IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Girvan v. McGlue,*
2023 BCSC 902

Date: 20230530
Docket: M196910
Registry: Vancouver

Between:

Alasdair John Girvan

Plaintiff

And

Eleanor Joanna McGlue and Stephen Anthony Ferreira

Defendants

Before: The Honourable Madam Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiff:	J.R. Kendall S.L. Herra
Counsel for Defendants:	L.J. Mackoff I.U. Azhar
Place and Dates of Trial:	Vancouver, B.C. September 6-9, 12-16 and 20, 2022
Place and Date of Judgment:	Vancouver, B.C. May 30, 2023

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Overview

[1] On July 18, 2017, the plaintiff, Alasdair Girvan, was involved in a motor vehicle accident in Surrey, British Columbia, wherein he was rear-ended by one of the defendants, Eleanor McGlue ("Accident"). The plaintiff claims to have suffered exacerbation of a variety of pre-existing conditions including chronic pain arising from a workplace injury, and various new injuries including injury to his left shoulder, major depression and opioid induced hyperalgesia ("OIH").

[2] Prior to the Accident, the plaintiff worked as a physical labourer in the construction industry. The plaintiff did not return to work after the Accident, and was terminated shortly thereafter, for reasons unrelated to the Accident.

[3] The defendants have admitted liability for the Accident. The plaintiff seeks compensation for the injuries sustained in the Accident, specifically non-pecuniary damages, loss of past and future earning capacity, the cost of future care, and special damages.

The Accident & Aftermath

The Accident

[4] The Accident occurred at approximately 5:10 p.m. on July 18, 2017. The parties were travelling south on 176th Street in Surrey approaching the intersection with Fraser Highway. Ms. McGlue was driving a Volkswagen Jetta sedan, and the plaintiff was driving a Nissan X-Terra sport utility vehicle ("SUV").

[5] Ms. McGlue testified that she was travelling between 40–60 km/hour when she noticed traffic slowing in front of her as she approached the intersection. She braked hard but was unable to stop and rear-ended Mr. Girvan. The hood of Ms. McGlue's car went underneath the rear of Mr. Girvan's SUV, dislodging his spare tire. Ms. McGlue testified that she felt a "fairly forceful" impact. There was smoke coming out of her car after the impact, and she did not attempt to drive it away from the scene of the Accident.

[6] Ms. McGlue remained in her vehicle following the Accident. She testified that Mr. Girvan hopped out of his SUV and came towards her car looking friendly and concerned for her. Ms. McGlue was very relieved that he was not angry with her. She apologized profusely to Mr. Girvan, who told her not to worry and that he had not even felt the impact. Ms. McGlue was firm in her evidence on that point.

[7] Ms. McGlue testified that Mr. Girvan helped her by calling a tow truck for her vehicle as she had just immigrated to Canada from Northern Ireland the month prior and did not know what to do. She recalls exchanging phone numbers with Mr. Girvan and that they had a friendly chat about him having Scottish heritage. Ms. McGlue's evidence was that approximately 15 minutes elapsed from the time Mr. Girvan got out of his truck to the end of their conversation.

[8] Mr. Girvan's recollection of his interactions with Ms. McGlue in the immediate aftermath of the accident is generally consistent with that of Ms. McGlue. Mr. Girvan agreed that he got out of his SUV and went to Ms. McGlue's car to see if she was okay, and that he was calm and collegial with her. He said that they discussed whether an ambulance should be called and decided that a tow truck for Ms. McGlue's car was all that was needed. Mr. Girvan did not deny telling Ms. McGlue that he did not feel a thing from the Accident; rather, he testified that he thought he felt fine and was more concerned about Ms. McGlue. Mr. Girvan agreed that he did not mention hitting his head on the roof of his SUV to Ms. McGlue.

[9] It became apparent that Ms. McGlue would need to wait for the tow truck to arrive and for her boyfriend to come and pick her up. She testified that Mr. Girvan said he hoped she got home okay, wished her good luck, said goodbye, and then climbed into his SUV and drove away. Ms. McGlue remained with her car at the side of 176th Avenue.

The Events Following the Accident

[10] While waiting for the tow truck to arrive, Ms. McGlue called her boyfriend. She also noticed she had a missed call from an unknown number. She testified that about ten minutes after Mr. Girvan left the scene of the Accident, she received what

she thinks was a second call from him (following the missed call). On that call, Mr. Girvan told her that he had spoken with a friend who said that if they called the paramedics to the scene of the Accident, they could each get $20,000 from the Insurance Corporation of British Columbia ("ICBC") for an injury claim. Ms. McGlue testified that she responded that she was not injured and did not want any part of that.

[11] Ms. McGlue next recalls her boyfriend arriving at the scene about the same time as a firetruck. The first responders said they had been called to an accident and asked if she was the person who had called. Ms. McGlue responded no, and then looked across 176th Avenue and saw Mr. Girvan's vehicle parked on the other side in a gravel shoulder area in front of the Honeybee Centre. She indicated to the first responders they were likely there for Mr. Girvan. Ms. McGlue did not recall seeing the plaintiff's vehicle arrive at the Honeybee Centre. The first responders asked Ms. McGlue if she was okay and she indicated that she was. They got back in the firetruck, drove south, turned around, and went over to the plaintiff.

[12] Mr. Girvan's evidence about what transpired after he left the scene of the Accidents is materially different. Mr. Girvan's testimony was difficult to follow but was to the general effect that after he left Ms. McGlue, he proceeded to attempt a left turn onto Fraser Highway but found himself driving into oncoming traffic so completed a U-turn and pulled over on the gravel shoulder in front of the Honeybee Centre, facing north on 176th Avenue. He testified that he called his then-partner, Julie Cowie, who he says told him to stop driving and call an ambulance. He says that he waited a few minutes then called the ambulance at approximately 5:40 p.m., which was in turn approximately 30 minutes after the Accident occurred.

[13] Mr. Girvan testified that he did not think an ambulance was necessary at first, but then started getting shaky, tensed up "a bit", and felt like he was in shock and getting stiff. He testified that an ambulance eventually arrived and took him to Surrey Memorial Hospital where he said he had x-rays and still felt "a bit stiff". Mr. Girvan did not recall being at the hospital for very long; he testified that Ms. Cowie arrived

quickly and they left quickly as well. Mr. Girvan testified that Ms. Cowie drove him back to his truck. His truck had a dead battery and would not start, so he gave it a "nudge start" and then drove home.

[14] With respect to the alleged phone call to Ms. McGlue, Mr. Girvan first testified that he did not recall calling Ms. McGlue and speculated that perhaps she had called him and he returned her call. The fact of Mr. Girvan having called Ms. McGlue on her cell phone is corroborated by Ms. McGlue's phone records.

[15] As to the substance of the call, Mr. Girvan testified that that he did not recall suggesting to her that they feign injury to obtain money from ICBC. He said that it did not sound like something he would say and queried where he would have gotten the amount of $20,000 from and what friend he would have talked to. Mr. Girvan denied any intention to defraud ICBC and then changed his evidence from not recalling the conversation with Ms. McGlue to denying that it occurred at all.

The Plaintiff's Conduct After the Accident

[16] I find no reason to reject Ms. McGlue's evidence as to what transpired after the Accident and prefer it to Mr. Girvan's. Ms. McGlue was a forthright, careful, and candid witness. She conceded when her memory of events was poor or less than certain in some respects, but had a very clear recollection of the phone call she received from Mr. Girvan. She was unmoved in cross-examination on this point, and there is no reason why Ms. McGlue would have fabricated her evidence. Ms. McGlue did not know Mr. Girvan before the Accident and has not spoken with him since.

[17] To the contrary, Mr. Girvan's denial is simply not credible, particularly when his evidence is considered in light of the totality of the circumstances and other evidence. I find that the interactions between Ms. McGlue and Mr. Girvan following the Accident were as Ms. McGlue testified: Mr. Girvan was friendly and helpful to her, told her he did not feel the impact and was not injured, assisted her in calling a tow truck, and then drove away from the scene of the Accident. I also accept Ms. McGlue's evidence that after driving away, Mr. Girvan called her and made the

proposal that they could obtain a financial benefit by way of payment from ICBC if they called paramedics to the scene of the Accident and that she indicated to him she wanted no part of such a scheme.

[18] I also reject Mr. Girvan's evidence that as he drove away from the Accident, his body seized up to the point where he almost drove into oncoming traffic and thus he ended up parked in front of the Honeybee Centre. Mr. Girvan's evidence about how he felt shortly after the Accident was not consistent. He gave conflicting accounts of whether he was injured in the Accident and how he felt shortly thereafter to Ms. McGlue, first responders, physicians at Surrey Memorial Hospital, and later his treating physicians, including Drs. Sidney Field, Shaohua Lu, and William Koch. Of particular note, Mr. Girvan reported to Dr. Koch that he was fearful for his life during the Accident and thought he had suffered a concussion afterward. That account is inconsistent with both Mr. Girvan and Ms. McGlue's evidence at trial as to how he felt and the statements he made at the scene of the Accident.

[19] Mr. Girvan's evidence that he was in sufficient pain to require an ambulance attend at the Accident is also difficult to reconcile with his ability to be able to push-start his SUV later that evening and drive himself home. Mr. Girvan testified under cross-examination that after he was discharged from the hospital, he "wasn't seized up" and was able to push-start the SUV, with Ms. Cowie in the driver's seat, by bending his knees, putting his back up against the truck, and pushing it hard enough to get it going fast enough to pop the clutch and start the engine.

[20] Finally, I reject Mr. Girvan's evidence that he called the paramedics because Ms. Cowie told him to do so. This aspect of his evidence was not corroborated by Ms. Cowie.

Credibility Assessments

[21] The plaintiff's credibility is a key issue in this trial. The defendants took the position that the plaintiff's "utter lack of credibility and overt dishonesty requires a finding that he has failed to meet the burden of proof". The defendants say Mr. Girvan is not credible at all such that I ought not to accept any of his evidence and

no award of damages ought to be made. The defendants say that the issues with Mr. Girvan's credibility are so significant that his claim ought to be dismissed in its entirety.

[22] It is not unusual for the credibility of the plaintiff to be a central issue in chronic pain cases. As the Court noted in *Gee v. Bock*, 2019 BCSC 1348 at para. 36, "[t]he court must always be concerned with the reality of the plaintiff's complaints of ongoing pain in order to determine the existence and extent of the injuries and properly assess damages based on such complaints". This is the case as the absence of objective findings in chronic pain cases increases the opportunity for exaggeration, distortion, or even fabrication: *Wells v. Kolbe*, 2020 BCSC 1530 at para. 83.

[23] The applicable principles were summarized by Justice Abrioux (as he then was) in *Buttar v. Brennan*, 2012 BCSC 531 at para. 24:

- the assessment of damages in a moderate or moderately severe soft tissue injury is always difficult because the plaintiffs are usually genuine, decent people who honestly try to be as objective and factual as they can. Unfortunately every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 397 (S.C.);
- the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery (*Price* at 399);
- an injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -- which could be just his own evidence if the surrounding circumstances are consistent -- that his complaints of pain are true reflections of a continuing injury (*Price* at 399);
- the doctor's function is to take the patient's complaints at face value and offer an opinion based on them. It is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114;
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek

> congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries *Fan (Guardian ad litem of*) *v. Chana*, 2009 BCSC 1127 at para. 73;
>
> - in a case of this kind care must be taken in reaching conclusions about injury alleged to have continued long past the expected resolution. The task of the court is to assess the assertion in light of the surrounding circumstances including the medical evidence. The question is whether that evidence supported the plaintiff's assertion and, if not, whether a sound explanation for discounting it was given *Tai v. De Busscher*, 2007 BCCA 371 at para. 41.

[24] I am also guided in my assessment of the plaintiff's credibility by the approach set out by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013), and *Faryna v. Chorny*, 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.). Additional factors that may be considered when assessing credibility include whether a witness' explanation defies logic or common sense, or if a witness is evasive, longwinded, or argumentative in their responses: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*., 2019 BCSC 739 at para. 92.

[25] Credibility and reliability are separate but related concepts. Credibility pertains to a witness' veracity, while reliability has to do with the accuracy of their testimony: *Ford v. Lin*, 2022 BCCA 179 at para. 104; *Equustek Solutions Inc. v. Jack*, 2020 BCSC 793 at para. 109, citing *R. v. H.C.*, 2009 ONCA 56 at para. 41. Significant frailties in a witness' evidence—such as inconsistencies between their testimony and contemporaneous documentation or inconsistencies and contradictory explanations of key issues—may affect both credibility and reliability: see e.g. *Chao Yin Canada Group Inc. v. Xenova Property Development Ltd*., 2021 BCSC 1445 at paras. 53–55, appeal to CA dismissed as abandoned, 2023 BCCA 39.

The Plaintiff

[26] Mr. Girvan is a complex person who has had to endure various struggles over the course of his life. I accept that Mr. Girvan has a genuine desire to improve the quality of his life and be a positive presence in his daughter's life, and that he had taken significant steps towards doing so prior to the Accident, including by

completing retraining as a surveyor/gradesman and obtaining employment with King Hoe Excavating Ltd. (“King Hoe”).

[27] However, and while I accept that Mr. Girvan was at times attempting to be truthful and accurate in his testimony, considering his evidence as a whole and weighing it against the preponderance of the evidence before me, I conclude that he is neither a credible nor reliable witness.

[28] Mr. Girvan’s evidence was replete with internal and external inconsistencies. Importantly, and as noted above, the history he provided regarding his injuries in the immediate aftermath of the Accident was inconsistent. By way of example:

a) he told Ms. McGlue he did not even feel the impact and was fine;

b) he told Drs. Field and Anton that he hit his head on the roof, but there is no mention of this in the ambulance or hospital records; and

c) his account of feeling extreme pain shortly after the Accident is difficult to reconcile with his admitted ability to push-start his SUV a few hours later.

[29] Importantly, my conclusion that Mr. Girvan called Ms. McGlue and proposed that they call an ambulance and feign injury to obtain financial benefit is fatal to his credibility and taints the whole of his evidence at trial. I also find that, whether intentionally or not, he suggested to Ms. Cowie that it would be financially beneficial to her to provide evidence supportive of his position in this litigation. I agree with the defendants that this conduct is indicative of dishonest intention on Mr. Girvan’s part and suggestive of a willingness to feign, exaggerate, or embellish his injuries to obtain financial benefit.

[30] Mr. Girvan’s testimony about his alcohol and cocaine use was also not credible. I do not accept that he only used cocaine occasionally and prefer Ms. Cowie’s evidence as to the nature and extent of his cocaine use and episodes of binge-drinking over the course of their relationship. I also find that the plaintiff tended to understate his use of, and dependency on, oxycodone. By way of example, he

told Dr. Hubert Anton—his physiatrist—that he was taking OxyContin “at one time” for his right shoulder injury; this is a significant and material understatement in light of his actual admitted use of OxyContin both prior to and following the Accident.

[31] I also find that Mr. Girvan was not a reliable historian of events. His recollection of his prior medical history was not consistent or precise, and his answers to questions were often tangential. Mr. Girvan’s testimony regarding the circumstances leading to his termination from a previous employer, Inspek Crushing Ltd., was not credible or capable of belief. He was defensive, argumentative, and at times sarcastic, particularly when confronted with inconsistencies in his evidence and when being questioned about his physical pain, psychological conditions, and corresponding use of medication in the months leading up to the Accident.

[32] By consequence, I find that I must treat Mr. Girvan’s evidence generally, and in particular his self-reported history of complaints to the physicians who assessed him, with caution, especially where his evidence lacks corroborative objective evidence or findings. This is particularly the case where it is necessary to make factual findings as to the nature and extent of Mr. Girvan’s injuries and ongoing sequelae thereof, based solely on his self-reported pain and impairment and where the evidence of the physicians who testified and provided opinion evidence is predicated on his self-reported subjective symptoms, in the absence of objective medical findings. In light of this, I conclude that I cannot accept Mr. Girvan’s evidence at face value and must treat it cautiously. This includes Mr. Girvan’s reports to his physicians regarding his medical history and past and present use of oxycodone and cocaine.

[33] However, I decline to make any adverse inferences in respect of Mr. Girvan’s evidence arising from the fact that he did not testify first. He was not present in the courtroom during prior witnesses’ testimony, and in my view, his evidence did not demonstrate an attempt to tailor his evidence to that previously given: see e.g. *Rabiei v. Oster*, 2019 BCSC 733 at paras. 108–109, citing *Gustafson v. Davis*, 2012 BCSC 1576 at paras. 114–116. I will address the impact of the timing of the

plaintiff's evidence on the defendants' ability to cross-examine certain expert witnesses on evidence, suggesting that the plaintiff engaged in activities inconsistent with the reported severity of his injuries, in further detail below.

[34] Finally, I note that credibility and reliability are not all or nothing propositions; I may believe all, part, or none of a witness' evidence and can attach different weight to different parts of that evidence: *Radacina v. Acquino*, 2020 BCSC 1143 at para. 96, citing *R. v. R. (D.)*, [1996] 2 S.C.R. 291 at para. 93, 1996 CanLII 207; *R. v. Howe*, 192 C.C.C. (3d) 480 at para. 44, 2005 CanLII 253 (Ont. C.A.). Further, and contrary to the defendants' overarching position in response to this claim, it does not necessarily follow that because the plaintiff's evidence lacks credibility and reliability, his position is untenable: *Davie v. Hill*, 2022 BCSC 2074 at para. 76, citing *Rab v. Prescott*, 2021 BCCA 345 at para. 51.

Julie Cowie

[35] Ms. Cowie's credibility is also in issue, particularly as it relates to her observations of Mr. Girvan in the years prior to and following the Accident. Considering Ms. Cowie's evidence as a whole, I found her to be an honest and forthright witness. Ms. Cowie conceded propositions put to her where appropriate and testified honestly and candidly about her own cocaine use, even where doing so reflected poorly on her.

[36] Ms. Cowie was candid about her animosity towards the plaintiff resulting from the breakdown of their relationship and ongoing custody proceedings involving their daughter. I have factored this into my assessment of her evidence. Notwithstanding her hostility towards Mr. Girvan, I find that Ms. Cowie did not embellish her evidence, despite the opportunity to do so. Accordingly, I prefer Ms. Cowie's evidence where it conflicts with that of Mr. Girvan and accept her evidence:

a) That the plaintiff's use of cocaine and alcohol increased in the period from 2015–2017 and that this was one of the principal factors that led to the breakdown in their relationship, which culminated in September 2017

when Ms. Cowie called the RCMP to have an intoxicated Mr. Girvan removed from the home;

b) That the plaintiff's physical capabilities appeared to decline in the 2015 to 2017 time frame following his second workplace injury, though not to the point of interfering with his ability to complete retraining and obtain employment with King Hoe. I note in this regard that Ms. Cowie's evidence in that regard is consistent with Mr. Girvan's contemporaneous pursuit of WorkSafeBC benefits for both physical and psychological injuries;

c) As to the events immediately following the Accident and the plaintiff's condition and capacity thereafter; and

d) As to the plaintiff's demonstrated capacity following the Accident, which I find she had the opportunity to observe given their ongoing co-parenting of their daughter and her resulting near-daily interaction with the plaintiff via FaceTime.

The Plaintiff's Employment History & WorkSafeBC Claims

[37] Mr. Girvan has had a varied employment history consisting largely of physical work in the construction and adjacent industries. Mr. Girvan enjoyed the physical aspect of this type of work and took pride in seeing the results of his efforts at the end of the day. He worked as a draftsman with his father for many years, but preferred working on job sites to sitting in an office.

[38] After a stint working in the Alberta oil sands and in construction in Edmonton, Mr. Girvan obtained employment doing merchandising and displays for Home Depot. This job led to employment with JB Merchandise Design Inc., where Mr. Girvan repaired and replaced framing and displays in Home Depot stores.

[39] Unfortunately, in September 2014, Mr. Girvan sustained a workplace injury when he was lifting a heavy I-beam and felt something pop in his right shoulder. Mr. Girvan returned to work after completing a gradual return-to-work program.

However, he suffered a second workplace injury to his right shoulder in April 2015, when a 1000-pound quarry wall from a kitchen display fell on him, causing him to twist his shoulder and back. Within weeks of this injury, Mr. Girvan began using opioids for his pain, having requested OxyContin from Dr. Field.

[40] Following his second workplace injury, Mr. Girvan eventually returned to light duties, but could not do the heavy work aspects of his job. This led to conflict with his co-workers and made it clear to Mr. Girvan that he was not going to be able to continue working in that role. Mr. Girvan went off work again in October 2015. By October 22, 2015, Mr. Girvan reported complaints of severe neck and low back pain to Dr. Field, and also that he had doubled his use of OxyContin.

[41] WorkSafeBC accepted Mr. Girvan's claim for his right shoulder injury and chronic pain resulting therefrom, but denied his subsequent claim for chronic neck and back pain. Mr. Girvan pursued multiple reviews of the decision to deny his claim for chronic neck and back pain through WorkSafeBC's procedure, but was unsuccessful in that regard.

[42] By June 2016, Mr. Girvan reported to WorkSafeBC that he was suffering anxiety and depression resulting from his workplace injuries, and advised that he would be advancing a claim for those psychological conditions. A November 2016 Review Decision also noted that Mr. Girvan was asserting a psychological condition as a result of his workplace injury, but that WorkSafeBC had not as of that time adjudicated a psychological condition in the decisions under review.

[43] On June 21, 2017, WorkSafeBC responded to Mr. Girvan's request for reimbursement for anti-depressant medication related to his psychological condition and request that a psychological condition be accepted as a compensable consequence of his shoulder injury. WorkSafeBC did not accept Mr. Girvan's psychological condition as a consequence of his workplace injury, concluding that the available evidence suggested his anxiety and depression pre-dated and were not exacerbated by the workplace injury.

[44] WorkSafeBC determined that Mr. Girvan was eligible for vocational retraining as a result of his shoulder injury. Mr. Girvan was initially reluctant to undertake retraining as he was not satisfied with the retraining options being offered and wanted to have his outstanding claims issues resolved first. However, when faced with the prospect of either participating in vocational retraining or having his benefits cut off, he decided to participate.

[45] Mr. Girvan attended retraining at Brighton College, from August 2016 to June 2017, where he participated in the Civil Infrastructure Design Technology diploma program. Mr. Girvan successfully completed his retraining and obtained certification as a surveyor/gradesman. He is very proud of this accomplishment, rightly so.

[46] In late June 2017, shortly after completing his retraining, Mr. Girvan obtained a job as a surveyor/gradesman at King Hoe. He learned about King Hoe from his friend, Shaun Madden, who also worked there and was hired the same day he applied. Mr. Girvan was initially assigned to a landfill reclamation project. He testified that he did not push himself too much for the first few days, having been out of work for some time, and was a bit sore for the first few days after work. He testified that he was sore, achy, and taking medication for pain management.

[47] On July 13, 2017, Mr. Girvan was surveying at the landfill when he began coughing and experiencing symptoms of dizziness and nausea, which he testified resulted from dust inhalation. He was taken to the hospital and subsequently discharged. He missed two days of work as a result—July 14 and 15, 2017—but returned to work for King Hoe on July 17, 2017. Mr. Girvan submitted a WorkSafeBC claim for dust inhalation in relation to this incident.

[48] On July 17, 2017—the day before the Accident—Mr. Girvan was driving a water truck at the dump reclamation project when he rolled the back end of the vehicle. He testified that he was not injured. As a result of this incident, King Hoe required that Mr. Girvan take a drug test, which was conducted by DriverCheck Inc. at his home at approximately 9:00 p.m. on the evening of July 17, 2017.

[49] The evidence as to when Mr. Girvan was notified of the final results of his test and that he was being terminated from King Hoe as a result thereof is unclear. I need not make any definitive finding in that regard as it is uncontroverted that Mr. Girvan did not return to work or attempt to do so after July 18, 2017. However, based on Mr. Girvan's evidence, I find that on the evening of July 17, 2017, the individual administering the test provided him with some indication that it was "non-negative" for cocaine and would be sent for further analysis. I therefore find that prior to the Accident, Mr. Girvan either knew, or had reason to suspect, that he had failed the drug test and that this may have negative consequences on his continued employment with King Hoe.

[50] On July 18, 2017, Mr. Girvan was assigned to a project in Port Moody, which is where he was working on the day of the Accident. He did not return to work with King Hoe after the Accident. Mr. Girvan was employed by King Hoe from June 28 to July 18, 2017, and worked approximately ten shifts during this period. His record of employment from King Hoe indicates that his employment ended for the following reason: "Dismissal/Terminated within probationary period".

Expert Medical Evidence

[51] The plaintiff tendered reports from the following medical experts: Drs. Lu, Anton, and Jennifer Griffiths. Louise Craig conducted a functional capacity evaluation and testified as an expert witness in that capacity. The plaintiff's general practitioner, Dr. Field, also testified as a fact witness.

[52] The weight to be given to the opinion of an expert depends on the degree to which the underlying assumptions have been proven by other admissible evidence: *Mazur v. Lucas*, 2010 BCCA 473 at para. 40. The opinion evidence proffered by the experts in this case relies heavily on Mr. Girvan's description of his symptoms. Where a plaintiff's description of their symptoms is unreliable, the opinion of the expert will likewise be unreliable and, therefore, should be given less weight: *Wettlaufer v. Air Transat A.T. Inc*., 2013 BCSC 1245 at para. 49.

[53] The importance of the plaintiff's reliability and credibility in reporting their symptoms to the usefulness of an expert's report was described by Chief Justice Wilson in *Leonard v. British Columbia Hydro and Power Authority*, 49 D.L.R. (2d) 422 at 424–425, 1964 CanLII 485 (B.C.S.C.), as cited in *Wettlaufer* at para. 50, as follows:

> … The doctor says he accepted some statements made by his patient as facts and formed an opinion thereon. Such an opinion, I think, is subject to criticism if the patient does not appear as a witness and corroborate the existence at the time of the symptoms alleged to have been described to the doctor. Such an opinion, in so far as it relies on the credibility of the patient, is subject to rejection by a judge or jury who, having heard the patient, do not find him credible. I do not think they are bound by the doctor's opinion as to credibility but they must pay a considerable regard to it, particularly if it is related to associated objective evidence, such, for instance, as evidence of spasm. But I do not see any reason why a judge or jury, having heard the expert and the patient, should not, in a proper case, reject the evidence of the expert on the ground that the patient is not a credible witness and that, therefore, the hypothesis on which the expert gave his opinion is not established having, of course, the fullest regard to the expertise of the doctor and to any objective evidence he has propounded. If this were not so then judges and juries would be completely bound by the opinions of experts as to credibility, and this cannot be.
>
> [Emphasis added.]

[54] In my view, this case falls within the circumstances described by Wilson C.J.S.C. in *Leonard*. The plaintiff's lack of credibility and reliability in providing his medical history, past and present drug use (oxycodone and cocaine), the injuries he allegedly suffered, the ongoing sequelae of pain resulting therefrom, and his functional capacity post-Accident has significantly and negatively impacted his ability to prove the facts and assumptions underlying the expert evidence on which he relies. In particular, Mr. Girvan's failure to provide complete and accurate medical histories to the experts who assessed him, and his demonstrated willingness to feign or amplify injuries to obtain financial benefit, undermines the weight that can be given to the experts' opinions on both causation and the nature, extent, and duration of the plaintiff's injuries and chronic pain.

Dr. Jennifer Griffiths – Plaintiff's General Practitioner

[55] Dr. Griffiths is a family physician who was qualified to provide expert opinion evidence in the area of family medicine. She provided two reports: an initial report dated February 5, 2019, and an updated report of May 30, 2022.

[56] Dr. Griffith's has been Mr. Girvan's family doctor since January 2018, when she took over the practice of the plaintiff's former family doctor, Dr. Field. Dr. Griffiths testified that in this capacity, she saw Mr. Girvan approximately once per month, but sometimes on a weekly basis, and was primarily treating him for chronic pain.

[57] Dr. Griffiths opines that the plaintiff suffered the following injuries from the Accident: chronic pain in his neck, back, and shoulders; frequent severe head pain as a consequence of chronic muscle spasms in his neck; and depression, anxiety, and insomnia. Dr. Griffiths also opined that pain is a significant contributing factor to Mr. Girvan's depression and anxiety, and impacts his movement, function, and sleep.

[58] In her February 2019 report, Dr. Griffiths testified that that the plaintiff's range of motion in his back, neck, and shoulders was extremely limited and his pain caused a significant increase in his baseline underlying anxiety. Dr. Griffiths' May 2022 report reiterates that Mr. Girvan's range of motion in his neck, back, and arms remained "very diminished" and adds that he was unable to walk for more than 20 minutes.

[59] These aspects of Dr. Griffiths' reports are inconsistent with the plaintiff's admitted capacity during that time frame and the lower extremity capacity demonstrated during his June 2019 functional capacity evaluation ("FCE"). More specifically, Dr. Griffiths' opinion regarding Mr. Girvan's physical limitations is inconsistent with his admitted ability to bounce on a trampoline and ride a scooter, albeit with pain thereafter. Her opinion that Mr. Girvan is unable to walk for more than 20 minutes is also difficult to reconcile with Ms. Craig's testimony that the plaintiff had no apparent difficulty walking and was able to do so quite quickly with a reciprocal gait at a normal to brisk pace.

[60] As to prognosis, Dr. Griffiths opined that as of February 2019, Mr. Girvan was "totally disabled from his usual employment and any other foreseeable employment" and anticipated this disability would be life-long. She thus opined that Mr. Girvan would benefit from help with chores at home, including cleaning, dishwashing, and yard care.

[61] Considering Dr. Griffiths' evidence as a whole and comparing it with her clinical records, I find that she demonstrated a tendency to overstate the plaintiff's injuries and the role of the Accident in his ongoing pain and disability. By way of example, Dr. Griffiths opined in her May 2022 report that the plaintiff "also has frequent, severe head pain which would be an anticipated consequences of chronic muscle spasm in the neck". However, she admitted on cross-examination that other than the plaintiff reporting that he had a headache to Dr. Field when he first saw her ten days after the Accident in July 2017, there is no mention of "severe" head pain in his clinical records. The next indication of headaches in the clinical records did not arise until May 25, 2021, when the plaintiff complained of headaches on orgasm. Despite this, Dr. Griffiths maintained that her clinical notes were not inconsistent with her reports. She also refused to acknowledge the potential impact of the delay between the Accident in July 2017 and the onset of orgasm headaches in May 2021 on the likelihood of a nexus between the headaches and the Accident.

[62] The reliability of Dr. Griffiths' evidence is also undermined by her apparent willingness to offer diagnoses without conducting the necessary diagnostic testing. By way of example, she opined in her May 2022 report that Mr. Girvan:

> … developed some post-traumatic stress disorder (PTSD) which I believe is largely related to the phenomenon of having his suffering constantly challenged. For example, when he underwent a psychological evaluation ordered by ICBC, he described the experience as "mental rape." This heightened emotional response to an unpleasant and hostile interview is classic for how someone with PTSD will respond to a triggering situation which evokes a cascade or prior emotional experiences.

[63] Leaving aside Dr. Griffiths' description of Dr. Koch's evaluation as being "unpleasant and hostile" despite lacking any first-hand knowledge of what in fact transpired at that evaluation, she agreed in cross-examination that there are strict

criteria under the DSM-5 that must be met for a post-traumatic stress disorder ("PTSD") diagnosis to be made, and that she did not apply that analysis to Mr. Girvan to see if he met those criteria. While the plaintiff does not advance a claim of PTSD and thus does not rely on this aspect of Dr. Griffiths' report, her willingness to make a diagnosis in the absence of having considered and applied the necessary criteria to the patient causes me significant concern in accepting the balance of her opinions and fundamentally undermines the strength of her opinion as a whole.

[64] Dr. Griffiths also demonstrated, through her reports, chart notes, and *viva voce* evidence, a tendency to attribute the plaintiff's injuries solely to the Accident in the absence of any critical analysis of the impact of his pre-existing conditions on those injuries and prognosis. By way of example, Dr. Griffiths certified in Mr. Girvan's Canada Pension Plan ("CPP") application that his disability arose from the Accident but did not appear to have given any consideration to the ongoing effect of—or even disclosed in the CPP application forms—Mr. Girvan's prior workplace injuries, WCB claims, and resulting pre-existing conditions.

[65] It became apparent in the course of cross-examination that Dr. Griffiths may not have been aware of the full nature and extent of Mr. Girvan's prior workplace injuries, psychological issues, and resulting WCB claims. Indeed, Dr. Griffiths admitted on cross-examination that she did not recall being aware of the plaintiff having claimed back and neck injuries arising out of his 2014 and 2015 workplace injuries and that he was reporting neck and low back pain to Dr. Ansel Chu, a physiatrist, three months before the Accident. Nor did she recall being aware that approximately one month before the Accident, the plaintiff was advancing a claim with WCB for psychological injuries.

[66] In my view, this demonstrates a lack of careful review of Mr. Girvan's clinical history and correspondingly undermines the weight that can be given to her reports. The confidence I can have in giving weight of her opinions was further undermined when Dr. Chu's March 2017 report was put to her on cross-examination, and she

agreed that there was a “remarkable similarity” to the plaintiff’s pre- and post-Accident complaints.

[67] Dr. Griffiths also appears to have provided the plaintiff with serial off-work notes indicating that he was unable to return to work, despite admitting in cross-examination that she did not recall if she knew what his job duties entailed. This persisted even after the plaintiff was accepted for CPP disability benefits based on the application that she assisted him in completing. Moreover, Dr. Griffiths testified that she felt Mr. Girvan was incapable of working, but admitted that she never discussed a return-to-work program with him, was unaware of any efforts he had actually made to return to work, and was unaware that his employment had been terminated on account of conduct that occurred prior to the Accident.

[68] This is demonstrative of what I find to be a concerning pattern of conduct—be it for the purpose of the plaintiff’s CPP application, off-work notes, or her reports in this litigation—whereby Dr. Griffiths provided her professional medical opinion attributing the plaintiff’s injuries and inability to work to the Accident without acknowledging his pre-existing conditions, and without any critical analysis of the impact of those conditions on his current condition or prognosis.

[69] While I accept that Dr. Griffiths was attempting to provide care for and advocate on behalf of her patient, her evidence strayed into advocacy and, at times, demonstrated a lack of appreciation of a physician’s role in providing independent expert evidence to the court. In addition to the tendency to overstate the plaintiff’s injuries and diagnoses purportedly arising from the Accident, Dr. Griffiths:

a) Failed to note in her report that the plaintiff had been engaging in the rehabilitation therapies mentioned therein prior to the Accident, thereby implying that these treatments arose only subsequent to and as a result of the Accident;

b) Refused to agree that it would have been important to know, at the time she completed the plaintiff’s CPP application and indicated that the date of

onset of his disability was the date of the Accident, that he continued to pursue compensation from WCB for essentially the same injuries arising from his workplace incidents; and

c) Admitted that she knew the plaintiff continued to advance WCB claims for largely similar injuries when she completed the plaintiff's CPP application certifying the date of the Accident as the date of the onset of his injuries, but denied that this was something that ought to have been disclosed in the CPP application.

[70] In the result, I conclude that Dr. Griffiths' evidence is to be given little weight and reject her evidence where it conflicts with that of Dr. Anton and Ms. Craig.

[71] In particular, I do not accept the implication in Dr. Griffiths' reports that the plaintiff's physical and psychological injuries were caused solely by the Accident. Dr. Griffiths was aware that the plaintiff suffered from significant and ongoing pre-existing back, neck, and shoulder pain as well as anxiety and depression—all of which were very similar in nature to his alleged injuries arising from the Accident—but does not appear to have considered the impact of those pre-existing conditions in providing her opinion. Put differently, Dr. Griffiths' opinion is predicated on the Accident being the sole cause of the plaintiff's injuries despite ample evidence that his prior neck, back, and shoulder injuries were causing him chronic pain, that he continued to demonstrate symptoms of depression and anxiety, and that he was advancing claims for all of these injuries before the WCB.

Dr. Hubert Anton – Plaintiff's Physiatrist

[72] Dr. Anton is a physiatrist who was qualified to provide expert opinion evidence in the area of physical medicine and rehabilitation. Dr. Anton assessed Mr. Girvan on December 13, 2021, and provided a report dated January 26, 2022.

[73] Dr. Anton opined that based on his evaluation, the history provided to him by Mr. Girvan, and his review of clinical records, Mr. Girvan more likely than not:

a) Sustained injuries to soft tissue structures in the neck, left and right shoulder girdle, and upper and lower back in the Accident, which probably aggravated and increased his pre-existing pain;

b) Developed an opioid dependence having doubled his use of OxyContin after the Accident; and

c) Developed OIH, namely increased sensitivity to painful stimuli resulting in generalized pain that is exacerbated, rather than relieved, by opioid use.

[74] Dr. Anton opined that it was "possible" the plaintiff developed somatic symptom disorder with predominant pain, and that one possible explanation for the plaintiff's headaches was that he was experiencing analgesic rebound headaches. Notably, however, Dr. Anton was clear in his evidence that his use of the "possible" as opposed to "probable" reflected the fact that his diagnosis did not reach the threshold of more likely than not. As such, he does not go so far as to opine that the plaintiff more likely than not developed either somatic symptom disorder with predominant pain or analgesic rebound headaches from the Accident.

[75] Dr. Anton also opined that Mr. Girvan's pre-existing chronic pain would have increased his risk for prolonged recovery and pain after the Accident, and that the injuries he sustained in the Accident probably significantly contributed to that increased pain. Other contributing factors to the plaintiff's increased pain also likely included deconditioning and psychological factors, namely anxiety and depression.

[76] As to prognosis, Dr. Anton opined that even with further improvement subsequent to treatment, Mr. Girvan will likely continue to have pain severe enough to affect his participation in the workforce and avocational activities. Dr. Anton was of the opinion that Mr. Girvan will probably not improve enough to successfully return to work.

[77] Dr. Anton was a forthright and careful witness who demonstrated a clear understanding of his role as an expert. He was measured in his evidence and fairly conceded propositions when appropriate. Dr. Anton agreed that there was nothing

unusual if the plaintiff did not feel pain immediately following the Accident, but conceded that if the plaintiff's initial symptoms were different than as described to him, that may affect the validity of his opinion and indicate that the plaintiff's injuries were potentially less severe than he originally opined.

[78] Importantly, Dr. Anton agreed that his opinion would be undermined if the hypothetical facts put to him in cross-examination—the key ones being that the plaintiff professed not to have felt the impact of the Accident and later suggested to Ms. McGlue that they could profit from feigning injury—were proven to be true. I have found those facts have been proven. Dr. Anton also assumed, based on the history Mr. Girvan provided to him, that Mr. Girvan took "at one time took Oxy[C]ontin" (emphasis added) for chronic pain in his right shoulder. That is demonstrably at odds with the proven facts as to Mr. Girvan's ongoing and extensive use of OxyContin prior to the Accident. As such, it is in my view reasonable to expect that, had the plaintiff testified before Dr. Anton such that his evidence could have been put to Dr. Anton in cross-examination, Dr. Anton would in all likelihood have resiled at least somewhat from his opinion.

[79] Considered as a whole, I prefer Dr. Anton's evidence to that of Dr. Griffiths. Subject to the overarching caveat that the facts as I have found them regarding the plaintiff's condition and conduct following the Accident suggest that his pain was less severe than Dr. Anton opined, I generally accept Dr. Anton's opinion as to the injuries sustained and exacerbation of pre-existing conditions experienced by Mr. Girvan as a result of the Accident.

Dr. Shaohua Lu – Plaintiff's Psychiatrist

[80] Dr. Lu is a psychiatrist who was qualified as an expert in the field of psychiatry with expertise in the diagnosis, causation, treatment, and prognosis of mental health disorders, including addiction. Dr. Lu conducted a two-hour virtual interview of Mr. Girvan on January 17, 2022, and provided a report dated February 6, 2022. Dr. Lu also provided a rebuttal report to that of the defendants' psychologist, Dr. Koch, dated July 1, 2022.

[81] Dr. Lu assumed that the events and symptoms as reported by the plaintiff during the medical history portion of his interview were accurate to the best of his understanding and recollection. However, Dr. Lu agreed that Mr. Girvan's clinical records indicated a more severe history of depression than he reported.

[82] Dr. Lu described Mr. Girvan as having a "highly complex psychiatric presentation" and noted that he had experienced at least one prior episode of major depression. With respect to his psychological state at the time of the Accident, Dr. Lu said this:

> … At the time of the 2017 [Accident], there was no clinical indication that he has active depressive symptoms. Despite his workplace injury in 2014, there was no relapse of his major depression; this is an excellent indication of his mental health stability. At the time of the [Accident], Mr. Girvan was on long-term oxycodone treatment for his chronic pain. His two pre-existing conditions are a major psychiatric vulnerability. Despite these risks, he demonstrated resilience. He was able to successfully complete job retraining and found appropriate work at the time of the [Accident]. He prided himself being able to work despite his pain. There was no clinical or functional indication that he had any psychosis or paranoia. There was no indication of oxycodone-related issues. Based on his clinical history, he was able to maintain a balance of his work and personal responsibilities. Given the duration of his mental health stability, unless there are new stressors, he was not at risk of a relapse of his depression or developing psychosis. With his prior vulnerability and his emphasis on productivity, any stressor that threatens his work, productivity, and general stability would have a disproportionate negative impact on his mental health.

[83] Dr. Lu's opinion as to the plaintiff's mental state in the time frame leading up to the Accident is inconsistent with the preponderance of the evidence, including in particular Dr. Field's clinical records, the plaintiff's outstanding WCB claim for psychiatric injury, and Ms. Cowie's testimony. When pressed in cross-examination on the inconsistencies between his opinion and Drs. Field and Chu's clinical records, Dr. Lu became defensive and argumentative. He did agree that the plaintiff, having reported anxiety, panic attacks, and depression and being treated with medications for those conditions in the months prior to the Accident, indicated the presence of psychiatric symptoms, but professed not to have minimized those symptoms in his report. Dr. Lu refused to move off his opinion even when taken through clinical

records that called into question some of the facts and assumptions underlying his opinion.

[84] I agree with the defendants that it is difficult to reconcile the facts and assumptions regarding the plaintiff's psychological state prior to the Accident that formed the basis for Dr. Lu's opinion with those proven on the evidence before me. Accordingly, I reject Dr. Lu's opinion that Mr. Girvan was psychologically stable prior to the Accident. The preponderance of the evidence establishes that he had pre-existing psychological issues that were significantly more active and extensive than Dr. Lu acknowledged. This is the case even without factoring in the plaintiff's ongoing cocaine use and prior treatment for addiction—neither of which appear to have been disclosed to Dr. Lu by the plaintiff and were not put to him in cross-examination because he testified prior to the plaintiff.

[85] Based on Mr. Girvan's description of his clinical history and medical records, Dr. Lu opined that he met the DSM-5 diagnostic criteria for major depression with psychotic features that has adversely affected all aspects of his basic function, including self-care. Dr. Lu also opined that:

a) Mr. Girvan's chronic pain remains a predominate clinical factor;

b) Chronic pain is a well-recognized risk factor for major depression;

c) Major depression and chronic pain are mutually aggravating;

d) Mr. Girvan noted other psychological stressors and that financial distress, loss of routine and structure, disability, and loss of personal identity are additional factors contributing to the onset and maintenance of his major depression and psychosis; and

e) Mr. Girvan is likely to require anti-depressant and adjunctive treatment indefinitely.

[86] With respect to Mr. Girvan's OxyContin use, Dr. Lu opined that long-term use, especially for musculoskeletal pain, carries substantial risk and that for vulnerable

patients, opioids, particularly longer-term reliance, can intensify psychiatric symptoms. In this regard, Dr. Lu testified that OIH is common, occurs in a substantial portion of patients using opioids for chronic pain, is difficult to predict, and can take merely a matter of months or years to be established. Dr. Lu opined that Mr. Girvan's clinical history and medication records were indicative of OIH and that once established, it is self-perpetuating. Notably, Dr. Lu opined that:

> … Even prior to the [Accident], [Mr. Girvan] had some risk of OIH but after the [Accident], with disability and eventual major depression, there is progression of his OIH progression. His OIH is a complication of his chronic opioid treatment, chronic pain, and major depression.

[87] Finally, Dr. Lu opined that Mr. Girvan's prognosis is poor. Even with active treatment of his major depression and his OIH addressed, he still has chronic pain and will more likely than not have permanent occupational and functional disability.

Dr. William Koch – Defendants' Psychologist

[88] Dr. Koch is a psychologist and was qualified to provide expert opinion evidence as such. Dr. Koch conducted a four-hour assessment of Mr. Girvan on September 16, 2021, and provided a report dated September 21, 2021.

[89] Dr. Koch noted that the plaintiff provided a vague psychosocial and vocational history, and became angry and defensive at times during the assessment. Mr. Girvan became particularly angry when asked about his history of drug use to the point where he ceased participation in the assessment. The plaintiff described Dr. Koch's assessment as "mental rape" and admitted that he refused to return the test materials to Dr. Koch and instead tore them up.

[90] In light of the abbreviated nature of his assessment, Dr. Koch was not able to complete all of his testing, including to assess the potential exaggeration of the plaintiff's mental health issues. Nonetheless, Dr. Koch opined that the one test that was completed showed that Mr. Girvan was likely engaged in more defensive self-disclosure than 98% of the normative sample.

[91] Given the abbreviated nature of his assessment, Dr. Koch was unable to provide any diagnosis with a high degree of confidence. Dr. Koch was also unable to provide any opinion on Mr. Girvan's prognosis or treatment recommendations. Nonetheless, Dr. Koch did note various inconsistencies between the medical history provided by Mr. Girvan and that disclosed in the clinical records he reviewed, and provided the following opinions as a result:

a) Mr. Girvan's assertion that "life was grand and everything was coming together" before the Accident appeared to underreport previous life and health difficulties reflected in the clinical records, which included reports of panic attacks, anxiety, and sleep disturbance, along with instances of interpersonal and employment conflicts;

b) Mr. Girvan engaged in "defensive self-disclosure", which precluded a definitive diagnosis of his pre-Accident conditions, but the clinical records reviewed provided evidence that Mr. Girvan suffered some form of panic disorder or other anxiety disorder for which he was regularly using Ativan or Clonazepam into the month prior to the Accident and had a pre-Accident history of depression;

c) Some elements of Mr. Girvan's history, namely escalation of OxyContin use before the Accident and simultaneous use of OxyContin, marijuana, and benzodiazepines, suggested a possible polysubstance use disorder and opiate addiction; and

d) It was unclear whether Mr. Girvan's low mood arose because of his physical injuries, marital difficulties, or secondary to his substance use (OxyContin and marijuana), and Dr. Koch had no validity data to assist in understanding the extent to which Mr. Girvan may have been exaggerating his mental health issues.

[92] Notably, Dr. Koch was not aware of the plaintiff's ongoing cocaine use when he provided his report. Dr. Koch was not required to attend trial for cross-

examination and as such, Mr. Girvan, Mr. Madden, and Ms. Cowie's evidence about Mr. Girvan's cocaine use was not put to him.

[93] The plaintiff did not cross-examine Dr. Koch on his report, relying instead on Dr. Lu's reply report criticizing Dr. Koch's methodology. Dr. Lu's criticisms are, in my view, largely immaterial given that Dr. Koch candidly admitted that he was not able to provide a diagnosis with a high degree of confidence and provided no opinion on prognosis or treatment. I accept Dr. Koch's evidence as set out above and, in particular, his opinions as to the plaintiff's condition prior the Accident based on the clinical records he reviewed.

Louise Craig – Functional Capacity Evaluator

[94] The plaintiff tendered the report of Ms. Craig, who was qualified as a physiotherapist with expertise in providing FCEs and making care recommendations. Ms. Craig conducted a 3.5 hour in-person assessment of Mr. Girvan on June 20, 2019. Mr. Girvan reportedly took breaks every 30–45 minutes during the course of the assessment.

[95] Ms. Craig noted that Mr. Girvan arrived at the assessment with elevated pain levels, and that his pain continued over the course of the assessment to the point where she concluded that no further testing could be safely completed and terminated the assessment. Ms. Craig testified that Mr. Girvan's pain behaviours were consistent over the 3.5-hour period, that he had difficulty focusing on anything other than his pain, and that his verbal and physical pain behaviours increased to the point where they were distracting. These observations led her to conclude that he was accurately reporting elevated pain levels.

[96] Ms. Craig acknowledged that she was unable to complete a full FCE assessment of Mr. Girvan, and therefore was unable to provide a full opinion or confirm through testing whether he was demonstrating maximum effort. She acknowledged limitations in her conclusions resulting from lack of repetitive testing. However, Ms. Craig remained steadfast in her evidence that the pain behaviours she

observed during her assessment were consistent and indicative of high levels of pain and disability.

[97] Ms. Craig opined as follows regarding Mr. Girvan's functional capacity and employability:

a) He did not demonstrate the capacity to meet the physical demands of his pre-Accident occupation as a surveyor/gradesman, and is limited by his pain elevation in response to sedentary activity and sustained postures of sitting or standing;

b) There was a "large gap" between his physical abilities as demonstrated on assessment and those required for his pre-Accident employment such that absent substantial improvement to his pain management and physical abilities, it is unlikely he could return to the duties required for that work;

c) She did not consider him to be competitively employable based on his presentation at the truncated FCE; and

d) He does not meet the full physical demands for regular or seasonal household cleaning, regular or seasonal yard care, or household maintenance and requires assistance with these tasks.

[98] Ms. Craig did, however, concede that the level of pain and disability she observed from Mr. Girvan in her assessment was not consistent with multiple activities that the plaintiff testified that he could do. This included jumping on a trampoline and riding a scooter. Ms. Craig agreed that those activities were demonstrative of capacity beyond that which Mr. Girvan demonstrated during the FCE assessment.

[99] Cross-examination revealed further limitations in Ms. Craig's opinion, likely resulting from the truncated nature of her assessment. When asked whether, had Mr. Girvan been able to run up a flight of stairs two at a time close in time to the FCE, that would also be indicative of functional capacity inconsistent with her

conclusions, Ms. Craig responded that she observed Mr. Girvan for static postures and walking, not dynamic movements, and that static postures were problematic for him. As such, she testified that having the ability to climb stairs was not incompatible with a lack of tolerance for sustained posture of sitting and standing.

[100] However, in so testifying, Ms. Craig conceded that Mr. Girvan had "nothing wrong" with his lower extremity function and had no apparent difficulty walking, felt better walking, and was able to do so quite quickly with a reciprocal gait at a normal to brisk pace. Ms. Craig's evidence in this regard is inconsistent with that of Dr. Griffiths, who testified that the plaintiff was awkward in terms of how he would walk and noted in the plaintiff's January 2019 CPP application form that his gait was slow. Given my findings above regarding Dr. Griffiths' tendency to overstate the plaintiff's limitations and her limited ability to observe the plaintiff's lower extremity function in the clinical setting as compared to Ms. Craig's FCE, I prefer Ms. Craig's evidence on this point to that of Dr. Griffiths.

[101] Ms. Craig's report does not appear to reconcile her observations that there was nothing wrong with the plaintiff's lower extremity function and his ability to walk with a reciprocal gait at a normal to brisk pace with her overarching conclusion that he was, nonetheless, unable to work in any capacity. She does not explain how, given his lower extremity function, Mr. Girvan's disability from static work rendered him disabled from all work. When pressed on this inconsistency in her opinion, Ms. Craig became defensive and argumentative. Ms. Craig also opined that Mr. Girvan had not yet reached maximum physical rehabilitation, and that she expected further improvement to his functional abilities with further rehabilitation and improved pain management.

[102] I conclude that I must treat Ms. Craig's opinion cautiously, particularly where her conclusions are based solely on Mr. Girvan's presentation on assessment and are inconsistent with Mr. Girvan's demonstrated capacity in other contexts. My findings as to the plaintiff's credibility, taken together with Ms. Craig's acceptance of his reported history as true, significantly undermine the factual foundation for her

opinion. Ms. Craig's inability to complete a full FCE assessment further impacts the weight that I can give to her opinion.

[103] Finally, and most importantly, the weight that can be given to Ms. Craig's opinion is significantly limited by her concession that activities the plaintiff admitted engaging in in his evidence at trial were inconsistent with her opinion and indicative of greater functional capacity than she observed. This concession significantly undermines the fundamental premise underlying her report as a whole, namely that because the plaintiff's pain behaviours were consistent throughout her truncated FCE and consistent with her observations and the limited testing she performed, those pain behaviours accurately reflected his true level of disability. I find that Mr. Girvan has greater overall physical functional capacity than Ms. Craig concluded.

Plaintiff's Post-Accident Condition

[104] The plaintiff submits that he suffered the following new injuries from the Accident: major depression, OIH, chronic post-traumatic headaches, and chronic soft tissue injuries in his left shoulder. The plaintiff also says that the Accident aggravated his opioid dependency and pre-existing anxiety and chronic pain in his neck, back, and right shoulder.

[105] When dealing with a pre-existing condition, the question is whether there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff regardless of the defendant's negligence: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 35, 1996 CanLII 183.

[106] The applicable analytical framework was recently and aptly summarized by Justice Horsman (as she then was) in *Rattan v. Li*, 2022 BCSC 648:

> [105] The onus is on the plaintiff to prove on a balance of probabilities that the defendants caused or contributed to the injuries for which she seeks compensation. The general test for causation is the "but for" test, which requires a plaintiff to show that the injury for which they seek compensation would not have occurred but for the defendant's tortious act: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 13–14 [*Athey*].

> [106] Tortfeasors must take their victims as they find them in the sense that the defendant is liable for the plaintiff's injuries, even if those injuries are more severe than might be expected in the average person: *Athey* at para. 34. At the same time, the defendant is not required to put the plaintiff in a better position than she would have occupied absent the wrongdoing. The defendant is liable for the injuries caused, but need not compensate for the effects of a pre-existing condition if there is a "measurable risk" that the plaintiff would have suffered those effects in any event: *Athey* at para. 35.
>
> [107] Unrelated intervening events are taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the defendant's wrongful conduct is not as great, and damages are reduced proportionately: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 36 [*T.W.N.A.*].
>
> [108] The question of whether the plaintiff's original position would, regardless of the tort, have been adversely affected by a pre-existing condition or an unrelated intervening event turns on a consideration of hypothetical events. …
>
> [Emphasis added.]

[107] The fact that the plaintiff testified after Drs. Lu, Griffiths, and Anton impacted the defendants' ability to effectively cross-examine them on their opinions. Accordingly, as was the case in *Firman v. Asadi*, 2019 BCSC 270 at para. 262, I was deprived of the opportunity to consider the evidence of the experts who testified before the plaintiff within the proper context, and the defendants were unable to put the plaintiff's admissions regarding his ongoing cocaine use and participation in activities, which can fairly be construed as demonstrating greater capacity than they observed in their respective assessments, to them in cross-examination.

[108] Despite the defendants not having had the opportunity to put Mr. Girvan's actual evidence to his experts in cross-examination, I agree with the defendants that the hypothetical circumstances put to those experts were largely born out in the evidence and negatively impacted the weight that can be given to the expert evidence. I do not accept the plaintiff's contention that that none of his expert evidence was undermined in cross-examination. This is particularly the case given that the defendants' ability to put admissions made in the course of the plaintiff's testimony to some of the expert witnesses was limited by the order in which the plaintiff presented his case.

[109] Considering the evidence as a whole, I find that the plaintiff's expert evidence was undermined in multiple instances by his failure to prove the facts and assumptions underlying their reports. This failure stems in large part from the plaintiff's lack of credibility and reliability in providing a complete and accurate history to the experts, which resulted in significant inconsistencies between the facts as the experts understood them and those that were proven at trial. More specifically, I find that:

a) Dr. Anton's opinion was undermined as to the severity of the plaintiff's injuries;

b) Ms. Craig's opinion was undermined by the significant inconsistencies between the functional capacity she observed the plaintiff to have on assessment and his admitted capacity for activities in other contexts;

c) Dr. Lu's opinion was fundamentally undermined by his lack of awareness of the plaintiff's ongoing cocaine use and prior attendance at a drug rehabilitation program, and the defendants' inability to put that evidence to the plaintiff on cross-examination in the face of intransigence from Dr. Lu; and

d) The weight that can be given to Dr. Griffiths' opinion is nearly entirely negated by her tendency to overstate the impact of the Accident on the plaintiff, failure to account for the plaintiff's pre-existing conditions in her opinion, apparent willingness to provide a diagnosis without having completed the required diagnostic testing, and her failure to appreciate the proper role of medical expert witnesses.

Physical Injuries

[110] Considering the evidence as a whole, I find that the plaintiff suffered the following physical injuries from the Accident:

a) Exacerbation of pre-existing soft tissue injuries to the neck, back, and right shoulder;

b) Left shoulder soft tissue injury;

c) Exacerbation of pre-existing chronic pain;

d) Exacerbation of opioid dependency; and

e) Progression of OIH.

[111] Notably with respect to OIH, Dr. Lu noted that even prior to the Accident, Mr. Girvan had "some risk of OIH" and that with the Accident, there was "progression of his OIH progression". Dr. Lu also opined that his OHI "is a complication of his chronic opioid treatment, chronic pain and major depression". These opinions were provided in the absence of Dr. Lu having a full and accurate understanding of the plaintiff's prior and ongoing oxycodone and cocaine use, and prior addiction treatment.

[112] The plaintiff has not established that his headaches were caused by the Accident. Dr. Anton testified that post-traumatic headaches are those that have a clear temporal relationship and causal link to trauma—most often, trauma to the head or neck. I do not accept the plaintiff's evidence that he hit his head on the roof of his vehicle in the Accident. He did not report any head injury when he attended at Surrey Memorial Hospital following the Accident, nor were headaches a feature of his complaints to Drs. Field or Griffiths until May 2021—other than an initial complaint to Dr. Field in late July 2017. I find that there is an insufficient nexus on the evidence before me between the July 2017 Accident and ongoing complaints of headaches in May 2021 to establish the necessary causative link, and I reject Dr. Griffiths' opinion to that effect.

[113] Dr. Anton opined that it was possible that the plaintiff was experiencing analgesic rebound headaches, but was clear in his evidence that "possible" did not

equate to “probable”, namely more likely than not. In the result, the plaintiff has not met the burden of proving that his headaches were caused by the Accident.

Psychological Injuries

[114] The plaintiff relies on Dr. Griffiths’ opinion diagnosing him with “depression and anxiety since his accident” (emphasis added). I do not accept Dr. Griffiths’ opinion as: it is inconsistent with the preponderance of the clinical records, including, in particular, those of Dr. Field; she was not qualified as a psychiatrist or psychologist; and she demonstrated a willingness to make diagnoses in the absence of applying recognized diagnostic criteria.

[115] Rather, relying on Drs. Lu and Koch’s evidence, I find that as a result of the Accident, the plaintiff suffered an exacerbation of his pre-existing anxiety and depression and a recurrence of major depression with new psychotic features.

Plaintiff’s Original Position

[116] The plaintiff’s original position is relevant to the assessment of damages once causation has been determined: *Radacina* at para. 122, citing *Blackwater v. Plint*, 2005 SCC 58 at para. 78. A proper analysis requires a detailed consideration of the plaintiff’s pre- and post-Accident condition, as well as an assessment of the relative likelihood that he would have suffered similar losses even in the absence of the Accident: *Radacina* at para. 126. This analysis remains applicable following the Court of Appeal’s trilogy on the quantification of loss in *Dornan v. Silva*, 2021 BCCA 228; *Rab*; and *Lo v. Vos*, 2021 BCCA 421: see e.g. *Page v. Roy*, 2022 BCSC 1802 at para. 17.

[117] The defendants say that the plaintiff’s history and conduct from 2014 onwards, taken together with his lack of credibility, render it impossible for the Court to determine his original position immediately prior to the Accident, and thus whether he suffered any injuries as a result thereof. The defendants say that Mr. Girvan has failed to prove he suffered any injury or loss from the Accident.

[118] The plaintiff acknowledges that he had ongoing chronic right shoulder, neck, and back pain and anxiety prior to the Accident, but says that his pain and anxiety did not prevent him from completing his retraining program, securing work as a surveyor/gradesman at King Hoe, or performing his job duties in that capacity. The plaintiff also recognizes a pre-existing opioid dependency, but says that there were no concerns about opioid misuse prior to the Accident.

[119] I find that prior to the Accident, the plaintiff was suffering from chronic right shoulder, neck, and back pain. The preponderance of the evidence establishes that during the 2015–2017 timeframe, the plaintiff's physical condition was deteriorating. The plaintiff is to be commended for his ability to complete job retraining and obtain employment as a surveyor/gradesman at King Hoe despite this deterioration. This is due no doubt to his stoicism and ability to work through the pain he was experiencing. However, his ability to do so does not negate his pre-existing physical and psychological conditions.

[120] This deterioration of Mr. Girvan's physical condition is demonstrated in Drs. Field and Chu's clinical notes and corroborated by Ms. Cowie's evidence. Dr. Chu's medical records also suggest that the plaintiff reported serious pain throughout his body and worsening left-side symptoms as of May 2017. Indeed, Mr. Girvan admitted that he was experiencing significant pain in his neck and back leading up to the Accident.

[121] I also find that the plaintiff was suffering from anxiety, panic attacks, and depression prior to the Accident. In this regard, I reject Dr. Lu's evidence that the plaintiff was psychiatrically stable; his opinion in that regard is inconsistent with the contemporaneous clinical records of the plaintiff's treating physicians and unsupported by the facts as I have found them. Mr. Girvan also admitted that he was taking various medications for anxiety and depression prior to the Accident and was advancing a WCB claim for psychological injury arising out of his workplace injury.

[122] Finally, I find that prior to the Accident, the plaintiff was dependent on opioids and that his dependency was progressing towards OIH. As Dr. Lu testified, the

plaintiff was at risk of OIH prior to the Accident, and thereafter, he experienced "progression of his OIH progression". Dr. Lu provided this opinion without knowing of Mr. Girvan's ongoing cocaine use and that he had previously attended a residential treatment program for that reason.

[123] In this regard, Mr. Girvan's reported substance use in the years preceding the Accident was inconsistent with the preponderance of the evidence before me. I accept Ms. Cowie's evidence as to Mr. Girvan's history of drug and alcohol use during their relationship and find that both prior to and following the Accident, Mr. Girvan used cocaine not infrequently and engaged in episodes of binge-drinking. Ms. Cowie's evidence in this regard was corroborated by Mr. Madden, who admitted to what he characterized as drinking "heavily" and using cocaine with Mr. Girvan. Mr. Girvan also conceded that he attended a residential rehabilitation program around 2009 because he was spending too much money and "doing more cocaine than I should have".

[124] In particular, I accept Ms. Cowie's evidence that the plaintiff's use of cocaine and alcohol increased in the period from 2015–2017, and that this was one of the principal factors that led to the breakdown in their relationship, which culminated in September 2017 when Ms. Cowie called the RCMP to have an intoxicated Mr. Girvan removed from the home. While I appreciate that the plaintiff's family members, Jack Girvan and Wendy Petersen, were attempting to be forthright in their testimony, I find that they likely understated and minimized the plaintiff's past struggles with substance use and addiction, undoubtedly out of an understandable desire to protect and assist the plaintiff.

[125] I need not determine for present purposes whether Mr. Girvan did in fact trade his prescription opioids for cocaine with "Matt" or "Jay", as Ms. Cowie testified. I am satisfied based on the preponderance of evidence before me that Mr. Girvan's use of alcohol, prescription opioids, and cocaine prior to the Accident was significantly greater than his evidence suggested at trial. In the result, I find that the

plaintiff had a history of alcohol and drug use, and that this conduct continued in the months prior to the Accident.

[126] Mr. Girvan also takes the position that there is no evidence his pre-existing physical and emotional health and function would have gotten worse absent the Accident, and as such, no measurable risk ought to be found here. I disagree. It is accurate that no expert testified that Mr. Girvan would have suffered from all of the same symptoms he now endures had the Accident not occurred. However, a fair inference to be drawn from the evidence—including in particular Dr. Lu's testimony—is that Mr. Girvan would have experienced some degree of ongoing chronic pain, continued opioid use, opioid dependency, and psychological issues regardless of the Accident. Notably, in this regard:

a) Dr. Anton opined that he would have continued to experience chronic pain even absent the Accident;

b) Dr. Lu noted that the plaintiff had already suffered an episode of major depression prior to the Accident and opined that chronic pain is a well-recognized risk factor for major depression; that chronic pain and major depression are mutually aggravating; and that long-term opioid use for musculoskeletal pain can intensify psychiatric symptoms; and

c) Dr. Lu testified that OIH is common and occurs in a substantial portion of patients using opioids for chronic pain and opined that Mr. Girvan had some risk of OIH prior to the Accident.

[127] In the circumstances, I am satisfied that there is a measurable risk that even absent the Accident, Mr. Girvan's pre-existing chronic pain, opioid dependency, anxiety, and depression would have detrimentally affected him in the future. I am also satisfied that there is a measurable risk that Mr. Girvan's admitted prior and ongoing cocaine use would have detrimentally affected him in the future.

[128] I do not accept Mr. Girvan's submission that there is no evidence before me suggesting that his physical or mental health would have deteriorated absent the

Accident, or the defendants failed to lead any evidence capable of satisfying the "measurable risk" threshold. As outlined above, I am satisfied that there is a sufficient basis in the evidence of Drs. Anton and Lu, as set out in their respective expert reports, to satisfy the necessary standard.

[129] Accordingly, I find that a reduction to the plaintiff's damages is necessary to appropriately reflect his original position and avoid placing him in a better position than he would have been but for the Accident. Considering the evidence as a whole, I find Mr. Girvan's damages should be discounted by 40% to reflect the likelihood that his pre-existing conditions would have detrimentally affected him in the future regardless of the Accident.

Non-Pecuniary Damages

[130] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and those they will likely suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39; see also *Fung v. Dhaliwal*, 2020 BCSC 279 at paras. 37–40.

[131] Common factors influencing an award of non-pecuniary damages include: the plaintiff's age; the nature of the injury; the severity and duration of pain; level of disability; emotional suffering; loss or impairment of life; impairment of family, marital, and social relationships; impairment of physical and mental abilities; and loss of lifestyle: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006). It is also recognized "as a matter of ordinary experience and common sense, a person's ability to tolerate chronic pain diminishes with age": *Davidge v. Fairholm*, 2014 BCSC 1948 at para. 166(e); *Morlan v. Barrett*, 2012 BCCA 66 at para. 41.

[132] An award of non-pecuniary damages must be fair and reasonable to each party, with fairness measured in part against awards made in comparable cases: *Rattan* at para. 124. However, other cases only serve as a rough guide, as each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at

para. 189. The amount of the award depends on the seriousness of the injury considered in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39; *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, 1981 CanLII 35.

[133] The plaintiff seeks an award of $200,000 in non-pecuniary damages, relying on the following decisions wherein awards, adjusted for inflation, in the range of $180,000–$229,000 were made: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81; *Zawadzki v. Calimoso*, 2011 BCSC 45; *Kallstrom v. Yip*, 2016 BCSC 829, and *Radacina*.

[134] The defendants rested entirely on the position—which I have rejected—that the plaintiff failed to prove that he suffered any injury resulting from the Accident and thus is not entitled to any damages. The defendants did not provide an alternative position on damages in the event that I determined that the plaintiff did suffer injuries entitling him to an award of damages.

[135] Having regard to the *Stapley* factors, I find the plaintiff was 46 years old at the time of the Accident (51 years old at trial) and suffered a new injury to his left shoulder; an increased oxycodone dependency and progression of OIH; an aggravation of his pre-existing right shoulder, neck, and back injuries and chronic pain; an aggravation of pre-existing anxiety; and a reoccurrence of major depression. He now lives with significant pain that is expected to be severe and permanent, and is not competitively employable. He has suffered diminished ability to enjoy his life, including working in a physically demanding job for which he had successfully retrained and took pride in prior to the Accident.

[136] Based on these factors and the cases cited by the plaintiff, including in particular *Radacina*, I find that $150,000 is a fair and reasonable award of non-pecuniary damages. I find that, with the exception of *Radacina,* the cases relied on by the plaintiff are generally distinguishable on the basis that they did not involve significant pre-existing chronic pain or psychological conditions as is the case here. I also do not find *Zawadzki* of assistance as it was decided twelve years ago: see e.g. *Callow v. Van Hoek-Patterson*, 2023 BCCA 92 at para. 18, referring to *Valdez v.*

Neron, 2022 BCCA 301 at para. 58, leave to appeal to SCC ref'd, 40442 (30 March 2023). Moreover, the present plaintiff's employment prospects were less optimistic or certain given the circumstances occurring immediately prior to the Accident that led to the termination of his employment from King Hoe. A 40% reduction to account for the plaintiff's prior position results in an award of $90,000.

Loss of Earning Capacity

[137] An award of damages for past or future loss of earning capacity compensates for a plaintiff's pecuniary loss. Compensation for past loss of earnings is based on what a plaintiff would have—not could have—earned but for the accident-related injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[138] The burden of proof of actual past events is a balance of probabilities. However, an assessment of both past and future earning capacity involves consideration of hypothetical events. An award for past loss of earning capacity requires the court to assess how a plaintiff's life would have unfolded in the pre-trial period absent the injury. Such hypothetical events need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and substantial possibility and not mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at paras. 44, 48–49.

[139] Assessing loss of future earning capacity involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened. Accordingly, the central task for the court is to compare the plaintiff's likely future working life with and without the accident: *Rattan* at para. 145, citing *Dornan* at paras. 156–157; *Bains v. Cheema*, 2022 BCCA 430 at para. 21. The approach to this assessment post-trilogy was aptly summarized in *Rattan* as follows:

> [146] The assessment of a claim for loss of future earning capacity involves consideration of hypothetical events. Hypothetical events need not be proved on balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation. If the

> plaintiff establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event. Allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., in dissent, in *Grewal* at para. 48. The assumptions may prove too conservative or too generous; that is, the contingencies may be positive or negative.
>
> [147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[140] The three-step process for considering claims for loss of future earning capacity is as follows:

a) Does the evidence disclose a potential future event that could give rise to a loss of capacity;

b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff; and

c) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

See *Rattan* at para. 148, citing *Rab* at para. 47.

[141] When an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future, the first and second steps of the analysis may well be foregone conclusions since the plaintiff clearly lost capacity and income: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 11. The assessment is then not simply whether there was a loss of capacity, but whether that loss gave rise to a real

and substantial possibility of a future loss and the value of that loss: *Ploskon-Ciesla* at para. 11; *Rab* at para. 33; *Ker v. Sidhu*, 2023 BCCA 158 at para. 44.

[142] At the third step of the analysis, damages may be assessed using the "earnings approach" or the "capital asset approach". The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, and typically involves a determination of the plaintiff's without-accident future earning capacity, using expert actuarial and economic evidence as well as the plaintiff's past earnings history: *Kim v. Baldonero*, 2022 BCSC 167 at para. 91, citing *Lo* at para. 109; *Dornan* at paras. 155–156.

[143] At the final stage of the damage assessment process, the court must determine whether the damage award is fair and reasonable: *Lo* at para. 117.

***Rab* Steps One & Two**

[144] In cases where the event giving rise to a future loss is manifest and continuing at the time of trial, the evidentiary threshold under the first two steps of the *Rab* analysis is a given: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 52; *Ploskon-Ciesla* at para. 11; *Rab* at para. 29. Indeed, development of chronic injury is one type of event that may satisfy the first step of the *Rab* analysis: *Deegan v. L'Heureux*, 2023 BCCA 159 at para. 53, citing *Rab* at para. 47.

[145] I am satisfied that the evidence discloses a potential future event that could lead to a loss of capacity: Mr. Girvan has disabling chronic pain and psychological conditions that have rendered him unable to continue working as a surveyor/gradesman. It is clear that he has lost the ability to work in that capacity and has been rendered less competitively employable overall as a result of the Accident. This loss of capacity satisfies the first step of the *Rab* analysis.

[146] The evidence as to Mr. Girvan's future capacity to work is less clear. Drs. Lu and Anton both opined that he is likely to remain disabled indefinitely. Their opinions in this regard are, however, undermined by my findings as to the plaintiff's credibility as the experts' opinions rely heavily on the plaintiff's self-reported history,

symptoms, and presentation on assessment. Regardless, I am satisfied on the evidence that Mr. Girvan has suffered a future loss of earning capacity. As a result of his injuries, he is unlikely to return to the physically demanding work he was able to do, albeit not without pain, prior to the Accident and that there is a real risk that he will not return to full-time employment in the future. Indeed, Mr. Girvan has not returned to remunerative work as a surveyor/gradesman, or in any other capacity, since the Accident.

[147] I accept that Mr. Girvan's injuries from the Accident, including the aggravation of his pre-existing conditions, prevent him from carrying out the physical aspects of his surveyor/gradesman job. I am satisfied that there is a real and substantial possibility that this limitation will lead to an income loss because he is no longer able to work as a surveyor/gradesman and potentially other jobs that require regular physical exertion or static postures. I am also satisfied that there is a real and substantial possibility that Mr. Girvan will not regain the capacity to work full-time and will, at best, be restricted to part-time employment, thereby resulting in loss of income. Thus, the second step of the *Rab* analysis is satisfied.

***Rab* Step Three – Valuation**

Past Loss of Earning Capacity

[148] The plaintiff seeks past loss of income of $216,000, which he submits represents the mid-point net after-tax loss between his average pre-workplace injury annual earnings of $35,000 and his potential earnings of up to $70,000 annually as a surveyor/gradesman at King Hoe.

Pre-Trial Without-Accident Earning Capacity

[149] I accept that absent the Accident, Mr. Girvan likely would have continued to work as a surveyor/gradesman earning a similar rate of pay as he did at King Hoe, namely $30 per hour. Over the course of his retraining and during his relatively short time at King Hoe, he demonstrated the ability to perform the job functions of a surveyor/gradesman despite his pre-existing conditions. However, it is undisputed that his employment at King Hoe was terminated based on his conduct the day

before the Accident when he rolled a water truck and was required to take a drug test, which yielded a result that was non-negative for cocaine.

[150] Nonetheless, I accept the evidence of Erica Butler, who was the operations coordinator at King Hoe at the time of the Accident, to the effect that it was difficult for employers to find workers in the construction industry, which had been very busy over the previous five years. Ms. Butler also testified that there were multiple job postings for surveyor/gradesman roles such that employment would be relatively easy to find for someone willing to work. As such, I find that despite the circumstances surrounding his termination from King Hoe, Mr. Girvan would have obtained employment within one month of termination, i.e. no later than September 2017.

[151] Ms. Butler testified that a surveyor/gradesman can make $30–35 per hour, with experienced workers making up to $38 per hour, for annual earnings of approximately $60,000–$70,000. The plaintiff's rate of pay at King Hoe was $30 per hour for regular time and $45 for overtime. He asserts he worked on average eight hours of regular pay and one to four hours of overtime for earnings of approximately $330 per day. The plaintiff says this entitles him to an award based on gross monthly earnings of $6,600. I disagree.

[152] The plaintiff only worked approximately ten shifts at King Hoe prior to the Accident and would have been terminated in short order in any event of the Accident. Given the very short duration of his employment at King Hoe, I find that the ten shifts he did work are not a reliable indication of what his future work hours would have been. Nonetheless, the evidence before me suggests that despite his termination from King Hoe, Mr. Girvan would have found other employment as a surveyor/gradesman earning $30 per hour for 40 hours per week, with the opportunity for an additional ten hours per month of overtime at $45 per hour, for total monthly earnings of $5,250.

[153] However, Mr. Girvan's past work history demonstrates that long-term steady employment was elusive to him. He experienced interpersonal conflict with various

co-workers and supervisors in multiple instances at various jobs, and had been terminated on at least one occasion prior to his termination from King Hoe. In my view, this pattern of conduct would very likely have resulted in periods of under or unemployment for Mr. Girvan, which is all the more so the case when considered in conjunction with construction industry disruptions or shuts downs in the pre-trial period occasioned by the COVID-19 pandemic. Mr. Girvan's non-negative drug test also represents a negative contingency that may have impacted his ability to secure future employment.

[154] I do not agree with the plaintiff that these negative contingencies would be cancelled out by the positive contingency of the industry being very busy over the past five years. That positive factor relates only to his ability to obtain employment; it does not negate the negative contingencies outlined above that are relevant to his ability to sustain employment once obtained.

[155] Considering both positive and negative contingencies, I conclude that without the Accident, Mr. Girvan would have worked on average ten months per year from September 2017 to August 2022, resulting in pre-trial without-accident earning capacity of $267,750 ($52,500 x 5 years + $5,250 for September 2022).

Pre-Trial With-Accident Earning Capacity

[156] Mr. Girvan did not attempt to return to work and has not worked since the Accident. The expert evidence before me suggests that he has some permanent occupational and functional disability. While the plaintiff's lack of credibility causes me concern and limits the weight I can put on Ms. Craig's opinion, the defendants made no submissions on this head of damages, nor did they identify any evidence suggesting a real and substantial possibility that Mr. Girvan could have worked either as a surveyor/gradesman or in any other capacity despite the Accident.

[157] Nonetheless, Drs. Lu and Anton opined that Mr. Girvan is likely indefinitely disabled from working in any capacity on account of his psychological conditions. Ms. Craig also opined that Mr. Girvan is not considered competitively employable. She testified that Mr. Girvan is "limited" for work as a surveyor/gradesman due to

pain elevation in response to sedentary activity and sustained postures of sitting and standing. Ms. Craig also opined that the plaintiff is significantly limited by pain, with there being a large gap between the physical abilities he demonstrated on assessment and those required for the surveyor/gradesman type of work.

[158] However, Ms. Craig also opined that Mr. Girvan has not likely achieved maximum physical rehabilitation, and that with effective rehabilitation and improved pain management, she anticipated improvement to his functional abilities. In light of this and her findings regarding Mr. Girvan's lower extremity function, and given my findings on the plaintiff's credibility and Ms. Craig's inability to complete her assessment because of his reported pain, I find that there is a reasonable and substantial possibility that Mr. Girvan may have been capable of working in some capacity in the pre-trial period. As such, I find that applying a 10% negative contingency to this award is fair and reasonable in the circumstances.

[159] In the result, I find that Mr. Girvan's pre-trial loss of earning capacity is $240,975. Applying the 40% deduction necessary to account for Mr. Girvan's original position, this results in an award of past loss of earning capacity of $144,585. Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, income tax must be deducted from this award. If the parties are unable to agree on the appropriate deduction and net amounts, they may appear before the Registrar to settle the deductions.

Future Loss of Earning Capacity

Post-Trial Without-Accident Earning Capacity

[160] Mr. Girvan advances essentially the same position with respect to his loss of future earning capacity as he did in respect of past loss of earning capacity, namely that his most probable without-Accident future loss of capacity scenario is that he would have continued to work as a surveyor/gradesman earning between $35,000–$70,000 per year to age 65. Mr. Girvan also submits that as he has not worked since the Accident, the earnings approach is most appropriate. The defendants did not provide an alternative position as to Mr. Girvan's loss of future earning capacity.

[161] I find that Mr. Girvan's without-Accident future earning capacity would have would been similar to his without-Accident past loss of earning capacity, namely that he would have worked as a surveyor/gradesman earning $30 per hour for 40 hours per week and an additional ten hours per month of overtime at $45 per hour. Although the impact of the COVID-19 pandemic is not a factor in this analysis, I find that his propensity towards interpersonal conflict in the employment context and ongoing cocaine use represent negative contingencies impacting his ability to sustain full-time employment. As such, I find that absent the Accident, Mr. Girvan would probably have worked on average ten months per year for annual earnings of $52,500, to age 65.

[162] As such, applying the plaintiff's economist, Darren Benning's, future income loss multipliers to age 65, I find that Mr. Girvan's post-trial without-accident earnings to be approximately $640,395 ($52,500 x. 12.198). Applying the 40% deduction to account for his pre-existing conditions, this results in a net present value of his future without-Accident earning capacity of $384,237.

Post-Trial With-Accident Earning Capacity

[163] Mr. Girvan submits that the most probable with-Accident scenario is that he will never again return to the workplace in any capacity. He says that given his psychological conditions, chronic pain, OIH, and opioid dependency, the relative likelihood of him returning to any remunerative employment is nil. I disagree.

[164] I am satisfied on the evidence that Mr. Girvan has physical capacity greater than he demonstrated on assessment with Ms. Craig, and she nonetheless opined that he had not likely achieved maximum physical rehabilitation and she anticipated improvement in his functional abilities with effective rehabilitation and improved pain management. Moreover, my findings as to Mr. Girvan's lack of credibility and reliability undermine the weight I can give to Drs. Lu and Anton's evidence, as their opinions relied heavily on his self-reported history and presentation on assessment. Simply put, Dr. Lu's opinions are not consistent with the preponderance of the lay

evidence before me as to Mr. Girvan's psychological condition following the Accident.

[165] Accordingly, I find that there is a real and substantial possibility that Mr. Girvan may be able to return to the workforce in some capacity, particularly after attending a multi-disciplinary chronic pain program, receiving occupational therapy and with ongoing psychological support, all of which treatments are provided for in my cost of future care award below. As such, I find that applying a 10% contingency, reflecting the potential that Mr. Girvan may return to the workforce in some capacity, is appropriate based on the evidence before me. In the result, I assess Mr. Girvan's loss of future earning capacity as $345,813 ($384,237 less a 10% negative contingency).

[166] As the final step of the quantification process, I conclude that this award is fair and reasonable, and reflects "the type and severity of [Mr. Girvan's] injuries and the nature of [his] anticipated employment": *Ploskon-Ciesla* at para. 7. In making the award for loss of future earning capacity, I have tethered my conclusions to the available economic evidence, but remain aware that valuation is not a mathematical exercise.

Cost of Future Care

[167] The principles that govern the assessment of cost of future care were summarized by Justice Gomery in *Gill v. Borutski*, 2021 BCSC 554:

> [107] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 [*Gignac*] at paras. 29–30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta,* 2008 BCCA 420 at para. 41.
>
> [108] Each part of the claim must be supported by the medical evidence. If the plaintiff relies on the report of an occupational therapist or rehabilitation consultant, there must be an evidentiary link between the medical evidence and the recommendations in the report; *Gignac*, at paras. 31–32. If the plaintiff has not used or sought out a service in the past, it will usually be

> difficult for her to justify a claim in respect of that service; *Warick v. Diwell,* 2018 BCCA 53 at para. 55.
>
> [109] At the end of the day, an award for the cost of future care is assessed, not mathematically calculated; *Uhrovic v. Masjhuri,* 2008 BCCA 462 at paras. 28–31.

[168] Any claim for cost of future care must be medically justified, and must be reasonable to both parties: *Quigley v. Cymbalisty*, 2021 BCCA 33 at paras. 43–44. There must be an evidentiary link between the physician's assessment of pain, disability and recommended treatment, and the care recommended by a qualified healthcare professional: *Deegan* at para. 93, citing *Gregory* at para. 39. An award of future care costs is not intended to account for the cost of amenities that make the plaintiff's life more bearable or enjoyable, but are not medically justified: *Rattan* at para. 181, citing *Warick v. Diwell*, 2018 BCCA 53 at para. 24.

[169] Future care costs are a matter of prediction. The court must determine the present value of the future reasonable care needs of the plaintiff, allowing for contingencies to account for the fact that the future may differ from that suggested by the evidence at trial: *Rattan* at para. 182, citing *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58.

[170] The plaintiff claims the cost of the following future treatments:

a) Ongoing psychological support as recommended by Drs. Griffiths, Anton, and Lu, at a cost of $130 per session;

b) Residential in-patient treatment as recommended by Dr. Lu, at a cost of $40,000–$90,000;

c) Multi-disciplinary chronic pain program as recommended by Ms. Craig, at a cost of $14,000;

d) Six to 12 occupational therapy sessions as recommended by Dr. Anton, at a cost of $155 per session;

e) Assistance with regular household cleaning as recommended by Ms. Craig, at a cost of $100 per week; and

f) Regular pain medication, namely the cost of Supeudol, as prescribed by Dr. Griffiths, at a cost of $41.60 bi-weekly.

[171] The defendants made no submissions in response to Mr. Girvan's cost of future care claim. Considering the whole of the evidence before me, I am satisfied that it supports the awards as sought for attendance at a multidisciplinary chronic pain program ($14,000), occupational therapy (six sessions at $155 per session), and housekeeping assistance. However, I am not satisfied that the evidence supports weekly housekeeping, and instead award this on a bi-weekly basis for an award of $200 monthly and $2,400 annually.

[172] Mr. Girvan is awarded the cost of Supeudol as claimed in the amount of $2,775.62. Mr. Girvan appropriately limits his claim to the cost of the increased dosage he required after the Accident and seeks compensation only for a period of five years in recognition of the need to wean himself off this medication on a go-forward basis. I also accept the plaintiff's submission that a negative contingency ought not to be applied to the cost of Supeudol.

[173] I am also satisfied that Mr. Girvan requires ongoing psychological support. This recommendation was consistently made by Drs. Anton, Griffiths, and Lu. Mr. Girvan's calculations assume one session per month, though there is a void in the evidence on this point. Relying on Dr. Lu's opinion and his repeated reference to the need for ongoing psychological support for the plaintiff, and in light of my conclusions below regarding residential in-patient treatment for alcohol and opioid use, I award the plaintiff bi-weekly psychological support at a cost of $130 per session and $3,120 annually.

[174] The plaintiff did not make a submission on the duration of counselling therapy or housekeeping assistance. Considering the evidence as a whole, I consider awarding these costs to the age of 65 is fair, reasonable, and consistent with the

preponderance of the evidence before me. The total annual cost of future care for psychological support and housekeeping is $5,520. Applying the cost of future care multipliers provided by Mr. Benning to age 65, this results in an award of $65,175 ($5,520 x 11.807).

[175] Finally, the plaintiff seeks residential in-patient treatment and asserts that this was recommended by Dr. Lu. Having reviewed Dr. Lu's evidence, I am not satisfied that it supports such an award. Dr. Lu's opinion on this point was conditional:

> Mr. Girvan is also drinking excessively, about 26 standard drinks a week. Again, chronic pain, OIH, major depression with psychotic features are all factors in his increased alcohol use. He must need support to stop drinking. If he cannot switch his opioid and stop drinking with outpatient support, he would need residential treatment. Residential programs such as those offered at Edgewood or Homewood Ravensview are accepted options for those in public unions and other third-party insurer.
>
> [Emphasis added.]

[176] More importantly, Dr. Lu appears to have assumed that Mr. Girvan's excessive drinking arose only subsequent to the Accident. In this regard, Dr. Lu noted in the history section of his report that Mr. Girvan "described himself as a social drinker, although he had one 24-hour suspension in the remote past" and that he did not have "histories of addiction or significant substance use". This description of Mr. Girvan's alcohol and substance use is demonstrably inconsistent with the evidence before me, including that of Ms. Cowie, Mr. Madden, and Mr. Girvan himself. Dr. Lu does not appear to have been aware of Mr. Girvan's prior attendance at a residential addiction treatment facility, or history of binge-drinking and cocaine use prior to and following the Accident. As such, the facts upon which Dr. Lu based this recommendation were not proven, and the plaintiff has not met the onus of establishing that the cost of in-patient residential treatment is medically justified on the evidence before me.

[177] The awards for chronic pain treatment, occupational therapy, psychological support, and housekeeping must be reduced to reflect the negative contingencies arising from Mr. Girvan's original position. Applying the 40% reduction noted at para.

129 above, this results in an award of cost of future care of $39,105, plus the cost of Supeudol in the amount of $2,776, for a total cost of future care award of $41,881.

Special Damages

[178] Mr. Girvan has proven that he incurred out of pocket expenses for treatment in the amount of $9,061.70, and asserts that these expenses were all reasonably incurred and directly attributable to the injuries he suffered in the Accident. The defendants made no submissions on the reasonableness of Mr. Girvan's special expenses.

[179] I agree with the plaintiff that the special expenses documented were reasonable and directly attributable to the physical and psychological injuries and aggravation of pre-existing conditions that he suffered as a result of the Accident. In the result, I award special damages as sought by the plaintiff, namely in the amount of $9,062. In the absence of any submissions from the defendants as to whether these expenses would have been incurred in any event of the Accident and given that they have already crystallized, I decline to apply the negative contingency to the award of special damages: see e.g. *Dugas v. Kebede*, 2021 BCSC 2336 at para. 111.

Conclusion

[180] In the result, Mr. Girvan is awarded the following damages:

a) Non-pecuniary damages	$90,000
b) Past loss of earning capacity	$144,585
c) Loss of future earning capacity	$345,813
d) Cost of future care	$41,881
e) Special Damages	$9,062

[181] Mr. Girvan is awarded damages in the amount of $631,341.

[182] As the successful party, Mr. Girvan is presumptively entitled to his costs at Scale B. If either party seeks an alternative costs order, they have leave to request a further hearing before me on the issue of costs within 30 days of the date of this judgment.

"Hughes J."