IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Finley v. Choi,*
2023 BCSC 75

Date: 20230117
Docket: M153748
Registry: New Westminster

Between:

Ian Edwin Finley

Plaintiff

And

Gyu C. Choi and Yun Ha

Defendants

Before: The Honourable Justice Chan

Reasons for Judgment

Counsel for Plaintiff:	S. Ballard
Counsel for Defendants:	J. Cahan J. Ronsley, Articled Student
Place and Date of Trial/Hearing:	New Westminster, B.C. November 21-25, 28-29, 2022
Place and Date of Judgment:	New Westminster, B.C. January 17, 2023

Table of Contents

I. INTRODUCTION

[1] This is a personal injury action arising from a motor vehicle accident on June 23, 2012. The plaintiff Ian Edwin Finley was struck from behind by a vehicle while Mr. Finley was waiting to turn left at the intersection of Fraser Highway and 68th Avenue in Surrey, BC. The vehicle was owned by the defendant Yun Ha, and operated by the defendant Gyu C. Choi. Liability for the accident is admitted by the defendants. The sole issue for determination is the assessment of damages.

II. PRE-ACCIDENT

A. In the United Kingdom

[2] Mr. Finley was born on September 19, 1974 in the United Kingdom. When he was young, he was active in a variety of team sports and pursued outdoor activities such as rock climbing and mountain biking. He was a competitive mountain bike racer while he was in the United Kingdom. Mr. Finley trained as a carpenter, achieving the equivalent of a red seal certification. He worked for 2.5 years as a carpenter apprentice. In the early 1990s, Mr. Finley worked with a large construction company, rotating through different departments so he could learn all aspects of the industry. Once he completed his rotations, he became a site supervisor. He also obtained a diploma in construction management. As he gained experience in construction management, he worked on larger projects. His job in the United Kingdom required him to move many times, and he testified that for a period of time in his late 20s through early 30s, he spent very little time at home. He met his wife in 2005.

B. Immigration to Canada

[3] Mr. Finley was first approached in 2007 by PCL Construction (“PCL”) to immigrate to Canada. He testified that as his wife was pregnant at the time, they decided against it. PCL approached him again in 2009, recruiting Mr. Finley to work on the BC Place Roof Replacement Project (“BC Place Project”). Mr. Finley moved to Canada with his wife and two young daughters in 2009 (ages two and nine at the time), settling in the neighbourhood of Clayton Heights in Surrey, BC. Though moving to Canada meant a pay cut, Mr. Finley testified he wanted a job where he didn’t have

to move as often as in the UK. His family continued with outdoor activities in Canada, biking or hiking on weekends. Mrs. Finley testified the family went on hikes regularly in Golden Ears Provincial Park, at White Pine Beach, and in trails in Chilliwack. He attended the fireworks in Vancouver with friends every year, and enjoyed social activities.

[4] Before the accident, Mr. Finley described himself as very fit and healthy. He injured his back in 2010 while he was playing with his daughter. He visited Dr. Rice, a chiropractor, and described how he rebounded after two weeks. He testified that his chiropractor had recommended some follow-up maintenance appointments. During cross-examination, he agreed his first visit to Dr. Rice was on September 1, 2010, after doing a Google search for chiropractors. Mr. Finley agreed that on the intake form, he had accurately filled out “severe back pain” as the reason for the visit. He visited the chiropractor 13 times in September and October 2010, and six times in September and October 2011. Mr. Finley testified that his back pain had resolved before the accident.

[5] Mr. Finley had also been involved in a motor vehicle accident in the UK before he moved to Canada. However, he did not suffer any injuries and described it as having very low impact.

C. Pre-Accident Work at PCL

[6] Mr. Finley worked as a site superintendent with PCL on the BC Place Project. The BC Place Project was to replace the stadium’s inflatable roof with a retractable roof structure. His role as superintendent required him to deal with the outside subcontractor trades as well as PCL’s inhouse crew. He was responsible for more than 100 people on site on a daily basis. There were up to 10 site superintendents on the BC Place Project, with each superintendent being responsible for a different scope of work. His immediate supervisor on the BC Place Project, Shelley Neil, testified that Mr. Finley’s crew was responsible for keeping the stadium dry after the inflatable roof was removed. Mr. Finley described the work as fast-paced and he often worked upwards of 70 hours per week, at one point reaching close to 100 hours per week. He

testified his work involved 30 to 40 hours per week of sitting at a desk attending meetings and doing paperwork, with the remainder of the time walking around the site. The deadline was fixed, as the new roof had to be in place for the Grey Cup in the Fall of 2011. Mr. Finley described it as a high stress, physically and mentally demanding job.

III. THE ACCIDENT

[7] The accident occurred in the afternoon of June 23, 2012. Mr. Finley was driving a Ford F150 truck, and stopped at the intersection of Fraser Highway and 68th Avenue, Surrey, BC. He was waiting to turn left, with two vehicles in front of him. He testified he was wearing his seatbelt and had his foot on the brake. He was turned to his right, towards the front passenger seat, to grab some documents that he intended to drop off at his dentist's office.

[8] Mr. Finley described being hit from behind by a vehicle. At the time of impact, he was turned to the side looking over his right shoulder. The force of the impact pushed his vehicle forward and he collided with the vehicle in front of him. He was surprised by the impact, and he exited his vehicle to check on the driver behind him. The damage to his Ford F150 truck was minor, and later estimated to be approximately $3,500. The damage to the vehicle that hit him, a Honda Civic being driven by Mr. Choi, was estimated to be approximately $4,200. No air bags were deployed. No emergency vehicles attended at the scene. After exchanging information with Mr. Choi, Mr. Finley drove home. Mr. Finley estimates he stayed at the scene for approximately 10 to 15 minutes. He testified that while he was a bit shaken, he was feeling well enough for the five-minute drive home.

[9] However, Mr. Finley testified that in the next few days, he began feeling stiffness in his neck, shoulders and mid back. The pain was more on the right side. As the pain was gradually becoming worse, he visited Dr. Rice, his chiropractor, about 10 days after the accident. In August, he went to a local walk-in medical clinic and consulted with Dr. Webb, who became his family doctor. He testified that at this point

his symptoms were worsening, and he had difficulty sitting for long periods of time at work due to pain.

[10] After the accident, Mr. Finley tried various treatments, including visits to the chiropractor, massage therapy, acupuncture and various pain medications. He testified that while some of the treatments provided relief from his pain, any relief was short-lived. In his view, he has received the most benefit from trigger point injections, and he continues to see Dr. Waspe to receive these injections. He describes these as injections of nerve blocks by needle to assist with his pain.

IV. POST ACCIDENT

A. Work at PCL from 2012 to 2016

1. Ian Edwin Finley

[11] Mr. Finley did not initially take any time off work after the accident. As it was a busy time at work, he testified he did not want to let the team down. He tried to manage his tasks by starting work an hour earlier in the day, from approximately 5 a.m., to allow himself more time to complete his paperwork. He found the lengthy commute to work difficult, and struggled with the drive home. He described himself as being less tolerant and more irritable.

[12] After the BC Place Project was completed in late 2011, Mr. Finley worked as a site superintendent on the Anvil Centre in New Westminster (“the Anvil Project”). Mr. Finley started at the Anvil Project in early 2012, and he worked as one of two site superintendents. He was responsible for the concrete structure. Mr. Finley described the Anvil Project as complex, like the BC Place project. He testified he worked 70-hour weeks.

[13] One day in April 2013, Mr. Finley left for work but after driving for a kilometre, he could not continue. He described that he had intense pain from both sides of his neck, shoulders and back muscles. He returned home and his wife took him to the Langley Memorial Hospital, where he received some painkillers. He was off work for about a month and returned to work on May 24, 2013. Mr. Finley testified he did not

return to work full-time. He worked from approximately 10 a.m. to 3 p.m. or 4 p.m. He took time off for physiotherapy appointments. A field engineer was assigned to assist him with the paperwork, though when he moved to the Telus Project in 2016, the budget did not allow for that assistance.

[14] Mr. Finley completed his role on the Anvil Project in early 2015. He then worked on the Telus Project in downtown Vancouver. I note there is a slight discrepancy in the evidence as to when Mr. Finley started and ended on the Anvil Project, and when he started on the Telus Project. Mr. Finley testified at one point he started on the Anvil Project in 2012, then at another point he testified it was in 2013. With respect to when he started at the Telus Project, Mr. Finley testified it was 2015 and at another point testified it was early 2016. I find the exact year of when Mr. Finley started at the Anvil Project and the Telus Project not important to the issues in this case. While at the Telus Project, Mr. Finley was working night shifts with less traffic for a shorter commute.

2. Daniel Gordon Sadler

[15] Mr. Sadler retired as a construction manager from PCL in 2018. He worked at PCL for 34 years. He first met Mr. Finley in 2009, and became his direct supervisor in 2015 during the Telus Project. Mr. Sadler testified that Mr. Finley was a site superintendent on the Telus Project, and that in his view, Mr. Finley did a good job on a very difficult project. He described Mr. Finley as having a good rapport with his crew at the Telus Project, and that he always welcomed others onto his work site. During Mr. Finley's time at the Telus Project, Mr. Sadler was aware he had discomfort sitting in meetings, but he testified Mr. Finley never brought up any particular concerns.

[16] During the Telus Project, Mr. Sadler had almost daily contact with Mr. Finley. Mr. Sadler agreed that Mr. Finley's employee reviews during that period of time were positive, and he met or exceeded expectations. Mr. Sadler testified Mr. Finley had never approached him to discuss his decision to leave PCL, and that he only found out Mr. Finley had quit afterwards. Mr. Sadler agreed that if Mr. Finley had approached him with requests for accommodations, he would have gone to the human

resources department to see what could be done. Mr. Sadler testified that PCL accommodates employees who need equipment to work comfortably, such as ergonomic desks, chairs, or balls to sit on. Mr. Finley had never raised any issues with respect to his ability to do his work with Mr. Sadler.

3. Shelley Neil

[17] Ms. Neil was a construction manager at PCL and was Mr. Finley's supervisor on the BC Place Project. She described Mr. Finley's role as one of the site superintendents. He was responsible for the waterproofing of the stadium once the old roof was removed, and he was in charge of the outside decks and landscaping. As the site superintendent, he was responsible for managing the subtrades, labourers and carpenters. Ms. Neil testified that she had daily contact with Mr. Finley. Before the accident, she observed Mr. Finley being involved in the physical work, going up on ladders and hanging tarps. She described him as being very hands-on, and would show the workers how to do a task.

[18] Ms. Neil did not work with him immediately after the accident. She also worked on the Anvil Project, where she observed Mr. Finley once or twice a week. She testified that after the accident Mr. Finley was quieter, and seemed more discouraged when he needed to miss work for medical appointments. Mr. Finley was not able to be as hands-on, and would provide instruction to the crew rather than physically showing them how to do a task. Ms. Neil agreed that Mr. Finley met or exceeded expectations for his work at the Anvil Project. She testified that after the accident, Mr. Finley continued to be equal or exceed other superintendents of his level.

4. Bryan Ono

[19] Mr. Ono was a project coordinator and worked with Mr. Finley at PCL starting in 2011 at the BC Place Project. Mr. Ono worked daily with Mr. Finley and described him as a hard worker and a very capable site superintendent. After the accident, Mr. Ono testified that Mr. Finley had to adjust his work practices. Mr. Ono described Mr. Finley coming in earlier to give himself more time to get his paperwork done. Mr. Finley would call for assistance more often if anything needed to be lifted. Mr. Ono

agreed that Mr. Finley was still able to do his job after the accident, and continued to work full-time.

[20] Mr. Ono left his job at PCL in February 2013, and he eventually started his own construction company after a period of travel. Starting in 2016, after Mr. Finley left PCL, he worked with Mr. Ono on various construction projects. Mr. Ono testified he did not observe Mr. Finley having any limitations on the various projects they worked on together.

5. Jason Roy Gallant

[21] Mr. Gallant was called by the defence. He worked on the Anvil Project with Mr. Finley. Mr. Gallant is a senior superintendent at PCL, and he described himself as the overall person in charge of the project, with the various site superintendents reporting to him. Mr. Gallant described Mr. Finley as a very hard worker with a strong personality, who did not get along with everyone. His observation was Mr. Finley continued to fulfill his job requirements after the accident. However, Mr. Gallant never worked with Mr. Finley before the accident, so he could not comment on any changes to his physical abilities. Mr. Gallant testified that Mr. Finley never approached him to seek any accommodations, or to discuss his decision to leave PCL. Mr. Gallant was aware Mr. Finley had a farm property, and while his impression was that Mr. Finley left PCL to pursue farming, he agreed that Mr. Finley did not say that to him.

B. Move to Langley Residence in 2013

[22] Before the accident, Mr. Finley and his wife had been looking to move to a larger, more rural property. He testified he wanted more space for his children to play. In the summer of 2013, after looking for about 1.5 years, Mr. Finley and his wife purchased and moved to a five-acre property in Langley. They started an organic farm, growing their own fruits and vegetables. Mr. Finley testified that while Laurica Farm, named after his daughter, expanded, it did not generate much money from 2013 to 2016.

C. Decision to Quit PCL in 2016

[23] Mr. Finley continued working at PCL until June 2016, when he decided to resign. He testified that while he enjoyed his work at PCL, he believed he could no longer fulfill his duties due to his pain. He testified he quit so he could focus on his recovery. Mr. Finley testified that by leaving PCL, he had hoped his condition would improve as he would no longer be required to sit for long periods of time. He believed that he would feel better by moving around and engaging in more physical work.

[24] Mr. Finley denied that his decision to leave PCL was due to his wish to pursue a healthier, farming lifestyle. Mr. Finley testified that his job at PCL was a well-paying dream job. He testified that most farmers have another source of income, as farming is not a means to support a family. Mr. Finley was off on sick leave for about a week when he decided to resign in June 2016. He testified that he had immense pain during his last six months at PCL but he stuck it out to ensure his project was completed.

D. Laurica Farm in Langley from 2013 to 2016

[25] After working for three years to build it up, Laurica Farm was destroyed in a fire in the Fall of 2016. Both Mr. Finley and his wife testified the fire destroyed their home and their business. At that time, Laurica Farm had approximately 30 pigs, 10 to 12 sheep, four goats, 15 to 20 chickens and 10 to 12 dogs. Mr. Finley converted a small barn on the property to a living unit, so his family had a home while they stayed to look after the animals. Mr. Finley built a new home, directing most of the construction himself. Construction on this new home completed in August 2018. He described it as an environmentally responsible home, clad in material that is both fire resistant and decomposable. When the family moved in 2020, this home was towed to Creston, BC.

[26] Mr. Finley made claims against his insurance company and Apple, as a defective iPhone was believed to have been the cause of the fire. These claims were ultimately settled in 2020 and the Finleys received compensation. A non-disclosure agreement with Apple prevents Mr. Finley from revealing the quantum of the settlement.

E. Move to Creston Property in 2020

[27] Mr. Finley and his wife bought a 60-acre property in Creston, B.C. in 2020, and moved there with their younger daughter on June 1, 2020. The Creston property is rural, about 15 minutes drive to the town centre. There was a small shed on the property but no other structures. The Finleys had built a house while they were in Langley, and towed the house by trailer to Creston. The Finleys put in two large shipping type containers on the property; one of these has been converted into a cabin for rental, while the other container is used for refrigeration for fruits and vegetables. Mr. Finley and his wife did the work themselves, converting the shipping container into a living unit, suitable for rentals. Approximately one third of the property, 20 acres, is suitable for farm use.

[28] Both Mr. Finley and his wife testified their plan is to build a cidery business on the Creston property. The plan is to have a mixed fruit orchard, and 3000 trees will be delivered in the spring of 2023. This new business is called Little Dog Farm. The Finleys are planning production of cider along with having some farm animals. Mr. Finley testified he will move away from growing vegetables to growing trees next year, as trees are less labour intensive. To prepare for the trees, Mr. Finley testified he had to excavate and lay pipes in the ground. There is a rough business plan in place for Little Dog Farm, and Mr. Finley testified he expects it will take three years for the trees to start producing fruit.

[29] In addition to Little Dog Farm, Mr. Finley has other sources of income. He had some work with an excavation company, with the Mark Anthony Group in the building of two vineyards in Creston, and self-employment as a contractor. Mr. Finley testified he charges $85 per hour in his contractor work. He has done some work as a general contractor, including putting up agricultural fencing, installing a deck on a home in North Vancouver, building driveways and other concrete work. As with PCL, he testified his various employers have been satisfied with his performance, and there appear to be opportunities for further work with some of these companies.

F. Social and Recreation Activities

[30] After the accident, Mr. Finley testified he could not socialize in the same manner as before. Dinners with friends were short, as he could not sit for more than two hours. While he divided up household chores with his wife before the accident, after the accident Mr. Finley found he had difficulties with chores such as washing dishes, mopping the floor and ironing. He testified it was difficult for him to look down while he was washing dishes. He estimates his wife has spent two to three more hours per week doing chores since the accident. Mrs. Finley testified that after the accident, he had to adjust how he did his household chores. He no longer does any chores that require him to put his hands in front or above his head, such as raking leaves or fixing the roof. Mrs. Finley testified that she now takes on most of the household chores.

[31] In terms of recreational pursuits, Mr. Finley has not been able to return to mountain biking or climbing. He testified that when he tried both of those activities, he experienced excruciating pain in the neck and shoulders the next day. He was not able to do certain activities with his youngest daughter, such as playing board games. He still finds long drives difficult. His sleep has also been negatively impacted.

[32] Mr. Finley testified he believes his health is worse today than in 2016 when he left PCL. He testified the pain is still present and relentless, though the level of pain varies from day to day. He testified that, in his view, self-employment is the best option for him, as it provides him with flexibility to choose when he works. In his view, physical labour is more manageable for him than administrative tasks, as physical work allows him to move around.

[33] His wife testified that after the accident, he is now often in a low mood. In her view, he has lost some spark.

V. THE MEDICAL AND EXPERT EVIDENCE

A. Dr. Margot Webb

[34] Dr. Margot Webb was qualified at trial as an expert in family medicine and medical management of patients with injuries from motor vehicle accidents. She has

been practising as a family physician in BC since 2011. Dr. Webb first saw Mr. Finley on August 21, 2012, as a walk-in patient at the Clayton Heights Medical Clinic. She became his family doctor and managed his care after his accident. She wrote a medical legal report at the plaintiff's request on May 20, 2013.

[35] In her medical legal report, Dr. Webb stated that on physical examination on August 12, 2012, Mr. Finley had some tightness of his trapezius muscles but good range of motion. She referred him for an x ray of his neck area, and started him on some muscle relaxants. She also referred him for physiotherapy and massage therapy. Dr. Webb saw Mr. Finley four more times in 2012 and early 2013, prior to her medical legal report. She referred him for a CT scan in January 2013 to rule out a herniated disc, and recommended acupuncture.

[36] Her opinion in May 2013 was that Mr. Finley injured his soft tissues in his neck and upper back from the accident, "resulting in a soft tissue mediated (myofascial) pain". Dr. Webb wrote the following in the conclusion of her medical legal report:

> In conclusion, Mr. Finley was involved in a MVA on June 23, 2012, since that time he has had ongoing pain in his neck and back which has been affecting his ability to work in the same capacity as he did prior to the accident. More recently he has had a flare up of pain which has resulted in him being unable to work for a month. His investigations to date suggest that the pain is muscular in origin. He has tried massage, chiropractor, acupuncture and physiotherapy with some degree of short term improvement in his symptoms. I believe his prognosis as this stage is guarded. Ideally with the correct combination of therapy his symptoms should resolve over time, however, as mentioned above, the prognosis for these types of injuries tends to be quite variable and it is possible that Mr. Finley may require rehabilitation longer term to prevent aggravation of his injuries or to treat exacerbations.

[37] In 2013, Dr. Webb referred Mr. Finley to see Dr. Waspe, a specialist in physical medicine and rehabilitation. After her report was completed in May 2013, Mr. Finley consulted with Dr. Webb or another physician at the medical clinic 14 more times. Mr. Finley continued to report neck and shoulder pain. Dr. Webb testified her opinion from May 2013 remains unchanged.

[38] In cross-examination, Dr. Webb agreed that soft tissue injuries rely to a large degree on self-reporting. She also agreed that someone with a history of back pain,

such as Mr. Finley, has an increased risk of future back pain. She agreed that Mr. Finley did not report any low back pain in his first visit, and that six weeks after an accident, she would have expected the locations of injury to be well established by that point. Dr. Webb agreed that while the majority of patients with soft tissue injuries resolve, there are some individuals who have pain for longer periods of time.

[39] Dr. Webb testified that at no time did she advise Mr. Finley to leave his job at PCL. Dr. Webb was referred to her notes about a visit on June 8, 2016. In her notes, she had written that Mr. Finley advised he was handing in his job resignation the following Monday. Dr. Webb testified Mr. Finley never discussed with her whether he should quit his job and never asked for her opinion on that issue. She testified that June 8, 2016 was the first time he had brought up the subject of quitting with her. He advised her that was his plan, and that he believed his work aggravated his pain. Dr. Webb testified that in June 2016, her physical findings indicated tenderness in the neck area, as well as upper and lower back, and a reduced range of motion in the neck. She noted that by June 2016, Mr. Finley had experienced pain for four years.

B. Dr. Anibal Bohorquez

[40] Dr. Bohorquez was qualified at trial as an expert in physical medicine and rehabilitation, and the medical management of patients with injuries arising from motor vehicle accidents. He has been a practising specialist in BC for 12 years. Dr. Bohorquez examined Mr. Finley on July 23, 2013 at the request of the plaintiff, and prepared a medical legal report on the same date.

[41] Dr. Bohorquez's opinion, as stated in his report, was that Mr. Finley has myofascial pain in his neck, shoulder and back muscles. In Dr. Bohorquez's opinion, the myofascial pain was caused by the accident. During cross-examination, Dr. Bohorquez agreed that while the majority of patients with soft tissue injuries recover after a year, there are some patients who will continue to have lingering pain. In his view, Mr. Finley was in this category, as it had already been a year post-accident at the time of his report. Dr. Bohorquez noted that Mr. Finley had full range of motion in his neck and shoulders during his examination, and his main complaint on July 23,

2013 was neck pain, which Mr. Finley described as intermittent. Dr. Bohorquez noted in his report that Mr. Finley was able to continue his work by adjusting how much time he spent sitting. Dr. Bohorquez agreed that he was not recommending Mr. Finley to change his job, and that Mr. Finley ought to explore ways to make his work more manageable, including seeking accommodations from his employer. Dr. Bohorquez stated in his report his opinion on whether Mr. Finley may have long term restrictions on his employment:

> As far as employment opportunities go, he is able to do his job at this time; however, he has had to adjust the timing of office versus on site work. Physical activities seem to affect more his neck symptoms. Sitting for prolonged periods of time seems to affect more his mid back and low back discomfort. Therefore, a job that would allow him the flexibility of sitting or standing for prolonged periods of time would be best for him. Given the line of work he is in, there might be limitations in employment opportunities for Mr. Finley in the future if there isn't flexibility for him.

[42] Dr. Bohorquez was of the view that Mr. Finley would not require any assistance with regular household chores.

C. Dr. Kim Waspe

[43] Dr. Waspe was qualified at trial as an expert in physical medicine and rehabilitation, and the medical management of patients with injuries arising from motor vehicle accidents. She has been a practising specialist in BC for nine years.

[44] Dr. Waspe has been the treating specialist for Mr. Finley since June 17, 2014. She completed a medical legal report at the request of the plaintiff on April 9, 2018, after eight consultations with Mr. Finley. After the report, Dr. Waspe continued to treat Mr. Finley, and her most recent appointment with him was on November 7, 2022.

[45] Dr. Waspe testified that in Mr. Finley's first appointment, his main complaint was neck pain. Dr. Waspe testified that Mr. Finley had a stooped posture, with his head extended forward. At his next appointment on June 25, 2014, Dr. Waspe administered trigger point injections into the muscles in the neck and shoulder area. Trigger point injections involve injection of local anesthetic into tight muscles. She explained that trigger point injections assist the patient in pain release and allow the

muscles to relax for a longer period of time. In her opinion, Mr. Finley responded very well to the trigger point injections.

[46] From 2014 to 2018, Dr. Waspe administered seven sessions of trigger point injections. In her 2018 report, Dr. Waspe included her diagnosis:

> Due to the subject motor vehicle accident in 2012 it is my opinion that Mr. Finley sustained the following:
>
> (1) Whiplash associated disorder grade 2.
>
> (2) Secondary to this WAD grade 2, he developed persistent cervicalgia.
>
> (3) Cervicalgia triggering tension headache phenomenon with chronic protracted and forward stooped posture aggravating matters.
>
> (4) Episodes of dyssomnia.

[47] In layman's terms, my understanding of Dr. Waspe's evidence is that Mr. Finley sustained a whiplash injury from the accident, and he developed persistent neck pain from the trauma to the soft tissues, which have periodically been retriggered due to poor posture and other factors. Mr. Finley also developed headaches and poor sleep episodes. Dr. Waspe's opinion is that Mr. Finley is partially disabled, with limitations due to neck pain, tension headaches and interscapular upper thoracic pain. However, her opinion is that he is not permanently disabled. She testified that based on her follow-up visits with Mr. Finley after the report, her opinion remains the same.

[48] In cross-examination, Dr. Waspe agreed that in his first visit in 2014, Mr. Finley did not complain of back pain, and that the first time he brought up back pain was during a March 2016 visit. She agreed that the back pain may not have been from the accident, but from his work on the farm. In April 2016, Mr. Finley had reported to Dr. Waspe that he believed he had recovered to 70% of his pre-accident condition. The April 2016 visit was the last visit before Mr. Finley decided to leave his job at PCL. Dr. Waspe agreed that Mr. Finley did not raise any issues with her about his work at PCL. She agreed that there were no medical reasons for Mr. Finley to leave his job at PCL, and that she did not recommend that he do so; she described it as a choice that Mr. Finley made to try to manage his pain. After Mr. Finley left PCL, there were other intervening events such as the fire to his Langley farm property, which Dr. Waspe

called a significant stressor. Her opinion was that Mr. Finley having to rebuild his home and business after the fire set him back in his recovery. Dr. Waspe's opinion is that there is potential for further improvement for Mr. Finley, once the litigation surrounding the fire and this accident resolves, and if he has sufficient funding to pursue treatment options.

D. Dr. Olli Sovio

[49] Dr. Sovio was qualified at trial as an expert in orthopaedic surgery, with skills to treat injuries from motor vehicle accidents. He examined Mr. Finley at the request of the defendants on June 25, 2013 and wrote a medical legal report.

[50] Dr. Sovio indicated in his report that he found no structural abnormalities, for example no bony protrusions or evidence of a disc herniation. His opinion was that the neck and back pain likely came from an injury to the soft tissues, as the pain seemed to come and go and move around. On cross-examination, Dr. Sovio agreed he did not have any specialized training in chronic pain, and that a patient can experience pain without any structural abnormalities. Dr. Sovio agreed he had no reason to doubt Mr. Finley's reports of pain.

E. Dr. William Henry Craig

[51] Dr. Craig was qualified at trial as an expert in physical medicine and rehabilitation. He examined Mr. Finley at the request of the defendants on March 6, 2018 and completed a medical legal report.

[52] On examination, Dr. Craig noted the muscles in the head and neck were tight and tender. Dr. Craig's opinion was that Mr. Finley's pain appeared to be primarily myofascial. His view was that Mr. Finley had a moderate soft tissue injury to his neck and shoulder area, and a mild to moderate low back soft tissue injury as a result of the accident. Dr. Craig noted on examination, Mr. Finley had "well-preserved range of motion" in his neck, shoulder and back. As Mr. Finley had been able to return to work at PCL for four years after the accident, and continued to do physical labour including house renovations and farming, Dr. Craig's opinion was that Mr. Finley's capacity was

greater than he perceived. Dr. Craig noted that in his view, Mr. Finley had not reached maximal medical improvement. He also noted with appropriate ergonomic modifications, in his view, Mr. Finley should be capable of returning to work as a site superintendent.

[53] Dr. Craig agreed that Mr. Finley has some degree of chronic pain, which he defined as pain that is persistent for longer than six months. Dr. Craig agreed that Mr. Finley fits into the category of individuals who continue to have pain after the usual healing period for soft tissue injuries. Dr. Craig's view was that if the accident had not occurred, Mr. Finley would unlikely have issues with his neck and shoulder area, but his history of back pain created risk that he would have issues with his back in any event. However, Dr. Craig's view was Mr. Finley could do a job which required a few hours a day working at a desk on a computer, as ergonomic equipment and breaking up the desk work into smaller chunks are effective modifications.

F. Louise Craig

[54] Ms. Craig performed a functional capacity evaluation on July 15, 2013. She found that Mr. Finley had limitations for upper level lifting, that he needed to get up and move after 30 to 45 minutes of sitting, and that he had difficulties with sustained stooping or overhead work. While her opinion was that he did not meet the full physical demands of his job as a construction superintendent, Mr. Finley reported to her that he had modified his work to allow him to manage his symptoms. Mr. Finley reported that his employer tolerated the modifications but that he did fall behind in his paperwork.

G. Andrew Hosking

[55] Mr. Hosking is a physiotherapist and he conducted a functional capacity evaluation of Mr. Finley at the request of the plaintiff on February 26, 2018.

[56] Mr. Hosking's opinion is that Mr. Finley has limitations in being able to lift to his shoulder level and above, and is limited in activities in prolonged static postures. His opinion is that Mr. Finley would require substantial modifications to work as a

construction superintendent, and that he partially meets the physical demands of a construction labourer or a farm supervisor. Mr. Hosking expressed the following opinion on Mr. Finley's work capacity:

> Based on results of this evaluation, within the context of the medical diagnoses and prognoses, Mr. Finley is poorly suited to occupations with the requirement for long intervals of static postures. More specifically he is poorly suited to office or administrative based occupations, such as his former position as construction supervisor, primarily due to poor endurance capacity for sitting while looking down or while moving his head between looking up and down…
>
> …In the balance, the demonstrated limitations in this evaluation determine that the scope of work once available to Mr. Finley has been narrowed as a result of injuries sustained in the subject motor vehicle collision of June 23, 2012 …

[57] In cross-examination, Mr. Hosking agreed that Mr. Finley's self-report of his abilities was moderately reliable. He found that Mr. Finley overstated his disability in the written questionnaire, perceiving himself to be more disabled than he was. However, in his oral responses during the examination, Mr. Hosking found Mr. Finley's answers to match Mr. Hosking's observations. Mr. Hosking also agreed that other than his poor ability to sit for long periods of time, Mr. Finley was otherwise a match for the job of construction superintendent.

H. Anita Mohan

[58] Ms. Mohan is a chartered accountant and she prepared a report with calculations of Mr. Finley's loss of income from PCL between 2016 and the time of trial.

[59] Ms. Mohan's report was based on Mr. Finley's earnings if he had remained as a site superintendent at PCL, minus his actual earnings from farming and part time contractor work, during that period of time. In terms of earnings from PCL, the report included a base salary, a bonus and projected dividends from share purchase in the company. Mr. Finley testified that his base salary at the time of the accident in 2012 was approximately $115,000 per year. He explained PCL had a bonus allocation to individual employees at the end of each year, based on profits and performance. He explained PCL's compensation package also included a share scheme where employees were offered a number of shares to purchase each year, and dividends

were paid out based on profit. I note the evidence was sparse, vague and mainly anecdotal on the issue of how shares were offered to employees and how dividends were calculated and paid. This affects how much weight ought to be attached to the calculations in Ms. Mohan's report.

[60] Ms. Mohan's report was calculated using a projection of a base salary, bonus and dividends for 2016 to 2022. Her report contained a range of $1,207,700 and $1,260,279 as the calculated earnings for the time period of 2016 to 2022 if Mr. Finley had stayed at PCL.

I. Robert Carson

[61] Mr. Carson is an economist and he was qualified at trial as an expert witness who can provide an opinion of the present-day value of future losses. He prepared a report of future loss of income if Mr. Finley had continued his employment at PCL from 2022 to 2034 when he turns 60 years old. Mr. Carson's report calculated the present value of a loss of $1,000 per year until age 60 to be $10,607. That means the present value of a loss of $100,000 per year until age 60 is $1,060,700.

VI. CREDIBILITY AND RELIABILITY

[62] The factors to be considered when assessing credibility were summarized by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013):

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[63] With the exception of one area, which is discussed below, I find Mr. Finley a credible and reliable witness. He testified in a straight-forward manner. While both the functional capacity evaluators found that Mr. Finley over-stated his disability in written questions, they found in conversation with him that Mr. Finley's perceived level of disability matched what the testing showed. There is no evidence to support that Mr. Finley exaggerated his injuries. I find that Mr. Finley accurately described the nature and extent of his injuries.

VII. CAUSATION AND INJURIES

[64] In order to succeed in his claim for damages, the plaintiff must prove on the balance of probabilities that the defendant's negligent conduct actually caused or contributed to the loss or injury that is the subject matter of the claim: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183. The general test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant. This causation test is not to be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact which can best be answered by ordinary common sense. It is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. As long as it is part of the cause of an injury, the defendant is liable.

[65] All the medical experts agree that Mr. Finley suffered soft tissue injuries to his neck and shoulder area as a result of the accident. Some of the medical experts believed the accident also caused his back pain, though Mr. Finley did not complain of back pain until some time after the accident. Another area where there is slight difference in the medical opinion is whether the accident caused the upper and lower back pain, or the accident caused only upper back pain.

[66] I find the evidence shows that while Mr. Finley did have an issue with his back due to an incident in 2010, that injury had resolved by the time of the accident. He was no longer visiting the chiropractor for treatment as of the end of 2011. I find the accident caused injuries to his neck, shoulder and upper back areas, as he had no

complaints about pain in these areas prior to the accident. The timing of when these complaints started is some evidence of the causal connection.

[67] I find, based on the totality of the evidence:

1. The accident caused whiplash associated disorder grade 2.

2. Mr. Finley suffered soft tissue injuries to his neck, shoulder and upper back areas.

3. The accident caused a moderate soft tissue injury to his neck and shoulder area, and mild to moderate soft tissue injury to his upper back.

4. While Mr. Finley had a previous episode of back pain due to an incident in 2010, that pain had resolved prior to the accident.

5. Over time, Mr. Finley developed persistent neck pain, which is his main complaint.

6. The accident also caused Mr. Finley to suffer from headaches and poor sleep.

7. The main functional limitations caused by the accident are that Mr. Finley has difficulties with prolonged periods of sitting or being stationary. He also has difficulties with activities which require him to hold his neck in one position, such as looking down to do paperwork. He has difficulties lifting items to or above his shoulder level.

VIII. NON-PECUNIARY DAMAGES

[68] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities caused by a tortious act. In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, 31373 (19 October 2006), the Court of Appeal outlined certain factors to be considered when assessing non-pecuniary damages at para. 46:

> The inexhaustive list of common factors cited in *Boyd* [*v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[69] Mr. Finley seeks an award of $130,000 for non-pecuniary damages while the defendants submit it ought to be in the range of $75,000 to $100,000. The plaintiff relies on the following cases: *Kam v. Van Keith,* 2015 BCSC 1519 ($125,000); *Scelsa v. Taylor,* 2016 BCSC 1122 ($125,000); *Broomfield v. Lof,* 2019 BCSC 1155 ($130,000); *Vasan v. Herd,* 2022 BCSC 2000 ($140,000). The defendants rely on the following: *Singh v. Wu,* 2015 BCSC 526 ($75,000); *Eaton v. Riddell,* 2020 BCSC 734 ($75,000); *Larson v. Bahrami,* 2017 BCSC 2308 ($80,000); *Siu v. Clapper,* 2020 BCSC 944 ($80,000); *Bucholtz v. Zhang,* 2020 BCSC 571 ($85,000); *Hsu v. Choquette,* 2015 BCSC 1123 ($87,500); *McLatchie v. Guineau,* 2017 BCSC 1950 ($90,000); *Stark v. Bartier,* 2021 BCSC 1347 ($100,000).

[70] While the cases cited are helpful, as noted in *Stapley* at para. 45:

> Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal,* [[1981] 2 S.C.R. 629 at 637, 1981 CanLII 35] is a helpful reminder:
>
> > Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering

> his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* [*v. School Dist. No. 57 (Prince George) et al.*, [1978] 2 S.C.R. 267 at 284, 1978 CanLII 12]).
>
> [Emphasis in original]

[71] In this case, Mr. Finley has suffered soft tissue injuries to his neck, shoulders and upper back areas. He has experienced pain of varying degrees since the accident 10 years ago. The pain has affected his sleep, his mood, his ability to play with his children when they were younger and his social activities. He has not been able to enjoy some of the physical activities he used to, such as mountain biking, due to the jarring nature of the sport. His hikes are now less strenuous, and more akin to walks. His dinners with friends are now shorter, as he cannot sit for long periods of time. He needs to break his drives into smaller segments, so he can get out and stretch. He requires his wife to travel with him from Creston into the lower mainland to visit his doctors, as he cannot manage the drive alone. The injuries from the accident have also impacted his ability to work in sedentary positions, as he needs to be able to move around from time to time.

[72] I find the plaintiff's cases involve more serious soft tissue injuries with psychological impacts such as depression: see *Kam v. Van Keith*; *Broomfield v. Lof*. The injuries also caused more significant impacts on functionality: see *Vasan v. Herd*; *Scelsa v. Taylor*. I find Mr. Finley's situation closest to *Stark v. Bartier*, in that the soft tissue injuries resulted in chronic pain which required frequent stretching to alleviate. In *Stark v. Bartier*, there was also no evidence of any significant psychological effects from the injuries. In my view, an award of $100,000 for non-pecuniary damages is fair and reasonable in the circumstances.

IX. PAST LOSS OF EARNINGS

[73] Mr. Finley seeks $420,000 for loss of past wages. He argues that he would have continued working at PCL as a site superintendent if the accident had not occurred. His position is that he would have earned from between $1,207,700 to $1,260,279 from PCL between 2016 and 2022, relying on Ms. Mohan's report. He acknowledges he was capable of earning more income than his actual earnings during this period, as he could have worked as a contractor at an hourly rate of $85. Using this hourly rate, and assuming full-time work at 40 hours per week for 48 weeks per year, Mr. Finley argues his gross business income would be $163,200 per year. He argues he ought to be allowed deductions of $3,000 per month for reasonable business expenses such as tools, fuel and other deductions. He would have a gross income of $127,200 per year. He argues that from the date he left PCL to the trial, he would have earned $811,600 if he had continued working as a contractor. Mr. Finley seeks the difference between what he would have earned at PCL and this amount, which is roughly $420,000.

[74] The defendants argue Mr. Finley's approach to calculating past wage loss is flawed. Their position is Mr. Finley's decision to leave PCL was unrelated to the accident, and that any losses flowing from that decision are not recoverable. The defendants argue that Mr. Finley made a personal choice to change lifestyles and pursue farming, and as a result his earnings decreased. Their position is Mr. Finley's past loss of earnings is restricted to the one month he was off work in 2013, and their estimate is the past wage loss for one month is approximately $8,000.

[75] The plaintiff's position on past wage loss relies on a hypothetical event – that he would have continued working at PCL from 2016 to 2022 without the accident. Proof of a hypothetical event is the same whether it is a past or future event, and proof on a balance of probabilities is not required. This was made clear in *Grewal v. Naumann,* 2017 BCCA 158:

> [45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. Rowles J.A. wrote for the court. She explained

> that the plaintiff in the first instance was required to establish both liability and causation on a balance of probabilities. This required the plaintiff to establish that the respondent's negligence, in whole or in part, caused the accident, and that the injuries the appellant sustained in the accident caused or contributed to the loss for which damages were sought (para. 26).
>
> [46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:
>
> > [29] … What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
>
> [47] I note that neither *Reynolds* [*v. M. Sanghera & Sons Trucking Ltd.*, 2015 BCCA 232] nor *Ostrikoff* [*v. Oliveria*, 2015 BCCA 351] referenced *Smith*. To the extent that those decisions could be read to hold that a past hypothetical event must be proven on the balance of probabilities, they must be regarded as *per incuriam*.
>
> [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
>
> [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[76] The onus is on the plaintiff to show that continued employment at PCL from 2016 to 2022 was a real and substantial possibility, and not mere speculation. The plaintiff does not need to prove this on a balance of probabilities. If the court finds this hypothetical event was a real and substantial possibility, the court will have to assess the relative likelihood of this event occurring.

[77] In this case, I find it was a real and substantial possibility that Mr. Finley would have continued working at PCL after 2016 without the accident. Mr. Finley testified

that it was a well-paying job, and that he was performing well. All the witnesses from PCL who testified at trial agreed that Mr. Finley was well-regarded within the company and a hard worker. Mr. Finley was recruited from the United Kingdom and he testified that immigrating with his family to Canada was expensive, and not a decision that could have been easily reversed.

[78] However, in terms of the relative likelihood that Mr. Finley would have stayed at PCL from 2016 to 2022, I find the likelihood to be low. While I acknowledge that Mr. Finley and his wife both testified the plan was for Mr. Finley to work at PCL until the age of 60, Mr. Finley's actions speak otherwise. I note that Mr. Finley and his wife had started looking for a farming property before the accident. This shows a pre-existing intent to move in another direction, even without the accident. Mr. Finley purchased and moved to the Langley property in 2013, which was a move further away from his job at PCL, necessitating a longer commute. At the time of the move, the accident had occurred and Mr. Finley was already finding longer drives difficult. It can be argued that if the accident had not occurred, the length of the drive would not be a relevant concern and this factor is neutral. However, in assessing the likelihood of Mr. Finley staying at PCL after 2016, the court cannot ignore facts which speak to this likelihood.

[79] Further, there is no evidence that Mr. Finley pursued to the full extent possible what accommodations PCL was willing to provide so he could continue working. The evidence was that PCL was tolerant of all the modifications Mr. Finley had sought. There is no evidence that PCL was not willing to allow Mr. Finley to break up his desk duties, to provide ergonomic equipment, to look for different ways for Mr. Finley to get his paperwork done. The evidence from Mr. Sadler and Ms. Neil, his supervisors on two different projects, was that Mr. Finley never approached them with any concerns, and never consulted them on whether he should leave the company. Mr. Finley did not pursue with PCL whether there was any possibility he could have transferred to a different role, at least on a temporary basis.

[80] Mr. Finley had reported to Dr. Waspe in April 2016, two months before he left PCL, that he felt he was back to 70% of his pre-accident health. He did not consult with Dr. Waspe or any of his medical advisors on whether he ought to quit. None of the doctors advised him to quit PCL. There is no medical evidence that Mr. Finley could not have continued working at PCL with the appropriate accommodations. The evidence is Mr. Finley continued to do his job for four years after the accident and there were no complaints about his work. If a career at PCL was important to him, one would have expected Mr. Finley to have pursued and exhausted other alternatives prior to resignation. There were negative contingencies which may have affected his decision to continue working at PCL without the accident, such as burnout from the extremely long hours, the desire to change his lifestyle to a more sustainable way of life, and wishing to spend more time with his family. Mr. Finley testified that his work at PCL was extremely high stress physically and mentally and did not leave him much time to spend with his family. While I accept Mr. Finley was an honest witness, I find his evidence at trial that he was planning to work at PCL until he retired at age 60 must be assessed in light of all the evidence to determine the relative likelihood of this hypothetical event. I find, due to personal reasons unrelated to the accident, that the relative likelihood of Mr. Finley staying at PCL until age 60 was low.

[81] For all these reasons, I find that the reasonable likelihood of Mr. Finley staying at PCL from 2016 to 2022 to be about 20%. Using this as a guide, I assess his past wage loss to be 20% of $422,400, which is $84,480. I round this up to $90,000. The parties advise they will agree on the appropriate tax deductions for this portion of the award.

X. FUTURE LOSS OF EARNING CAPACITY

[82] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court of Appeal recently restated the operative principles to determine loss of future earning capacity, which had previously been revisited in *Dornan v. Silva,* 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345, and *Lo v. Vos*, 2021 BCCA 421:

> [7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to

> their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.
>
> [8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, Grauer J.A. clarified this approach. Although the judge did not have the benefit of *Rab* when he wrote his reasons, the principles summarized therein are not novel; they have been the applicable law for a considerable time.
>
> [9] I will repeat those principles here, drawing heavily on *Rab*. I do so because it is clear the judge did not undertake the requisite steps when assessing damages, nor did he make the findings of fact necessary to quantify an award. This dearth of analysis leaves us to speculate on the basis for the award, as it did in *Schenker v. Scott*, 2014 BCCA 203 at paras. 55–56.
>
> [10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:
>
> > [47] … The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

[83] Mr. Finley argues that because of the accident, he lost the capacity to continue his employment at PCL until age 60. He seeks as damages the difference in present value from what he would have earned at PCL from 2022 until 2034, when he turns 60, and what he is capable of earning now working as a contractor. Using the figure of $127,000 a year working as a contractor, Mr. Finley argues this is approximately $100,000 a year less than if he had continued working at PCL. He argues using the multiplier supplied in Mr. Carson's report, this translates into a present value for the future loss in the amount of $1,060,700. If the court finds Mr. Finley's residual earning power is greater than $127,000 per year, the loss would be less. He seeks $750,000 for future loss of earning capacity, which he argues is a reasonable assessment of his limitations since the accident.

[84] The defendants argue Mr. Finley has not proven any future loss of earning capacity. They argue Mr. Finley has not taken a significant period of time off while he was at PCL, and since leaving PCL, he has engaged in physically demanding business pursuits such as farming and general contracting. Their position is that this shows Mr. Finley has not been rendered less employable due to the accident, and any lasting injuries from the accident has not led to any loss of earnings. The defendants argue Mr. Finley ought not be granted any damages for loss of future earning capacity or $50,000 at most.

[85] The first step in ascertaining future loss of income is to determine whether the evidence discloses a potential future loss of earning capacity. I accept, based on the evidence, that there is a potential for Mr. Finley to no longer be able to work as a construction superintendent, due to limitations on his ability to do administrative tasks which require desk work. It may be that any future employer may not be willing to accommodate Mr. Finley by providing him flexibility in when and how he performs his administrative tasks. The second step is for Mr. Finley to show there is a real and substantial possibility this future event will lead to economic loss. Mr. Finley relies on the hypothetical that without the accident, he would have worked at PCL until age 60. For the same reasons stated in my discussion under loss of past income, I accept that he has proven there is a real and substantial possibility he would have worked at PCL after 2016 without the accident. However, as more time passes since the accident, my view is that the relative likelihood of Mr. Finley staying at PCL diminishes, for the same reasons as discussed under loss of past income.

[86] The third step is to assess the value of that possible future loss. To prove there is a loss of future income, Mr. Finley relies on two assumptions: that he would have continued to work at PCL until age 60 without the accident, and that his residual earning power is what he would be able to earn as a contractor working at $85 per hour full-time with some deductions. Mr. Finley essentially seeks the difference between these two figures, arguing that shows his loss. However, the relative likelihood of Mr. Finley continuing at PCL after 2016 was low. Further, I expect his residual earning capacity will grow greater once his general contracting business is

established. He will be able to charge more than $85 per hour with more experience; he will likely not need to continually buy more tools and equipment as he becomes established; he has shown he is capable of working long hours and he may decide to work more than 40 hours per week if that will be profitable to him. Further, his farm and cidery business may far exceed his site superintendent salary. There has been no evidence tendered of what the future profits may be from his farm and cidery.

[87] The evidence does not support that Mr. Finley has any significant limitations on his ability to earn income. The main limitation to his functional capacity is his ability to sit for a prolonged period of time and look down to do desk work. There is no evidence to support that he has any significant limitations to his ability to do physical work. In fact, Mr. Finley has built a house, installed fencing, laid irrigation pipes in the ground, converted a shipping container into a living unit and established two farms – one in Langley and one in Creston. While he did not do these tasks alone, I find he was an integral part of each of these endeavours. There is no evidence that Mr. Finley has been permanently disabled. Dr. Waspe stated in her report that, in her view, he is partially disabled, but not permanently so.

[88] I find that as we move forward in time, Mr. Finley's residual earning capacity will increase as he will be able to charge more than $85 an hour as a contractor. In my view, it is reasonable to estimate that Mr. Finley would be able to earn $177,000 per year from his general contracting business, which was an alternative figure put forward by his counsel. Using this figure, the difference between what he would have earned if he stayed at PCL until age 60 and his residual earning capacity working as a general contractor is approximately $530,350. Applying the negative contingencies already discussed, I find that there was a 20% likelihood he would have stayed at PCL without the accident. The $530,350 loss ought to be reduced to $106,070. The evidence supports that Mr. Finley's condition will continue to improve with appropriate treatments, and in a few years, he may be able to pursue construction jobs with an administrative role. In my view, an award of $110,000 for loss of future earning capacity is fair and reasonable in the circumstances. Mr. Finley is resourceful and able to work.

XI. COST OF FUTURE CARE

[89] When determining a cost of future care award, the court should try to restore the plaintiff, as best as possible with a monetary award, to the position he 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 at paras. 29–30.

[90] The plaintiff seeks $98,000 for cost of future medical treatments. This is broken down into one-time treatments and ongoing treatments listed in Mr. Hosking's cost of future care report. In addition, Mr. Finley seeks an annual amount of $5,000 to cover the estimated costs of funding the annual items listed in the report. Mr. Finley seeks an award of $98,000 representing the present value of the costs of these treatments for 23 years, until he turns 70 years old.

[91] The defendants submit an award for cost of future care ought to be from $5,000 to $15,000. The defendants argue some of the treatment options listed in Mr. Hosking's report are not medically recommended, some are not reasonable and some of these treatment options will not be used by Mr. Finley.

[92] The following are the items listed in Mr. Hosking's report:

1. Physiotherapy: cost of 34 to 38 sessions $2,905 to $3,330, recommended by Mr. Hosking.

2. Supervised exercise program with a kinesiologist: cost of 10 to 12 sessions $875 to $1,045, recommended by Dr. Waspe and Mr. Hosking.

3. Massage therapy: cost of 6 to 12 sessions $750 to $1,500 per year, recommended by Dr. Waspe to be ongoing to manage flare-ups.

4. Gym membership with pool access: annual membership of $484, recommended by Dr. Waspe to be ongoing as long as symptoms persist.

5. Self-acupressure device: cost of machine $60 and $11 per year for refills, recommended by Dr. Waspe.

6. TENS unit and refills: cost of machine $195 to $484 and $64 per year for refills, recommended by Dr. Waspe.

7. Various oral medications: estimate of $3,500 a year if effective, recommended by Dr. Waspe.

8. Topical inflammatory pain ointment: $300 to $550 a year, recommended by Dr. Waspe.

9. Painkillers such as ibuprofen: $110 to $900 a year, recommended by Dr. Waspe.

10. Botox injections to treat headaches: $1,500 to $2,400 a year if effective, recommended by Dr. Waspe.

[93] The plaintiff advised in oral argument that the ongoing treatments are the massage therapy, the gym membership, the oral medications, the refills required for the self-acupressure device and the TENS unit. I agree with the defendants that as there is evidence the plaintiff will not take oral medications due to stomach upsets, there is no basis to award the oral medications or the painkillers. I accept Dr. Waspe's evidence that the plaintiff had financial difficulties that restricted access to certain treatments which may have been helpful. However, I find there is no basis in the evidence to award the ongoing treatments for 23 years. Dr. Waspe did not provide any timeline for how long Mr. Finley would require access to these medical treatments; however, she did note that, in her view, Mr. Finley's condition will improve. I find an award for 10 years of treatment is a reasonable timeline, as it will likely be that Mr. Finley will continue to improve.

[94] I make the following awards:

Physiotherapy	$3,500
Supervised exercise program	$1,100
Massage therapy	$1,500/year for 10 years for $15,000
Gym membership	$500/year for 10 years for $5,000
Self acupressure device	$60 and $110 for refills for 10 years for total of $1,160
TENS unit	$500 and $700 for refills for 10 years for total of $1,200
Topical pain ointment	$5,500
Botox injections	$2,400 a year for one year to see if effective. There is no evidence to support an award of this treatment for longer than one year on a trial basis

[95] This totals $34,860. This will be rounded up to an award of $35,000 for cost of future care.

XII. LOSS OF HOUSEKEEPING CAPACITY

[96] The plaintiff seeks an award for loss of housekeeping capacity. In *Kim v. Lin* 2018 BCCA 77, the Court set out the two routes for determining such an award:

> [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu* [*v. Bains*, 2016 BCCA 374], "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

> [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.

[97] The plaintiff seeks $27,760 for past loss of housekeeping capacity, and $40,000 for future loss of housekeeping capacity. The plaintiff argues the evidence shows that since the accident, Mrs. Finley has taken over doing the household chores, spending about two to three hours additional per week performing these duties. Mr. Finley argues this should be valued at $25 per hour.

[98] The defendants argue there should be no award for loss of housekeeping capacity, as the evidence shows Mr. Finley is capable of heavy, physical labour. The defendants point to the evidence of the work done by Mr. Finley as a general contractor and in the farm to support their position that Mr. Finley is capable of doing household chores.

[99] The evidence does not support Mr. Finley's position. None of the medical experts were of the view that Mr. Finley required assistance with regular household chores. Both of the functional capacity evaluations, conducted in 2013 and 2018, stated that Mr. Finley was capable of performing regular housekeeping activities. The only recommendation was for assistance with heavier, seasonal cleaning and yard maintenance. Mr. Hosking's report stated an annual cost of $1,500 for twice per year assistance. I find an award of $7,500 is a reasonable amount, taking into account the physical abilities of Mr. Finley as well as the prognosis for improvement.

XIII. SPECIAL DAMAGES

[100] The parties agree that an award of $17,804.13 ought to be made for the out-of-pocket expenses incurred as a result of the accident, and I award that amount.

XIV. CONCLUSION

[101] In summary, I award the following:

Non-pecuniary damages	$100,000.00
Past loss of earnings	$ 90,000.00
Future loss of earning capacity	$110,000.00
Cost of future care	$ 35,000.00
Loss of housekeeping capacity	$ 7,500.00
Special Damages	$ 17,804.13
Total award	$360,304.13

[102] Unless there are matters the court is not aware of, Mr. Finley has been successful in this action and he ought to be awarded his costs on Scale B. If the parties wish to make submissions on costs, they are directed to set a date with the registry within 14 days of receiving this ruling.

"Chan J."