law spouse’s father held a position that allowed him to direct work to Mr. Lennox’s painting business. Strokes Painting’s revenue exceeded $250,000 during 2004. Mr. Lennox stopped actively painting in 2005 but managed the business until it was closed. He stopped the business because he felt he could not make money unless he was personally “on the brush” painting and he was not able to do the physical labour for Strokes Painting due to his injuries.

[103] After his relationship with Ms. Vassilio failed, he was no longer considered for work controlled by her father. In any event, film work was Mr. Lennox's preference.

[104] Mr. Lennox did not produce the bulk of income tax returns relevant to his income loss claim. He said there was some delay in preparing and filing his returns from 2002 - 2006. He said these returns had been filed; he did not provide a reasonable explanation as to why these returns and supporting documents had not been produced in this litigation.

[105] The financial documents provided included:

- Bank statements in the name of 1539600 Ontario Inc.;
- His TD Bank records;
- His T-1 general income tax return for 2004;
- A summary of invoices and deposits for Strokes Painting from January 2004 - December 2004;

- Invoices for Strokes Painting January 2004 - December 2004;
- A tax return relating to Strokes Painting for 2004;
- A financial statement for Strokes Painting for 2004 - 2005;
- A trial balance for Strokes Painting for 2004;
- Bank records for Strokes Painting for 2004; and,
- A general ledger for Strokes Painting for 2004.

[106] Mr. Lennox said that a number of his financial records had been taken by Ms. Vassilio.

[107] His 2004 personal income tax return revealed commission income and other income amounting to $12,360.

[108] Strokes Painting showed a gross income for 2004 of $269,480. Although financial statements prepared for Strokes Painting revealed gross revenue in 2000 of $485,397 and in 2005 $123,813, the net profit in each of those two years was $12,784 and $4,090 respectively.

[109] Rampant Lion financial statements for 1994 - 2000 were entered into evidence by the defendant. Those statements reveal a pattern of variable gross earnings from as low as $26,301 in 1996 and as high as $109,835 in 2000. In every year except 1998 Rampant Lion experienced negative profit after accounting for expenses. In each year there was a management expense of $1,500 - $36,000. Mr. Lennox did not provide any financial statements for Rampant Lion beyond 2000. He did provide a schedule of IATSE work for April 2002 until October 2003, suggesting that his average gross weekly pay during that time was between $4,600 and $6,500.

[110] He was unable to estimate the portion of his income that derived from non-IATSE work.

[111] The absence of financial statements for Rampant Lion and Ontario Inc. from 2002 - 2004 severely hampered a fair assessment of his pecuniary losses stemming

from the accident. I could not discern from the evidence what his net income was in the period before and after the accident.

[112] Mr. Lennox could not recall turning down any work during the period August 2003 to February 2004. He was engaged for a one day film project in October 2003 and "might have done some light duties" but his records were incomplete and he could not confirm precisely what work he did after returning to Toronto. He did not look for work until February 2004; he said he could not hang the 80 pound camera around his neck.

[113] I observed from the 2000 Rampant Lion statement that the company's expenses (excluding management fees) are in the order of 66% of total revenue. He indicated expenses were variable but could include steady camera rental costs, food and lodging, and other equipment needs.

[114] Mr. Lennox was cross-examined on terms of a settlement agreement reached with Ms. Williamson regarding the shared custody and care of their children. That agreement provided that the children would be in the care of each parent on a week-on week-off pattern. I accept that Mr. Lennox had pressing parenting reasons to return and remain in the Toronto area after September 2003. Although there was evidence that film work was available in Vancouver in 2003 and 2004, I was not satisfied on balance that he would have pursued those opportunities due to home based demands on him.

[115] He was also cross-examined on an affidavit sworn April 11, 2006, in family law proceedings in Ontario. In the affidavit. He said:

> I am self-employed as a steady cam operator in the film industry. This is seasonal employment. I have previously supplemented my income through a painting business, Strokes, and I have carried on during the winter months.

[116] He added that due to the nature of the employment, he did not receive a steady paycheck but got paid when he worked. However, there are large periods of time when he did not work. He estimated his total net income for 2005 was approximately $30,000. He also said "due to the unpredictability of the film industry, I

am attempting to maximize my income by running my own painting business". Due to the long hiatus between the date of the accident and the swearing of this affidavit, I do not attach much significance to the circumstances described by the plaintiff insofar as those circumstances may well have changed dramatically after he returned to work in 2004.

[117] Mr. Lennox testified that he did not attempt to under report income for the years prior to the accident.

[118] The plaintiff advances a claim asked for $60,000 to compensate him for his past loss of earning capacity. This claim is founded on the proposition that Mr. Lennox's income was reduced for 16 weeks. During which time he would have earned $5,700 per week. Without knowing Mr. Lennox's tax rate was for 2011, he suggests that there be a 25% deduction from that amount, and that the gross loss becomes $68,400. He argues that this amount should be reduced by a further 5% - 15% to achieve an outcome equal to his net loss of income from this accident.

[119] The plaintiff argues that past loss of income is properly characterized as lost past earning capacity. The overriding principle is that a monetary award is intended to put the plaintiff into the position he would have been but-for the defendant's negligence.

[120] The assessment of the plaintiff's claim in this case is severely handicapped by the absence of properly prepared financial statements of Mr. Lennox's income between 2000 and 2003, and from 2003 until 2004.

[121] The plaintiff has the burden of proof to establish damage to his income earning capacity on a balance of probabilities.

[122] The plaintiff submits that from April 16, 2002 to August 30, 2003, he worked a total of 40 weeks. He argues the IATSE records do not record all of his steady camera work income and he has been unable to obtain his non-union records.

[123] Ms. Kaspercyzck and Mr. Williamson testified that the film industry in BC was busy in 2003 and to a lesser extent busy in 2004.

[124] Mr. Lennox said that the painting business only made money when he was "on the brush" and that the painting work was too physical for him after September 2003. He alluded to the injuries limiting his ability to paint but I was not convinced as to the extent of that limitation.

[125] In my view, Mr. Lennox's evidence regarding his wage loss was not proven on a balance of probabilities. Given that Mr. Lennox was returning to Toronto shortly after the accident and he was responsible for the care of his children, it is my view that he was unlikely to have returned to BC for work in the immediate period after the accident.

[126] I am not satisfied that the evidence establishes that Mr. Lennox was unable to work or unable to work full-time in film or in painting. I am not satisfied that the painting business did not earn income as a result of his physical limitations caused by the accident. I was not satisfied that he has established that he could not perform some labour or attend to the management of the company's affairs after he returned to Toronto and during the subsequent 22 weeks. The evidence was so flawed as to give me little assistance in assessing his claim.

[127] I observed from the financial statements that Mr. Lennox's net income from the film business was in the order of 34% of gross revenues. I assume for example that when he is in BC his costs of living are dramatically higher than they would be if he was living in his home in Toronto. He did not explain the differences between gross income and net income and the only evidence that I have is that the expenses of his film business are significant.

[128] I accept that Mr. Lennox was likely prevented from working at full capacity in the six months after the accident. He was attending physiotherapy and massage therapy on regular basis and that treatment would likely have interfered with his

ability to work. Further, I recognize that both painting and film are physically demanding jobs and Mr. Lennox was likely limited in what he could do.

[129] I accept that he had earned something in the order of $5,700 per week in the prior 16 months before the accident and earned some income from his painting business. However, his estimates of his camera work income is of less value in my assessment without some reliable evidence of the business' expenses. Further he did not clearly address the business opportunities he might have lost due to the injuries that interfered with his activities in the first six months after the accident.

[130] His film business appears to have extraordinarily large operating expenses. He provided no reliable explanation as to the real income that accrued to him from his film work. He performed management duties in his painting business after the accident. He might have done some painting during his period of disability. In the final analysis, I do not know, with any confidence, the extent that his income earning ability was impaired.

[131] There is a dearth of reliable information to assist me in assessing this claim. Doing the best I can with the evidence available, I have concluded that Mr. Lennox's ability to earn income was impaired for six months after he returned to Toronto. I assess the impairment to his earning capacity during the six months after the accident at $10,000.

Non-Pecuniary Damages

[132] Non-pecuniary damages are assessed on the basis of the impact injuries have on a victim's life. This Court is guided by the criteria established in S*tapley v. Hejslet*, 2006 BCCA 34. The Court of Appeal outlined important factors to be considered when assessing non-pecuniary damages at para. 46:

> [46] The inexhaustive list of common factors cited in *Boyd* 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 (QL), 2005 BCCA 54).

[133] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[134] Mr. Lennox suffered injuries to his neck, back, thumb, and some discomfort to his knee. His injuries interfered with his recreational activity, work, and enjoyment of life.

[135] Mr. Lennox lived a fairly active life prior to the accident. His athletic pursuits included: soccer, golf, taekwondo, skiing and scuba diving.

[136] He said the accident has affected his ability to golf and he now plays sporadically. He has tried playing soccer, but notices that his knee swells up. He has skied once or twice since the accident but has not returned to his pre-accident aggressive style of skiing.

[137] Prior to the accident he was active in taekwondo and had involved his whole family. Since the accident he has not been able to do the kneeling exercises required. He wore a brace for some time but the kicking involved was too much for him.

[138] He said his knee hurt "pretty much since the accident".

[139] He said that he is now a director of photography and stereography and does not continue with steady camera work because of his ongoing knee complaints.

[140] I accept that that Mr. Lennox's recreational activities were limited after the accident. It appears that for most of the year after the accident his knee was not a significant problem; the limitations to his activities during that time compromised his overall enjoyment of life.

[141] I accept that his ability to perform his role in filming and painting were limited by the injuries not related to the torn meniscus. It appears that the more serious effects related to that complaint did not become limiting until one year after the accident.

[142] The plaintiff relies on the following decisions from this Court regarding the quantum of non-pecuniary damages:

- *Hill v. Durham,* 2009 BCSC 1480: $40,000;
- *Poulton v. Inderbosch,* 2010 BCSC 711: $70,000;
- *Baxter v. Jamal,* 2010 BCSC 289: $50,000;
- *Lai v. Wang,* 2009 BCSC 133: $40,000;
- *Tong v. Sidhu*, 2009 BCSC 305: $30,000;
- *Filimek v Braaten,* 2009 BCSC 866: $30,000.

[143] The defendant invited me to assess non-pecuniary damages on the basis of:

- *Cooper v. Torrance,* 2003 BCPC 271: $2,500
- *Seto v. Ng,* 2009 BCPC 218: $2,500
- *Dolha v. Heft*, 2011 BCSC 737: $7,000

[144] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each

case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[145] This accident did not cause a tear in his medial meniscus.

[146] The effects of the injuries lasted for approximately one year. Although the acute symptoms were mostly resolved within six months.

[147] Mr. Lennox received 46 treatments at the CBI, physiotherapy and rehabilitation office in Toronto between September 3, 2003 and February 6, 2004.

[148] When the Court assesses non-pecuniary damages, it must address the unique circumstances of each injured person. In my view, the plaintiff's injuries are comparable to those referred to in *Kelly* v. *Yuen*, 2010 BCSC 1794, except for Mr. Lennox's shorter recovery time. However, in view of his age, the extent and duration of his back, neck, hand injuries and the short time during which he had knee symptoms (not from the torn meniscus), Mr. Lennox will have judgment for non-pecuniary damages of $15,000.

Disposition

[149] Mr. Lennox will have judgment for $15,000 for non-pecuniary damages and $10,000 as compensation for his past loss of earning capacity and costs.

[150] The parties will have liberty to speak to the issue of costs if necessary; otherwise the plaintiff is entitled to costs.

"Armstrong J."