FIREFIGHTER UNABLE TO RETURN TO FULL DUTIES IS AWARDED $750,000.00 FOR LOSS OF FUTURE EARNING CAPACITY

M v. S 2021 BCSC 1411

The Reasons for Judgment of The Honourable Mr. Justice Walker were given on July 20, 2021 at Vancouver, BC.

The Plaintiff, was injured in a motor vehicle accident on March 5, 2017. He was stopped in traffic when his Chevrolet Cruze was struck from behind by a Ford Explorer. Just before impact Mr. M's body and neck were turned to the right. The impact of the collision caused Mr. M to jolt forward and then back into his seat. His head snapped back with force and struck his seat's headrest. His vehicle was propelled forward several feet. The damage was significant, and Mr. M's vehicle was written off. It could not be driven and was towed from the scene. The defence has admitted liability. They do however challenge the credibility and/or reliability of Mr. M and every witness who testified in Mr. M's case, including expert witnesses. The defence argued that Mr. M and every non-party lay witness either embellished or exaggerated their evidence. They argued that the experts who gave evidence, gave biased, unreliable testimony, and that two of them engaged in advocacy and argument. Mr. Justice Walker stated at the very beginning of his lengthy Reasons for Judgement that he found the defence submissions in each of those respects to be without merit.

PRE-COLLISION

Mr. M lives in Maple Ridge. He was born in December 1970. He was 46 years old at the time of the collision. He is now 50. Mr. M is an experienced firefighter who has worked for the Vancouver Fire Department ("VFD") for approximately 17 years. He worked four days on, followed by four days off. He worked at Hall 10 which is located at the University of British Columbia. He started off, at age 30, being accepted at the Abbotsford Fire Department in 2000 for an "on call" position and soon realized that his passion is to work as a firefighter. In 2004 he tried out for one of the highly competitive positions with the VFD. Mr. M was one of a dozen of approximately 500 candidates who was accepted into the VFD's six-to-eight-week training program, described as being akin to boot camp in the armed forces.

He successfully passed his training and one-year probation that followed.

Mr. M embraced the VFD from the very beginning. He relished its culture and flourished within it. He developed new friends and felt supported by his colleagues who became his second family. Mr. M could not recall a day where he did not look forward to going to work; he typically arrived early for his shifts. Evidence from Mr. M and the firefighters who testified, demonstrates the range of duties required of a firefighter, from light housekeeping tasks at their fire halls, cleaning and maintaining firefighting equipment, to extreme and highly arduous tasks while attending a fire scene or using the jaws of life to rescue a person trapped inside a motor vehicle. They must be capable at any moment of climbing 15 to 20 flights of stairs in a burning building wearing a heavy helmet and carrying 70 pounds of equipment plus tools and an air pack, or carrying 35-foot ladders, gas powered ventilation fans, hydraulic tools, and handling firehoses with water running through at 250 gallons per minute. Regardless of their assignment per emergency call, each firefighter must be ready and capable of assisting each other in their tasks when needed, creating a team-oriented approach to all tasks. Each firefighter must be physically and mentally capable of performing any firefighting duty at a moment's notice, regardless of rank. There can be no weak links in the crew. Each firefighter is part of a team that must have each other's backs at all times. Often the lead officer – Captain or Lieutenant – leads the way through the fire scene.

Mr. M was known throughout the VFD community prior to the collision for his "happy-go-lucky attitude", honesty, resilience, and energy, in addition to being very good at his job. Mr. Justice Walker was satisfied that Mr. M was able to perform all the job demands of a firefighter prior to the collision and he was well regarded by his co-workers and his superiors.

VFD policy requires firefighters to rotate frequently through different halls, particularly in their early years, to ensure they are exposed to all manner of emergencies in order to gain experience. Thereafter, rotation periods vary from every 2 – 3 years to as long as five years. Rotation could occur sooner if the firefighter is posted to a very busy hall (e.g. Hall 2 at Main and Hastings – one of the busiest fire halls in Canada) to share the load and avoid burnout. Hall 10 is one of VFD's quieter halls. Mr. M has been at Hall 10 since 2013. He was overdue to be rotated to a different hall when the collision occurred.

Physical and mental fitness were top priorities for Mr. M, and a source of pride. He does not smoke and rarely drinks alcohol. He grew up playing hockey, soccer, softball, running and BMX bike racing. He continued to play competitive hockey as an adult and joined the VFD Soccer league. He has had a gym pass since he was 13 years old. He worked out regularly as a means of coping with stress. He ran half-marathons and hiked the Grouse Grind frequently. In warmer weather he regularly cycled from his home in Maple Ridge to Hall 10 at UBC. As a firefighter he was obliged to remain in top physical condition not only to handle the requirements of the job but also to prevent or minimize injury and cope with stressors of the job (involving accident and fire scenes where people have been badly injured or died). Mr. Justice Walker accepted Mr. M's evidence that prior to the collision he could do everything he wanted to do and enjoyed being very active.

Although Mr. M has suffered from anxiety in the past – losing his mother to cancer when he was only 12 years old, his divorce, and witnessing the death of a two-year-old child while attending a fire scene in 2013 – his anxiety symptoms did not impair his ability to function or his vocational and avocational pursuits, nor did they result in any mental health disorders. The Court found that he had no difficulties with respect to either, prior to the collision.

Mr. M has two children who were, at the time of the collision, 11 and 9 years old. He shares parenting with his ex-wife and he has the children with him during each of his four days off work. He has been with his current girlfriend for six years. They met approximately 18 months prior to the collision. They have maintained separate residences on account of their young children but nevertheless enjoy a close positive relationship. They have discussed plans to live together when the children are older and have left home. Mr. Justice Walker concluded by citing a portion of Mr. M's evidence, which he accepted:

> *"I was always happy. I enjoyed my life. You know, I – I was always so thankful for what I had. You know, I had a -- my dream job, I had my health. I had two amazing kids, like, they're just so important to me. And I just, life was – was good."*

POST-COLLISION

Almost immediately after impact Mr. M felt pain in his left wrist, left shoulder, chest, abdomen, and the right side of his neck, as well as intense headache. Due to his training he knew to remain seated in his vehicle and call 911. Despite feeling shock and confusion he did his best to remain calm and keep his neck stabilized until emergency personnel arrived. He was taken by ambulance, with spinal precautions, to Surrey Memorial Hospital. Mr. M suffered a concussion and soft tissue injuries to his neck, back and left shoulder as a result of the collision.

Upon his release from the hospital, Mr. M was taken by his girlfriend to her home where he immediately went to bed on account of his pain. He felt sore all over when he woke up the next morning. The pain was particularly bad in his head as well as his upper body, left shoulder, chest, and wrist of the hand that held the steering wheel. He also felt dizzy and nauseated to the point of vomiting and experienced impaired concentration, tinnitus, and severe headache. He was later driven home where he spent two days in bed due to his symptoms. Mr. M's family doctor referred him to a chiropractor and a concussion clinic where he learned that his vestibular system was not functioning properly. He suffered from vision issues (including peripheral vision) improper eye function, difficulty reading and sharp pain in his right eye. He was referred to a neuro-optometrist. He continues to struggle with impaired memory and concentration since the collision. He described feeling, for quite a lengthy period following the collision, as if he was in a fog where, "things that should be really easy seemed hard at the time", and he had to write things down to remember them.

Mr. M's symptoms have improved over time. However, in addition to some memory and concentration issues, he is left with ongoing neck and mid-back pain (which have worsened over time) and constant low-grade headaches on a daily basis, all of which impair his sleep, daily function, physical activities and mental status. He often feels exhausted and forces himself to push past the pain or headache symptoms to work at his job or carry out his daily tasks. His neck symptoms and headaches are at times worsened by certain physical activities including moderate exercise. At times, without any particular trigger, his headaches shift from low-grade intensity to throbbing, exhausting headaches of moderate to severe intensity. He no longer plays or referees hockey. He has been advised by neurologist, Dr. Gordon Robinson to stop running because it aggravates his headaches. Mr. M no longer hikes the Grouse Grind. He is still able to cycle and will, weather permitting, ride his hybrid bike (which he modified to raise the handlebars to relieve the pressure on his neck) on wide forest roads or gravel paths for up to 50 km. He is not the same outgoing, happy, physically fit, energized individual that he was prior to the collision. Mr. M is able to maintain his basement suite, albeit with pain and limitations. Mr. Justice Walker is satisfied that he will find it difficult to carry out household tasks in a larger residence.

Mr. M struggles with mental health issues caused by the collision including depressed mood and anxiety. He is lethargic at times, irritable, impatient and prone to anger. Mr. Justice Walker agreed with his submission that every important relationship in his life has been significantly and adversely affected. He is withdrawn and socially disengaged. He accepted Mr. M's evidence that he feels 20 years older than he did prior to the collision. Further, Mr. Justice Walker found "Mr. M to be a credible witness whose evidence was candid, honest, and reliable. Likewise, I am also satisfied that each lay witness who testified in his case (and corroborated much of Mr. M's testimony) was forthright and honest…"

IMPACT ON CAREER

Mr. M remained off work for approximately 14 months after the collision. He was allowed to do a gradual modified return to work program as a fire prevention officer with light duties in the VFD's Fire Prevention Department, gradually returning to full-time hours. This position involves site inspections and computer work. Computer work was difficult, aggravating his neck pain and exacerbating his ongoing headaches. He required frequent breaks from sitting at a desk. He disliked the position and pressed the VFD to go back to Hall 10. He was cleared to return to fire suppression work and returned as a firefighter at Hall 10 in September 2019, but he struggled to carry out his duties. Since his return he has good days and bad days, depending on the tasks he has to perform and his level of fatigue. He was not capable of performing his tasks on a sustained basis. Mr. Justice Walker was "satisfied that prior to his leave in December 2020 (discussed further below), Mr. M's capacity to perform the strenuous job duties of a firefighter had not been tested." He has been accommodated by VFD and his colleagues at Hall 10 and has been spared many of the heavier tasks. He has been fortunate enough to avoid any calls to active fires burning since his return. Even with accommodation Mr. M needs to take frequent breaks from his

duties due to pain. He lacks confidence in his ability to do all aspects of his job as a firefighter. He also found studying for his Lieutenant's exam difficult due to pain and lack of concentration. He did however complete his exam approximately one year ago and is now in the position of an Acting Lieutenant on call – filling in for ranking Lieutenants who are ill or away. It is Mr. M's understanding that when he returns to active duty he will be transferred out of Hall 10 to a busier hall to gain experience as a Lieutenant.

Mr. M's goal has always been to obtain the rank of Captain, which requires further study, exams and requisite hours as an Acting Captain and then moving to a full-time position when one comes available. Progressing in rank is important to Mr. M both in terms of his role within the VFD and for his pension.

Mr. M has been off work since he suffered a psychological breakdown during his examination for discovery in early December 2020. When asked, what seemed to be fairly innocuous questions, about the death of a child he witnessed at a fire scene in 2013, Mr. M broke down crying. The events surrounding the death of the child, which he had suppressed, were brought to mind causing him to suffer a significant emotional breakdown. He stopped sleeping and eating and felt overcome with anxiety. It was the result of a coincidental phone call from his father that the police attended Mr. M's home to check on him. His presenting symptoms to the police (including crying and yelling) were serious enough that he was taken to hospital in handcuffs, for his protection, for a psychiatric evaluation. Following his discharge from hospital he took a medical leave of absence from work and is now using his vacation time to remain off work. He was still off work when he testified at trial. Given the medical evidence of Dr. Sheila Patton, psychiatrist, the Court was satisfied that Mr. M would not have had such an adverse psychological reaction but for the injuries he sustained in the collision. It was accepted that Mr. M was not displaying any symptoms, or impairment from, any psychiatric disorders at the time leading up to the collision and concluded that, based on the evidence of Mr. M and Dr. Patton's expert opinion, "there is a causal nexus between Mr. M's reaction at his examination for discovery and his collision injuries."

If Mr. M is cleared for return to active duty he will be transferred to a different hall as an Acting Lieutenant on call to fill in at any VFD hall in Vancouver. Otherwise, his position is "senior firefighter". He can only move to rank of full-time Lieutenant when a position comes available due to retirement or promotion of an existing Lieutenant, and after he completes a set number of hours as an Acting Lieutenant.

Mr. Justice Walker concludes:

[74] The evidence establishes that Mr. M is no longer the vibrant, outgoing, happy, active, and extremely physically fit person he was prior to the Collision. From the descriptions of Mr. M given by the lay witnesses, whose evidence I accept, he is, as one witness said, "a shell of the person he once was."

Mr. M is embarrassed at his inability to support his VFD colleagues as he used to do. Mr. M remains highly distraught at the thought that he can no longer carry out all of the required tasks of a firefighter. If he is allowed by the VFD to remain, he intends to work as a firefighter so long as he can push through the job

by limiting his work to less arduous tasks to age 60. Nonetheless, he is consumed with uncontrollable anxiety over the thought of losing his job as a firefighter with the VFD.

MEDICAL EXPERT EVIDENCE

Dr. Andrei Krassioukov is an expert in the field of physical medicine and rehabilitation. He was licensed to practice medicine in 1979 in Russia, although he has spent much of his career in Canada. He has gained significant clinical, research and surgical experience. He taught at the University of Toronto (2000 – 2003) and University of British Columbia since 1994 and has held the position of full Professor in division at UBC since 2010. He has received numerous awards for his work since 1980. Dr. Krassioukov met with Mr. M on March 23, 2019, when Mr. M was still working on modified duties at VFD's Fire Prevention office. He issued the first of his two medical-legal reports on May 12, 2019 ("May 12 Report")

DIAGNOSIS

[77] In the May 12 Report, Dr. Krassioukov described the injuries Mr. M sustained as a result of the Collision (as well as Mr. M's pre-existing conditions which, he opined, have no nexus to his injuries caused by the Collision).

[78] Excerpted below from the May 12 Report are the injuries Dr. Krassioukov said were caused solely by the Collision:

i. Mild traumatic brain injury (concussion)
ii. Development of postconcussive syndrome
iii. Soft tissue injury to the neck
iv. Development of cervicogenic headaches
v. Soft tissue injury to the left shoulder
vi. Development of left rotator cuff injury
vii. Soft tissue injury to the left wrist
viii. Soft tissue injury to the mid and low back
ix. Development of anxiety and depression
x. Development of chronic pain

[79] Dr. Krassioukov's discussion of Mr. M's non-contributory pre-existing conditions is set out below (I have inserted the word "incidental" in view of Dr. Krassioukov's explanation that the word "accidental" in the text of the May 12 Report is a mistake):

It is also my opinion that Mr. M has the following conditions that, in my opinion, have not contributed to the injuries and conditions that he developed as a direct result of the events of his MVA in March 2017:

Degenerative changes within the cervical spine: CT scan evaluation of Mr. M's cervical spine (March 24, 2018) demonstrated the presence of degenerative changes within his cervical spine with a small disc bulge at C6-C7, resulting in mild spinal canal narrowing and mild right foraminal narrowing.

Based on Mr. M's complaints and my physical examination, I was not able to identify any signs or symptoms consistent with cervical radiculopathy. It is my opinion that these imaging findings are most likely [incidental] and the result of the natural aging changes within Mr. M's cervical spine.

[Emphasis added by the Court]

[80] The progression of Mr. M's symptoms from the immediate post-Collision period to March 23, 2019 is also addressed in the May 12 Report:

(a) headaches – improved by approximately 70%;

(b) neck pain and discomfort – improved by approximately 80%;

(c) mid-back pain – worsened by approximately 40%;

(d) emotional distress – improved, although still suffers from ongoing limiting pain and discomfort;

(e) significant dizziness and vomiting, blurred vision, and left wrist and hand pain – resolved; and

(f) difficulties with balance – with assistance from a physiotherapist, not currently a significant issue.

[81] Mr. M's headaches, and associated nausea, dizziness, light and sound sensitivity, and visual disturbances were diagnosed to be, at least initially, posttraumatic symptoms indicating post-concussive syndrome caused by the Collision. However, Mr. M's current, ongoing headaches are, Dr. Krassioukov said, cervicogenic in nature, to which his chronic myofascial neck pain (which is the result of soft tissue injury to his neck and upper trapezius muscles) is "a major contributor".

[82] Dr. Krassioukov issued a second, addendum report on July 17, 2019, after he received the results of ultrasound imaging of Mr. M's left shoulder. Imaging disclosed a small calcification within the posterior aspect of his supraspinatus (one of the muscles of the rotator cuff complex) and mild synovial hypertrophy within the left acromioclavicular joint (possibly related to a previous minor subluxation of that joint). Dr. Krassioukov determined that Mr. M sustained a soft tissue injury to his left shoulder from the Collision, developed a calcific tendinopathy of his left rotator cuff, and most likely "also sustained a minor subluxation of his left acromioclavicular joint." He recommended Mr. M be referred to an orthopedic surgeon for evaluation and treatment options.

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PROGNOSIS

[83] According to Dr. Krassioukov, Mr. M's limitations in function, which affect all aspects of his life, are "most likely a direct result of the injuries and conditions that he developed as a result of [the Collision]". In the May 12 Report, at a time when Mr. M was working modified duties in Fire Prevention, Dr. Krassioukov confirmed the nexus between the Collision and Mr. M's reports of his difficulties carrying out his job duties as well as his avocational pursuits.

[84] In respect of his job duties, Mr. M's reporting is set out in this extract from the May 12 Report:

During my interview with Mr. M, he also reported that following the events of his MVA in 2017, he developed the following limitations with his work-related activities:

- Mr. M reported that at the present time he is on modified duties. He is working 40 hours over four days; his schedule is four days on, four days off.
- He reported that right now his duties are 50% office work with a computer and 50% site evaluations as a fire inspector.
- He stated that while he is working at a desk, he experiences discomfort in his neck and right shoulder.
- He reported that in his present state, "I won't be able to return to my full duties as a firefighter."

[85] Mr. M reported decreased home-based activities (approximately 20%), decreased recreational activities (approximately 60%), ongoing pain and discomfort with specific activities causing neck and back discomfort and headaches, inability to return to play hockey, and inability to engage in lifting activities at the gym.

[86] Dr. Krassioukov's opinion concerning nexus is set out in the extract below:

Based on my interview with Mr. M, the following periods of total or partial disability were identified after his MVA in March 2017:

- Mr. M reported that following the events of the MVA in 2017, he was off work for 14 months. He eventually started a gradual return to work program, four hours per week, in May 2018.
- In September 2018 he was put on modified duties. His present modified duties work is a desk job and he also drives and inspects objects for fire safety. He stated that at the present time, his job is 50% desk work and 50% inspection of objects.

…

It is my opinion that the persisting limitations with work, home and recreational activities in Mr. M's case are consistent with the findings on my examination. It is my opinion that his present limitations with work, home and recreational activities are most likely a direct result of the injuries and conditions that he developed as a result of the MVA in March 2017.

Based on my clinical experience and literature evidence, it is my opinion that Mr. M most likely will continue to experience some level of pain in the future that could continue to limit his work, home and recreational activities (see section "e," Prognosis).

[Underlining and italics in original; bold emphasis added] [bold emphasis added by the Court]

[87] Mr. M's injuries have resulted in chronic pain; its impact is aptly summarized in these excerpts from the May 12 Report:

At the time of my evaluation of Mr. M, it had been exactly two years since the events of his MVA in March 2017. Based on my interview and evaluation of Mr. M as well as review of the documents provided to my attention, it is my opinion that as a direct result of the injuries that he sustained during this MVA, Mr. M has developed chronic myofascial pain.

Chronic pain syndrome (pain lasting for more than three months) can affect patients in various ways. Major effects in the patient's life are depressed mood, poor-quality sleep, non-restorative sleep, fatigue, reduced activity, reduced libido, excessive use of drugs/alcohol, dependent behaviour and disability out of proportion with impairment. Chronic pain may lead to prolonged physical suffering, marital problems, family problems, loss of employment and various adverse medical reactions from long-term therapy (Bair, Wu, Damush, Sutherland, and Kroenke, 2008). As evident from the facts provided to my attention, a number of these symptoms are present in Mr. M's case.

[Emphasis added by the Court]

[88] In Dr. Krassioukov's opinion, Mr. M's prognosis to return to work as a firefighter is guarded. The reasons, he explained in the May 12 Report, are multifactorial:

One of the positive prognostic factors in Mr. M's case is that he was able to return to [financially, Dr. Krassioukov added in testimony] meaningful employment following the events of his MVA in March 2017. *However, it has to be noted that although he is back to work, he is still experiencing persisting pain in various parts of his body that limits his work, home and recreational activities. Mr. M is presently working modified duties as a fire inspector.*

It is my opinion that the prognosis for his return to work as a firefighter in the future is guarded. It is my opinion that numerous negative prognostic factors are present in Mr. M's case:

- It is my opinion that the development of ***chronic pain*** is one of the major negative prognostic factors in this case.
- As evident from the clinical literature, up to 30% of individuals who sustained soft tissue injury developed chronic disability. The prolongation and worsening outcome are associated with a longer predicted recovery time, psychological distress and greater number of symptoms (Williamson, Williams, Gates and Lamb, 2015).
- ***It is my opinion that Mr. M most likely will continue to have some level of pain in the affected areas for the foreseeable future***. The clinical evidence suggests that in general, the longer pain is present in an individual, the less likely the patient is to fully recover with treatments (Elbinoune, Amine, Shyen, Gueddari, Abouqal, and Hajjaj-Hassouni, 2016).
- ***Furthermore, based on my clinical experience and the literature evidence, chronic pain frequently results in development of depression and anxiety.*** As evident from the literature, more than half of patients presenting with chronic pain also present with symptoms of depression (O'Sullivan, 2004). Uncertainties about ever being pain-free or the possibility of worsening pain are accompanied by feelings of anxiety, sadness, grief and anger. For some people, the burden of pain is difficult to manage and may lead to the emergence of a mental disorder (Holmes, Christelis, and Arnold, 2013).
- As I indicated in section "I' (causation of injuries), ***Mr. M presents with mild symptoms of depression and anxiety, which, in my opinion, are a direct result of his MVA in March 2017. It is my opinion that Mr. M is predisposed to worsening of his emotional health in the future. I will defer the final opinion on future prognosis and the potential impact of the MVA on his depression/ anxiety to colleagues from psychiatry.***
- I also will defer the final opinion with respect to headaches in this case to colleagues from neurology.
- I also will defer the final opinion on his left shoulder pain until we obtain the results of his ultrasound imaging.

[Emphasis added by the Court]

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TREATMENT RECOMMENDATIONS

[90] Dr. Krassioukov's recommendations for management of Mr. M's injuries are as follows:

> (a) participation in a pain management program to manage (not cure) chronic pain at St. Paul's Hospital, Jim Pattison Outpatient Care and Surgery Centre, or G.F. Strong Rehabilitation Centre;
>
> (b) home-based exercise to stretch and strengthen neck and shoulder girdle muscles;
>
> (c) a trial of neck and shoulder girdle trigger point injections to benefit his cervicogenic headaches;
>
> (d) evaluation and support from an occupational therapist to assist with workplace accommodations and to recommend activities that do not aggravate his pain;
>
> (e) ultrasound evaluation of left shoulder to establish the severity of the rotator cuff injury and from there, to consider future treatment (e.g., conservative exercise and strengthening program or aggressive interventions such as injections or surgery), which as mentioned above, was carried out on June 19, 2019;
>
> (f) Pilates, yoga, and water-based exercises;
>
> (g) trigger point injections and/or prolotherapy for chronic myofascial lower back pain; and
>
> (h) follow-up and monitoring by Mr. M's family physician of his "significant symptoms of depression and anxiety".

Mr. Justice Walker was satisfied that, as was the case with all of Mr. M's medical experts, Dr. Krassioukov carried out a thorough assessment, provided an objective unbiased opinion, and did not engage in advocacy in his reports or his testimony. He went on to say "I am satisfied from his reports and his testimony that as a result of his entirely thorough and objective assessment, Dr. Krassioukov provided an accurate diagnosis and prognosis of Mr. M's injuries. "

Dr. Gordon Robinson is a neurologist. He is regarded as Canada's leading expert in the causes and treatment of headaches. He met with Mr. M on November 18, 2020, and prepared a medical-legal report dated November 26, 2020.

DIAGNOSIS

[100] Dr. Robinson found objective evidence of soft tissue injury to Mr. M's paracervical musculature and right suboccipital region resulting in pain projecting forward into his head and behind his right eye. Dr. Robinson diagnosed Mr. M with persistent posttraumatic headache related to soft tissue injury to his neck sustained in the Collision. His report contains his in-depth analysis of the etiology of Mr. M's headache symptoms:

82. Ever since the accident he has had constant discomfort on the right side of his neck aggravated by physical activity as well as neck movement. Headaches have been constant as a mild to moderate discomfort with pain coming up from his upper neck, spreading onto the right side of his head and behind the right eye.

83. He did not suffer from headache prior to the motor vehicle accident.

84. ***I believe that his history and examination is consistent with a diagnosis of persistent posttraumatic headache related to soft tissue injury to the neck (whiplash) sustained in the March 5, 2017 motor vehicle accident.***

85. The diagnosis does meet the criteria outlined in the International Classification of Headache Disorders outlined as follows: …

…

87. Headache is a common symptom following soft tissue injury to the neck. The head pain may have various characteristics that are similar to primary headaches such as migraine and tension type headache.

…

89. In the majority of cases, clinical examination and investigation is normal in patients suffering from recurring headache and the diagnosis rests on the temporal relationship to trauma and the historical features reported by the patient. The headaches may reflect a worsening of pre-existing migraine or the development of head pain arising de novo from head and neck injury. ***Headache related to head and neck injury may be present from the outset or gradually develop in the weeks and months following injury.***

90. Many patients will have a constant background discomfort upon which, moderate to severe headache episodes may occur. ***Triggers or aggravators to the condition often include physical activities requiring repetitive neck movement or the need to maintain a fixed neck position.*** In some cases typical migraine triggers may be present even in patients with no pre-existing history of headache. These may include attacks associated with stress, lack of sleep, over sleeping, weather change, alcohol and/or certain foods.

91. ***The clinical examination often reveals tenderness in the upper neck with pain radiating into the temporal, frontal and/or retro-orbital regions. This reflects the anatomical and physiological connections between the sensorineural structures in the upper spinal cord and descending sensory tracts of the trigeminal nerve, which are responsible for sensation over the scalp and deeper structures of the head.***

…

93. ***Although many patients may recover within weeks to months, there is a substantial number that continue to have headache and neck pain years after the injury. Most at risk for chronic difficulties are females probably due to their longer, more slender neck with less developed musculature. Other negative prognostic factors include patients who were struck without warning, while the head was turned, the presence of a previous neck injury, underlying degenerative neck disease*** and/or advanced age.

[101] Dr. Robinson said he does not believe that Mr. M sustained a traumatic brain injury from the Collision. In his testimony, Dr. Robinson explained that not every concussion, even a mild one, should be characterized as a traumatic brain injury. It depends on the symptoms that follow, which in Mr. M's case, he said, do not indicate a traumatic brain injury (e.g., Mr. M did not suffer any loss of consciousness; he felt dazed and suffered from some confusion after impact along with some impairment of concentration and memory, but was alert enough to call 911 for assistance). Alternatively, Dr. Robinson opined in his report, that even if Mr. M did suffer a traumatic brain injury, his symptoms (which have resolved) were not consistent "with brain injury of a magnitude that would result in persisting cognitive and behavioral symptoms."

[102] In cross-examination, Dr. Robinson testified that whether Mr. M suffered a mild brain injury of is no consequence since his diagnosis and prognosis would not change. He explained that there is an inverse correlation between the severity of traumatic brain injury and the probability of development of headache disorders; i.e., patients with more severe brain injuries are less likely to develop a headache disorder than those who suffer from milder brain injuries.

PROGNOSIS

[103] For Mr. M's prognosis, Dr. Robinson opined that Mr. M "probably will continue to have posttraumatic headache indefinitely."

[104] In Dr. Robinson's opinion, it is unlikely that Mr. M's headaches will worsen on their own and that future improvement in Mr. M's posttraumatic headaches is possible. At the same time, he cautioned that if Mr. M is moved to a more active fire hall, he "will probably have an increase in his headache and neck pain unless accommodation is given to him by the fire department", adding, "[w]ithout accommodation, it is not clear whether he will be able to continue performing the general duties of a firefighter with the Vancouver Fire Department. If not, it may be necessary for him to explore other options within the Department that are less physically demanding."

[105] In addition, Mr. M must take care to limit his running and weightlifting activities as otherwise they will aggravate his neck pain. Dr. Robinson suggested Mr. M "consider other creative outlets for his desire to be physically active as this was a major part of his life prior to the [C]ollision." The difficulty for Mr. M is that his job duties as a firefighter require him to be in top physical condition, which in turn requires him to work with weights and other strengthening and endurance workout and exercise programs.

TREATMENT RECOMMENDATIONS

[106] Dr. Robinson does not think any further investigative techniques are warranted. In his report, he opined that treatment of chronic headaches related to head and neck trauma is usually difficult:

> 97. The treatment of chronic headache related to head and neck trauma is usually difficult. Research is limited despite the frequency and burden of these injuries to individuals and society. ***As yet there is no physical therapy that has been found to be curative. At most patients will experience temporary benefit and on occasion the headaches may be more severe following such therapy.***
>
> [Emphasis added by the Court]

[107] However, he noted that physiotherapy has provided Mr. M with temporary improvement in head and neck pain:

> 99. He has been subject to much in the way of physical therapy including massage, chiropractic manipulation, physiotherapy, vestibular physiotherapy and vision therapy. Most of these treatments have been completed possibly with benefit. ***He continues to have physiotherapy which is associated with temporary improvement in his head and neck pain.***
>
> [Emphasis added by the Court]

[108] Dr. Robinson opined that medications are often unhelpful in treating chronic posttraumatic headaches. Analgesics, muscle relaxants, and anti-inflammatory drugs are usually of little value (although he added that taking a stronger dose of ibuprofen is usually more helpful in treatment than acetaminophen, and recommended Mr. M take a dose of 400 to 600 mg of liquid ibuprofen for moderately severe headaches to help with symptoms).

[109] Otherwise, medications used for migraines are "occasionally efficacious", he said, for patients suffering from chronic posttraumatic headaches who have an aggravation of pre-existing migraine or posttraumatic headaches, which does not apply to Mr. M. Other possible pharmacological treatments are mentioned. Dr. Robinson said that it is "possible" that a tricyclic antidepressant such as nortriptyline "could be helpful in improving his sleep and reducing headache". Another medication that was mentioned was a beta-blocker, which Dr. Robinson said Mr. M "would probably not tolerate"

because it "would reduce his cardiac performance." In either case, Dr. Robinson's opinion was that "these drugs would probably be ineffective in reducing the frequency or severity of his posttraumatic headaches." Similarly, Dr. Robinson opined that while Botox injections may be a possible treatment to try, they are unlikely to be helpful for Mr. M's specific type of headache (one-sided arising from the upper neck).

[110] Otherwise, he suggested that Mr. M maintain an active lifestyle, adding, "[r]egular exercise directed to improving general fitness may increase the sense of well-being and ability to cope with pain."

Dr. Sheila Patton is a psychiatrist. She diagnosed Mr. M to suffer from a number of psychiatric disorders caused by the collision including Major Depressive Disorder, Somatic Symptom Disorder, Generalized Anxiety Disorder and other Specified Anxiety Disorder related to driving. All of them, she opined, were active and untreated at the time of her assessment on October 5, 2020. She shared Dr. Krassioukov's view that Mr. M suffered a mild traumatic brain injury. She testified that it was understandable that Mr. M believed his ongoing neurological and cognitive symptoms are the result of his mild brain injury since that was the advice he received from clinicians. In her opinion however, it was "much more probable" that those symptoms, as well as his other ongoing physical symptoms are "much more related to the development of his anxiety and depressive disorder"

The defence argued that some, if not most, of Mr. M's psychological disorders and symptoms pre-date the accident. The submission is not supported by any expert evidence. Dr. Patten opined that Mr. M's psychiatric symptoms would not have developed but for the collision. Dr. Patton was questioned at length by the defence about the ongoing effect of the incident in 2013, when the child died and Mr. M's breakdown at the examination for discovery, lacking any causal connection to the collision. Dr. Patton placed particular emphasis on Mr. M's resiliency following the 2013 incident. As Dr. Patton explained, by December 2020 Mr. M was worn down by the physical and mental health injuries he suffered from the collision. His coping mechanism and resiliency were impacted to the point that the tragic event he witnessed, and had been able to put out of his mind, welled to the surface. Thus, the nexus between the injuries Mr. M suffered in the collision and his reaction at and following the examination for discovery, regarding the 2013 incident has been established with expert medical evidence on the balance of probabilities.

According to Dr. Patton, even if Mr. M should recover from his psychiatric disorders, he remains at increased risk for the precipitation of further episodes of any/all of his current disorders. For example, Mr. M's risk of a second episode of a major depressive disorder is now approximately 50%, compared to 15% for the general population., with increased risk for any subsequent episodes.

The Court found Dr. Patton's answers to the questions put to her were well-considered and objective throughout without any hint of advocacy or bias.

Ms. Natalie Hull is an occupational therapist who conducted a functional capacity, strength, and durability assessment over the course of 7.75 hours. She opined that, from a functional capacity perspective, Mr. M is capable of meeting the minimum essential job demands associated with firefighting work but will suffer symptom aggravation with heavy strength pulling and is at significant risk of ongoing symptom flare-ups with exposure to tasks requiring sustained neck extension. She expressed significant concerns over his durability to perform the job duties of a firefighter on an ongoing basis due to the limitations in his neck because they impact his ongoing durability and reactivity. Mr. Justice Walker was satisfied and found that Ms. Hull's opinion accurately describes Mr. M's physical vocational limitations to his ability to carry on with his job duties as a firefighter. He accepted her opinion concerning the accommodation that must be shown to Mr. M to remain functional at work.

Mr. Jonathan Hawkeswood is a physiatrist who assessed Mr. M on behalf of the defence

[173] Many, but not all, of Dr. Hawkeswood's opinions contained in his medical-legal report (in particular, his prognosis) are at odds with the findings and opinions given by Dr. Krassioukov, Dr. Robinson, and Dr. Patton. As mentioned at the outset of these reasons, I have determined that much of Dr. Hawkeswood's evidence should be accorded no weight. I have come to that decision in light of his testimony which contradicted key parts of his report and revealed the unfortunate approach he took to obtaining Mr. M's history.

Mr. Justice Walker accepted the evidence of the experts who testified in Mr. M's case and accorded no weight to the majority of opinions expressed by Dr. Hawkeswood. He rejected the defence submissions challenging the evidence of the experts who testified in Mr. M's case. He stated that he had no hesitation in finding that they carried out thorough assessments of Mr. M and provided objective opinion evidence.

CRUMBLING SKULL AND DIVISIBILITY OF INJURIES

The defence argued in closing submissions that Mr. M's reaction following his examination for discovery is a divisible injury not caused by the collision. The defence contends that Mr. M suffered a psychological injury from the 2013 incident involving the death of a child, which remained unresolved in December 2020 and therefore Mr. M is a crumbling skull Plaintiff. Based on the medical evidence the Court rejected that argument stating *"There is no evidence to suggest that the anxiety and emotional upset Mr. M suffered from his mother's death, his divorce, or witnessing the death of the child in 2013 limited his vocational and avocational pursuits in any way. Dr. Patton ruled out the prospect of active symptoms of anxiety or other mental health conditions or symptoms prior to the Collision. At most, the evidence establishes that Mr. M was a thin-skull plaintiff… The defence cannot escape compensating*

Mr. M for the full effect of his psychological injuries on this basis."

FAILURE TO MITIGATE

The defence argues that Mr. M failed to mitigate his damages because he has not taken medication and pursued treatments recommended by Dr. Patton and Dr. Robinson. The Court discussed this issue at length and determined that the defence has not established that Mr. M has failed to mitigate his damages.

NON-PECUNIARY DAMAGES

Mr. Justice Walker discussed each of the cases cited by the parties, ten on behalf of the plaintiff and three for the defence. The plaintiff sought an additional award for loss of housekeeping capacity, but the Court included loss of housekeeping capacity under this head of damage, stating *"I have determined that an appropriate award for non-pecuniary damages, including loss of housekeeping capacity, is $210,000.00"*

PAST WAGE LOSS

The City of Vancouver paid Mr. M the total sum of $119,106.36 during his absence for periods between March 8, 2017 and September 28, 2019 using his sick leave credits. Mr. M is obliged to reimburse the City of Vancouver any amount he recovers. This was undisputed and an award was made in that amount.

LOSS OF FUTURE EARNING CAPACITY

To be entitled to an award for this head of damage, Mr. M must establish a realistic and substantial possibility that he will suffer a pecuniary loss as a result of the injuries he sustained in the collision. The Court found that he has established that his future income capacity is impaired as a result of the collision.

[289] Dr. Krassioukov opined that Mr. M's chronic pain is one of the major prognostic factors and that he will continue to have some level of pain in his currently affected areas for the foreseeable future even with treatment. Mr. M's functional impairments will prevent him from engaging in all of his required job duties as a firefighter even if he overcomes his mental health injuries (which I find will likely never fully resolve even with protracted treatment).

[290] I am satisfied that Mr. M's restrictions have and will continue to render him unable to perform all of the required aspects of his job as a firefighter on a sustained basis.

…

[293] The question is whether accommodation can be provided to Mr. M so that he can retain his job

as a firefighter. Dr. Robinson's opinion is that without accommodation, Mr. M will probably have an increase in his headache and neck pain. I am satisfied that, certainly upon transfer to a busier hall but also even if Mr. M is accommodated to the extent of being allowed to remain at Hall 10, when he is in fact tested on an emergency call he will have difficulty performing the arduous aspects of his job and in any event, will require time off of work to recover. He cannot be counted upon to be a reliable member of a firefighting team on a consistent basis, which will ultimately result in his loss of his position with the VFD as a firefighter.

The Court also found that quite apart from his capacity to work as a firefighter, Mr. M is now less capable overall of earning income from other types of employment and can no longer take advantage of job opportunities that might have been available to him upon his retirement as a firefighter or on his days off-shift.

SUMMARY

Mr. Justice Walker assessed an award to Mr. M in the total amount of $1,195,894.03, as follows:

Non-pecuniary damages, including loss of housekeeping capacity	$210,000.00
Past wage loss	$119,106.36
Loss of future earning capacity	$750,000.00
Cost of future care	$ 93,000.00
Special damages	$ 23,787.67
TOTAL	**$1,195,894.03**

Management fees: to be addressed in further submissions

The full Reasons for Judgment of The Honourable Mr. Justice Walker CAN BE FOUND HERE.

Written by Stella Gowans, Paralegal

IF YOU WOULD LIKE TO BOOK AN ASSESSMENT WITH DR. ANDREI KRASSIOUKOV, PHYSIATRIST, OR DR. GORDON ROBINSON, NEUROLOGIST, PLEASE CONTACT US AT INTEGRA

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