

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thomas v. Campbell*,
2023 BCSC 36

Date: 20230109
Docket: M166743
Registry: Vancouver

Between:

Jason Emerson Thomas

Plaintiff

And

Dale George Campbell and Janelle Yvonne Cowhig

Defendants

Before: The Honourable Madam Justice Girn

Reasons for Judgment

Counsel for the Plaintiff:

R.A. Holness

Counsel for the Defendant, Dale George
Campbell:

J.M. Noble
K. Green

Place and Dates of Trial:

Vancouver, B.C.
April 4-11 and 13, 2022

Place and Date of Judgment:

Vancouver, B.C.
January 9, 2023

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INTRODUCTION

[1] The plaintiff, James Emerson Thomas, seeks compensation for injuries he suffered in a motor vehicle accident on October 29, 2015 (the “Accident”).

[2] Liability has been admitted by the defendant, Mr. Campbell (the “defendant”). The plaintiff discontinued his claim against the defendant, Janelle Yvonne Cowhig.

[3] As a result of the Accident, the plaintiff says that he suffers from neck, upper back/trapezius, low back, shoulder and right leg pain. He says the most disabling injury is to his low back. As well, he says that he suffers from anger and changes in his mood.

[4] The plaintiff seeks non-pecuniary damages, loss of earning capacity (both past and future), cost of future care, and special damages. Loss of homemaking capacity is being claimed under general damages.

[5] The defendant acknowledges that Mr. Thomas was injured in the Accident, but he takes issue with the extent of the alleged injuries, their impact on his life, and the quantum of damages claimed. Their position is premised on expert medical evidence that suggest that while the accident caused the plaintiff to suffer lower back pain, this “faded away” after two years and was followed by a number of medical problems unrelated to the accident.

[6] Special damages have been agreed by the parties at \$8,148.

[7] The issues for determination are:

- a) the nature and extent of the plaintiff’s injuries;
- b) the appropriate quantum of an award for his non-pecuniary damages;
- c) the appropriate award for past and future loss of earning capacity; and
- d) the appropriate award for cost of future care.

BACKGROUND

[8] The plaintiff was 40 years old at the time of trial. Before the Accident, he worked as a qualified asbestos building inspector and ran his own successful business in the hazardous waste removal industry. The plaintiff is also a part owner of a plumbing company, in which he serves as a business adviser. He is not making any claims in relation to this company. At the time of trial, the plaintiff had also set up a third company in the hazardous waste removal industry.

[9] Lay witnesses testified on behalf of the plaintiff regarding his pre and post-accident work, family and social circumstances. They included his brother, Colin Thomas; his partner, Lace Van Egmond; Kelvin Johnston, project manager; and Dean Kotopski, the plaintiff's physiotherapist.

[10] The plaintiff also relied on expert opinion evidence from Dr. Ivan Crothers, his family physician, and two psychiatrists, Dr. Shawn McCann and Dr. Gillian Simonett.

[11] The defendant relied on expert opinion evidence from Dr. Joseph Wong, a psychiatrist; Dr. John Sun, a neurosurgeon; and Mark Szeleky, an economist .

The Plaintiff's Circumstances Before the Accident

[12] The plaintiff grew up in Port Coquitlam. At the time of the Accident, the plaintiff was living with his partner, Ms. Van Egmond. The plaintiff has two sons from a previous relationship with who he has parenting time on weekends. He also has a step daughter, who is Ms. Van Egmond's daughter from a previous relationship.

[13] The plaintiff has worked in the construction industry since the age of 17 when he began working as a labourer with a restoration company. After a few years, he moved onto a job doing hazardous waste removal and quickly took on abatement project management roles. The plaintiff testified that he chose this line of work because he was able bodied and could make a lot of money in this industry. The plaintiff has been very industrious in making himself more qualified in this line of work by obtaining a number of certifications in the handling of hazardous waste materials.

[14] In 2010, the plaintiff was hired as a project manager with Urban Environmental Asbestos and Abatement Ltd. (“UEAA”) with a base salary and 50% profits from the company. It is clear that the plaintiff worked extremely hard to build and develop the company and in 2015, he became the sole shareholder and owner of UEAA. The plaintiff’s evidence has demonstrated that he has excelled in his chosen profession. He has been motivated to take advantage of opportunities presented to him at an early age, which has allowed him to become very successful.

[15] The plaintiff’s duties at UEAA included project management as well as managing the day to day responsibilities of operating the company. The plaintiff testified that prior to the Accident he was a very hands-on owner – went into the trenches with his staff to motivate them as often as he could.

[16] The plaintiff testified that, as a project manager, the physical components of his job included wearing a hazmat suit, carrying multiple 50 lbs rolls of asbestos poly bags into homes, unloading and moving equipment, and performing inspections in small spaces such as crawl spaces and attics.

[17] A routine day involved him working 12-15 hours: starting work at 7:00 am at home, then working both at the office and offsite throughout the day, and then continuing to work at home until 7pm. A key part of his work involved performing site estimates and inspections, which would take anywhere from 4-6 hours per day including driving to and from the sites. This took up a significant part of his day as he serviced the Greater Vancouver and Fraser Valley areas. The plaintiff testified that he would spend up to 8 hours per day supervising and managing staff. Much of his management was done in his vehicle with his cell phone.

[18] The plaintiff testified that the number of employees increased as the business grew. When he took over UEAA, there was no project manager. However, along with him performing project management duties, he was also grooming a long-time employee, Trevor to become a project manager, who he hoped would eventually take over the business.

[19] At the time of the Accident, the plaintiff was also a part owner of a plumbing company, Clearly Plumbing. His role was that of a business advisor and did not participate in any day to day work. The plaintiff received dividends as a shareholder. As stated previously, the plaintiff is not making any claim in relation to this company.

[20] Prior to the Accident, the plaintiff testified that he would do activities with his children, including taking them to the park. He said he played golf approximately six times a year. I note that Ms. Van Egmond and his brother testified that the plaintiff was not an active person, but rather enjoyed taking clients to sporting events, and going out with his brothers and partner to events such as concerts.

[21] The plaintiff testified that he did not do very much housekeeping. He stated that his partner, Ms. Van Egmond, who did not work outside the home, and housekeepers did most of the cleaning. He also stated that he would cook food that had already been prepared by his partner. While the plaintiff performed some yard work and other physical work around the home, he did hire others to do most of this work. He also assisted with the various renovations to his homes but he “cherry picked” the tasks he wanted to take on. He hired tradespersons and his brother to do most of the renovations. This was confirmed by his brother.

Plaintiff’s Pre-Existing Medical Conditions

[22] The plaintiff argues there is no evidence that he had any prior medical conditions relating to his neck, upper back, shoulders, low back or right leg that impacted his function prior to the Accident. He says that this is supported by the testimony of his family physician, Dr. Crothers.

[23] Specifically, he points out that in the four years prior to the Accident, the plaintiff did not complain of any pain or was treated by Dr. Crothers in these areas. The plaintiff did testify in regards to having normal back pain prior to the Accident, but denied that it was chronic.

[24] The plaintiff says his prior degenerative disc disease in his low back was therefore a “quiescent” vulnerability that was triggered by the Accident.

The Accident

[25] The circumstances surrounding the Accident are not disputed. At the time of the Accident, the plaintiff was driving his work truck when he entered the intersection of Sumas Way and Delair Road in Abbotsford, British Columbia. The defendant was operating a van driving in the opposite direction, turned left and collided with the plaintiff's vehicle on the rear driver's side. This impact caused the plaintiff's vehicle to collide with another vehicle to his left. The plaintiff did not require any immediate medical attention and was driven from the scene by an employee. Later that day, the plaintiff was evaluated by Dr. Crothers.

The Plaintiff's Circumstances After the Accident

[26] Shortly after the Accident, the plaintiff was seen by Dr. Crothers. The plaintiff testified he had pain in the lower back, which radiated down his leg and was prescribed anti-inflammatory medication along with Tylenol. The pain became worse as the weeks and months went by and he continued to see Dr. Crothers.

[27] He testified that these injuries have resulted in constant low back pain, numbness, reduced range of motion, immobility, anger, and changes in his mood and depression. He testified that the most disabling injury is to his low back. The plaintiff says that the injuries sustained from the accident have had a "devastating impact on his quality of life" both professionally and personally.

[28] The plaintiff testified that since the Accident, he has gained a significant amount of weight. He was depressed and started to eat a lot more. His weight went from 330 pounds pre-accident to 380-390 pounds in 2018. However, since then, he has been able to lose much of the gained weight by working with a fitness trainer and focussing on his diet. He also has a gym set up in his home.

[29] The plaintiff says his activities are limited due to the injuries from the Accident including the time he spends with his children, housekeeping duties, and yard work. His symptoms have prevented him from playing a full round of golf since the Accident.

[30] Ms. Van Egmond gave evidence that since the Accident, the plaintiff arrives home early from work and appears to be in pain. She helps by applying anti-inflammatory cream and massaging his neck and back several times per week. He will often come home and lay on the sofa or go to sleep.

[31] However, in cross-examination, she agreed that the plaintiff has continued to work on the phone when he returns home at the end of the day. The plaintiff enjoyed cooking, but she does most of the cooking now. Their intimate moments have gone down from two times per week to one time per month. The plaintiff is often irritable and angry, which has been directed at times on the children and her.

[32] The plaintiff testified that home renovations are now being done by his brothers. The plaintiff's brother, Colin Thomas, testified that he helped the plaintiff with many renovations at the plaintiff's home prior the Accident. Since the Accident, he has continued to help the plaintiff, including a bathroom renovation.

[33] Presently, the plaintiff testified that he continues to deal with "residual physical and emotional symptoms" from the Accident. He says that he feels constant pain in his low back along with flareups that require him to be bedridden. This was confirmed by Ms. Van Egmond.

[34] At work, since the Accident, he has not able to go into tight spaces such as crawl spaces and attics to conduct inspections and avoids putting on a hazmat suit and driving, activities which give him pain.

[35] Trevor was fast tracked into project management after the Accident because the plaintiff said he could not work to his pre-Accident capacity. He also had two other managers to take on these tasks. Specific evidence on how the tasks of the other managers increased after the Accident was not led nor elicited in cross-examination.

[36] The plaintiff says that the year following the accident, he attempted to use his existing staff to cover site inspections and the heavy work and driving. The plaintiff testified that he tried to manage projects from his office but gradually felt his business was beginning to fall apart – he realized he was going to have a critical failure if he

did not do something about it. He testified that he made the decision to hire Kelvin Johnston in October 2016, someone whom he had known for years and had been a mentor to the plaintiff.

[37] The plaintiff says hiring Mr. Johnston reduced his driving and site inspections duties from 4-6 hours to 2-3 hours per day. According to the plaintiff, Mr. Johnston was also able to take care of the project estimates and was on site to manage the crew. This allowed the plaintiff to focus on the operations of the company and spend more time managing the business.

[38] This arrangement has continued to present. Currently, the plaintiff does a lot of the phone consultations and talks to clients on the phone. However, he still relies on Mr. Johnston to be out in the field. The plaintiff testified that he also passes site inspection duties to another project manager. The plaintiff says but for the Accident, as his business grew, he would have continued with the onsite inspections and managing projects and would not have needed to hire Mr. Johnston.

Kelvin Johnston – Project Manager

[39] Mr. Johnston is a project manager employed by UEAA. His evidence is particularly important given the plaintiff’s claims for past and future loss of earning capacity revolves around the hiring of Mr. Johnston.

[40] I found Mr. Johnston to be a credible witness. He was forthright in his answers, both in direct and cross-examination. I did not find him to exaggerate the extent of this work at UEAA or the plaintiff’s role in UEAA.

[41] Mr. Johnston met the plaintiff 12 years ago when they both worked for a restoration company. He mentored the plaintiff when they worked together. After the plaintiff left to run his own business, Mr. Johnston awarded many jobs to the plaintiff because of his ability to bid for contracts and skills in estimating the cost of the work.

[42] Mr. Johnston testified that the plaintiff said he should come work for UEAA. Mr. Johnston says they spoke about the idea for a better part of a year during which

the plaintiff kept offering him the job, but Mr. Johnston was unable to commit. Mr. Johnston recollects that the plaintiff said if he came to work for the plaintiff, Mr. Johnston would be in charge [at UEAA] and could drive the plaintiff's "big" truck. Johnston testified that he knew the plaintiff had been in an accident because the truck being offered to him was the vehicle involved in the accident, and that the plaintiff did not want to drive it anymore.

[43] Mr. Johnston said he was aware the plaintiff was looking to grow his company. Mr. Johnston also stated that given his experience in the industry, he knew what the plaintiff needed to expand his small company.

[44] Mr. Johnston did not testify that he was hired because the plaintiff was having difficulties doing certain work because of the injuries he sustained due to the Accident or that he was hired to replace the plaintiff's work.

[45] In October 2016, Mr. Johnston agreed to start working for UEAA as a project manager. He was paid a base salary of \$100,000, benefits and bonuses based on sales and revenue. Mr. Johnston that this was a pay cut from his former job but he wanted to work for a smaller company.

[46] Mr. Johnston stated that when he first began working for the plaintiff, he knew that he would have to find his own work. I take this to mean that he would need to bring in his own clients and projects. Initially, he assisted the plaintiff because he did not have his own projects. Consequently, he did a lot of physical work in the first few months, which included conducting site inspections as well as providing direction to the staff in order to make them more efficient.

[47] In the first six months at UEAA, Mr. Johnston also designed and constructed UEAA's new office in Coquitlam with help from other employees, rather than hiring outside contractors. When asked if the plaintiff assisted in the warehouse, Mr. Johnston replied, "no, he's the big boy and gets everyone else to do it."

[48] Initially, Mr. Johnston testified that he was doing more of the plaintiff's jobs because he did not have his own. I take that to mean "projects". Mr. Johnston became

busier with projects and inspections he brought in. He said he wanted to load up on project managing rather than doing physical labour work. However, Mr. Johnston continued to assist with the physical work at UEAA when he had time. Currently, Mr. Johnston is doing more of his own jobs and confirmed there are three fulltime project managers, which includes him, the plaintiff and Trevor.

Treatment

[49] From December 1, 2015 to March 24, 2016, the plaintiff attended physiotherapy. He testified that exercising and stretching helps relieve his pain but only does them when he can, despite having a home gym. He takes anti-inflammatory medication for the pain including a prescription topical cream. Since March 2016, he has not received any other medical treatments.

[50] The plaintiff also worked with a fitness trainer and then continued exercises in his home gym.

Dean Kotopski – Physiotherapist

[51] Mr. Kotopski was called as a fact witness. The plaintiff attended 16 physiotherapy treatments with Mr. Kotopski from December 1, 2015 to March 24, 2016. He also missed 6 scheduled appointments. Treatment included heat, manual therapy, soft tissue mobilization, acupuncture, and exercise therapy. The plaintiff was taught exercises to perform at home. Mr. Kotopski confirmed the plaintiff had gotten better over the course of his treatment. He reported improvement in pain, had decreased soft tissue ‘tone,’ and resolution of the radiculopathy down the right leg.

EXPERT EVIDENCE

Plaintiff’s Experts

[52] The plaintiff relies on three experts – Dr. Crothers, general practitioner; Dr. McCann, physiatrist; and Dr. Simonett, physiatrist.

[53] As this juncture, I will note that there was no expert evidence presented on the plaintiff’s current or past work capacity. I will return to this later in these reasons.

Dr. Ivan Crothers – General Practitioner

[54] Dr. Crothers had been the plaintiff's family physician since 1987 until his retirement in 2022. He prepared a report dated April 7, 2017.

[55] Dr. Crothers diagnosed the plaintiff with soft tissue injuries of his neck and back, along with an exacerbation of his degenerative disc disease/osteoarthritis in the lumbosacral spine with right foot numbness. He recommended physiotherapy as well as pain and anti-inflammatory medications.

[56] Regarding the plaintiff's pre-existing condition, Dr. Crother's report notes:

On review of past medical history, this man is known to suffer from degenerative disc disease/osteoarthritis of his lumbar spine and has had several previous sprain/strain soft tissue injuries of his back.

...

In summation, this man suffered soft tissue injuries to his back in a motor vehicle accident. This was not his first soft tissue injury. His back slowly settled. There was no evidence of bony injury on his x-rays. Injection of glucocorticosteroid in his back was performed because of ongoing pain.

Prognosis for these injuries is that hopefully they will settle down. The plaintiff's situation is complicated by pre-existing advanced degenerative disc disease/osteoarthritis of his spine. Pain may exacerbate from time to time related to psychological stress, excessive physical use, viral infections, etc. but hopefully pain will settle over the next one to two years.

[57] Dr. Crothers also testified about the plaintiff's health issues post-Accident. Dr. Crother's testified that, from January 2018 to April 2019, the plaintiff began suffering hypertension, multiple atrial fibrillations, cardioversions and eventually underwent two heart surgeries. The plaintiff made several visits to the emergency department. Dr. Crothers' clinical records indicate that from January 2017 to December 2019, the plaintiff's medical visits almost exclusively focused on his heart health.

[58] Dr. Crothers' clinical notes also indicate that in November 2018, the plaintiff was smoking up to 40 cigarettes per day. In March 2019, the plaintiff was advised to cease smoking and drinking alcohol and begin an exercise regiment to lose weight.

[59] In cross-examination, the plaintiff did not dispute that he had heart health issues from January 2017 to December 2019. He also agreed he took time off after each of the heart surgeries and that he continues to see a cardiologist.

Dr. McCann – Physiatrist

[60] Dr. McCann was qualified as an expert in physical medicine and rehabilitation able to diagnose, treat and prognosticate on traumatic and chronic conditions, including soft tissue injury, mechanical low back pain, and degenerative disc disease. After examining the plaintiff, he wrote a report dated January 17, 2018.

[61] Regarding causation, Dr. McCann noted the following:

lumbar back pain and radiculopathy: It is my opinion that the patient suffered a type 2 whiplash associated disorder of his lumbar spine at the time of the motor vehicle accident that has resulted in increased lower back pain, radiation of pain down his right leg.

the soft tissue injury occurred on the background history of degenerative disc disease in his lumbar spine. Based on the information provided by the patient, the symptoms were mostly mechanical with some mild radicular features down the right leg which worsened after the accident.

the plaintiff had undergone a right L4 nerve root block in March 2017 that “dramatically helped his leg pain and back pain.”

Neck pain: He most likely suffered a mild soft tissue injury to his cervical spine at the time of the injury that would be consistent with type 2 whiplash associated disorder. Over time, this most resolved.

Left shoulder: he eventually developed pain in his left neck and restriction of his range of motion in the left shoulder. The restriction in the range of motion of the left shoulder and severe pain in the left shoulder occurred well after the accident and I cannot attribute the development of this left shoulder pain to the events of the motor vehicle accident.

[Emphasis added.]

[62] Regarding prognosis, Dr. McCann opined that the plaintiff is restricted in terms of his ability to perform overhead work and repetitive stooping, bending and prolonged sitting. The plaintiff’s lower back pain restricts his ability for prolonged sitting because it increases the “intradisc pressure in the lumbar spine and will lead to more symptoms down the right leg.”

[63] Dr. McCann opined that, “as long as [he] delegates physical lifting and prolonged sitting to his employees, he should be able to maintain his management position in the three companies he runs. Driving longer distances for site inspections will worsen his pain and discomfort”.

[64] Regarding future treatment, Dr. McCann opined that the plaintiff will likely require a further nerve root block to his lumbar spine in the next 6-12 months to alleviate the pain down his right leg. He also noted that the plaintiff will not require surgery on his lower back in the next 5-10 years. He suggested the plaintiff improve his overall fitness level and core stability, and thus recommended 8-15 future treatments with a fitness trainer. However, he noted that a trainer was not necessary indefinitely.

[65] I found that Dr. McCann was a balanced and credible witness. Where his evidence contrasts with that of Dr. Simonett, as described below, I prefer the evidence of Dr. McCann.

Dr. Simonett – Physiatrist

[66] Dr. Simonett was qualified as an expert in physical medicine and rehabilitation, with the ability to diagnose, treat and prognosticate on traumatic and chronic conditions including soft tissue injury, mechanical low back pain and degenerative disc disease. After examining the plaintiff, she wrote a report dated February 27, 2020.

[67] Dr. Simonett’s diagnosis was “most consistent with mechanical low back/hip pain with concerning features of radiculopathy”.

[68] She opined it is more likely than not that the Accident materially contributed to his low back pain and it is likely the Accident materially contributed to his leg pain.

[69] Regarding shoulder pain, Dr. Simonett opined that, given that the pain on the right shoulder was documented in September 2016 and left shoulder pain presented in September 2018, the direct relationship with the accident is “undetermined”. She recommends that the plaintiff have his blood glucose levels checked as this can

increase one's risk for adhesive capsulopathy. I prefer Dr. McCann's opinion over Dr. Simonett's relating to shoulder pain.

[70] Similar to Dr. McCann's opinion, Dr. Simonett opined that the plaintiff has work limitations to the more physical tasks such as putting on his hazmat suit as well as going into awkward positions, such as when doing an inspection, and concluded that it was medically reasonable for the plaintiff to hire an individual to do the more physically demanding tasks that he was no longer able to do.

[71] Dr. Simonett noted that the plaintiff did not discuss neck pain during her assessment.

Defence's Experts

[72] The defendant relies on three experts – Dr. Joseph Wong, a physiatrist; Dr. John Sun, a neurosurgeon; and Mark Szekely, an economist.

Dr. Joseph Wong – Physiatrist

[73] Dr. Wong was qualified as an expert in physical medicine and rehabilitation in the area of chronic pain. He examined the plaintiff and wrote a report dated December 10, 2019.

[74] Dr. Wong's report noted the absence of objective signs of injury. He opined that the plaintiff might have had soft tissue injury as a result of the Accident, but that it had subsided.

[75] The plaintiff takes issue with Dr. Wong's testimony and says that given that Dr. Wong only conducts medical examinations for ICBC, it is tenuous as to whether Dr. Wong can be considered impartial. I am unable to agree with the plaintiff's assertion. Dr. Wong testified that he also provides expert testimony for plaintiffs in Ontario. Pursuant to Rule 11-2, an expert has a duty to assist the Court and is not to be an advocate for any party. Even if I were to find that Dr. Wong only conducted assessments for ICBC, that fact alone does not prove a lack of impartiality. The plaintiff has not provided any evidence that raises a realistic concern that Dr. Wong has not

met his obligations as an impartial expert. As such, I do not give any weight to the plaintiff's argument on impartiality.

[76] Dr. Wong agreed that soft tissue injury is a genuine medical condition. Dr. Wong further agreed that some people have long term pain which becomes chronic in the sense that the brain signals pain even if there is no longer a physical cause.

Dr. John Sun – Neurosurgeon

[77] Dr. Sun was qualified as an expert in neurosurgery. After examining the plaintiff, he wrote a report dated October 28, 2021. It is the most recent expert medical report.

[78] Dr. Sun concluded that there was a temporal relationship to the Accident and the plaintiff's injuries, and therefore the Accident is "causal". He also noted that the plaintiff's back pain and leg pain predated the Accident, but it accelerated or worsened matters.

[79] At p. 3 of his report, he writes:

Based on my review of the medical records provided to me, Mr. Thomas did have similar low back and right leg symptoms prior to the October 29, 2015 MVA. The plaintiff does not recall but believes he had sought medical attention for back problems prior to the October 29, 2015 MVA but it was not a chronic issue.

Medical documentation after the October 29, 2015 MVA does state that he had a history of degenerative disc disease/osteoarthritis of the lumbar spine and several previous sprain/strain soft tissue injuries of his back.

...it is probable that the Mr. Thomas had a pre-existing back condition that predisposes him to re-injury of his low back and cause low back pain and right leg pain. Without understanding his pre-existing condition more with medical records prior to the October 29, 2015 MVA, I cannot state whether he would have suffered similar symptoms regardless of the MVA. However, it is probable that the October 29, 2015 MVA aggravated or accelerated previous low back and right leg symptoms.

[80] Dr. Sun also opined that the plaintiff's neck and mid-back pain was not related to the Accident:

Based on my review of the medical record, Mr. Thomas made no further complaints of neck pain after November 2015. His next complaint of neck pain was September 10, 2017 when he presented to the emergency department. He was suffering of viral upper respiratory infection and had torticollis. At that time, the emergency physician stated that he woke up with a stiff neck three days ago and since then he had been getting worse. Therefore, it is my opinion that he did recover fully from the soft tissue injury of his cervical spine as a result of the October 29, 2015 MVA. A viral infection caused tension in his neck almost 2 years later with a recurrence of neck pain. Therefore, the October 29, 2015 MVA is not the probable cause of his recurrent and current neck pain.

[81] Regarding prognosis, Dr. Sun opined that since the plaintiff's complaints have been ongoing beyond the first year, they will likely persist into the future.

Mark Szekely – Economist

[82] Mr. Szekely is an economist with specialty in litigation in personal injury. He wrote a report dated January 5, 2022.

[83] Mr. Szekely reviewed the plaintiff's personal income tax returns from 2013-2016 and UEAA's revenues and expenses for fiscal periods ending September 30, 2014 to September 30, 2017.

[84] He noted that the company's expenses, in particular, direct wages, were higher for fiscal year 2017 than in previous years where they were relatively stable year after year. Mr. Szekely concluded that it is not possible to determine using the available information whether the Accident contributed to the higher wage costs or whether the higher wage costs were instead incurred to realize higher revenues.

ANALYSIS

Credibility and Reliability

[85] In making my findings, I must assess the credibility and reliability of the plaintiff and the other lay witnesses.

[86] Credibility and reliability are two different, but related, considerations. Credibility focuses on a witness's veracity, while reliability is concerned with the accuracy of the witness's testimony, with consideration of the witness's ability to

accurately observe, recall, and recount events in issue: *R. v. H.C.*, 2009 ONCA 56 at para. 41.

[87] When assessing credibility, I am guided by the factors set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296:

[186] 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).

[88] Where a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury, the Court must be exceedingly careful in assessing credibility: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399, 1982 CanLII 36 (S.C.); see also *Buttar v. Brennan*, 2012 BCSC 531 at paras. 24–25.

[89] I find that the plaintiff was generally a credible and reliable witness regarding the injuries which he suffered in the Accident, his symptoms post-Accident, and his work activities. While there were occasions when he was not able to recall certain health-related events, I find that is understandable given the Accident occurred almost seven years ago.

[90] However, there were certain aspects of the plaintiff's evidence that gave me cause for concern. For example, he was unable to recall a visit to the hospital in 2017 during which he had severe neck pain, even though it was a significant event. I also find that the plaintiff downplayed the serious heart health issues he developed after the Accident. I also find that his evidence relating to a key issue, the hiring of

Mr. Johnston, was not credible nor reliable. When comparing his evidence with that of Mr. Johnston's, I prefer the evidence of Mr. Johnston on this issue.

[91] However, as stated in *Rab v. Prescott*, 2021 BCCA 345 at para. 51, just because a plaintiff's evidence is not reliable, does not make their position untenable. While I find some of the plaintiff's evidence is unreliable, I have assessed his case on the basis of all of the evidence, and nonetheless conclude he is entitled to damages for injuries sustained from the Accident.

[92] I found the expert and lay witnesses to be generally credible and reliable. Where I found parts of their evidence problematic, I have addressed it below.

Causation

[93] In order for the plaintiff to recover damages from the defendant there must be a causal link between the Accident and his injuries. He must prove that the defendant's negligence was causative, both in fact and in law, of the damage he sustained: *Kallstrom v. Yip*, 2016 BCSC 829 at para. 316.

[94] The test to be applied in determining causation is the "but for" test. The plaintiff must show, on a balance of probabilities, that "but for" the negligent act or omission of the defendant, the plaintiff's injury would not have occurred. The "but for" test is not to be applied too rigidly and need not be determined with scientific precision. Rather, causation is a practical question of fact which can be best answered through the application of ordinary common sense: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328, 1990 CanLII 70.

Findings regarding the Plaintiff's Accident-related Injuries and Health

[95] The plaintiff does not dispute his past medical history, specifically, degenerative disc disease/osteoarthritis of his lumbar spine or previous soft tissue injuries to his back. The evidence of the medical experts was largely consistent in this regard.

[96] I accept the plaintiff's evidence that these pre-existing medical conditions did not impair his ability to do his job. This is supported by Dr. Crothers evidence that in

the four years prior to the Accident, there were no complaints regarding the neck, upper back, shoulder, low back or leg.

[97] Having considered all of the evidence, I find that the plaintiff suffered soft tissue injuries to his neck, lower back and right leg from the Accident. I also find that the Accident aggravated previous low back and right leg symptoms.

[98] I accept Dr. McCann's opinion that the nerve root block in March 2017 "dramatically helped his leg pain and back pain and the neck pain, over time, mostly resolved but did not resolve 100%."

[99] I conclude the plaintiff's complaints relating to his low back, neck and right leg pain have been ongoing and will likely continue into the future to the extent that it will impact his ability to return to his pre-Accident work duties at UEAA.

[100] However, I am unable to find that all of the injuries complained of by the plaintiff are causally connected to the Accident.

[101] The plaintiff has not proven on a balance of probabilities that the symptoms related to his shoulder pain were caused by the Accident.

[102] Medical records show that the plaintiff's symptoms relating to shoulder pain did not arise until months after the Accident. In September 2016, the plaintiff visited Dr. Crothers after he injured his right shoulder from moving from his house, where Dr. Crothers' noted that the plaintiff had capsulitis. In September 2017, the plaintiff attended Langley Hospital for neck and shoulder pain and was diagnosed with an upper respiratory infection and torticollis.

[103] I find the medical opinions of Dr. Sun, Dr. McCann and Dr. Simonett helpful in my assessment. Dr. Sun opined that a viral infection caused the tension in his neck. As well, Dr. McCann opined that the left neck pain and restriction of his range of motion in the left shoulder occurred well after the Accident and he could not attribute this pain to the Accident. Additionally, Dr. Simonett opined that the direct relationship of shoulder pain with the Accident is "undetermined." The plaintiff did not report shoulder

pain to either Dr. Sun or Dr. Wong. On the basis of all of the evidence, I am not persuaded that the shoulder pain would not have occurred but for the Accident.

[104] I find that the plaintiff did suffer from mood changes. The Supreme Court of Canada in *Saadati v. Moorhead*, 2017 SCC 28, endorsed the notion that claimants alleging mental injury are not required to show that their condition carries a certain classificatory label or a medically recognized diagnosis. His partner testified that his mood has changed, and he will often take it out on her and the children. The fact that he did not take medication nor attend counselling, does not equate to a lack of mood changes. I find that while his mood changes were not significant, the Accident did affect him psychologically.

[105] The plaintiff encountered a number of post-Accident health issues unrelated to the Accident, which I will return to in my assessment of future loss of earning capacity. I find that the plaintiff began having serious hypertension cardiac health issues which led to him having to visit emergency departments multiple times in early 2018 to April 2019. He underwent two heart surgeries which required him to take time off work. I accept the evidence of Dr. Crothers that between January 2017 to December 2019, his visits with Dr. Crothers focussed on his heart health.

[106] I find the heart health issues would have required the plaintiff to reduce his work from January 2018 onwards, which also impacted the plaintiff's ability to return to pre-Accident work capacity.

ASSESSMENT OF DAMAGES

Non-Pecuniary Damages

Legal Framework

[107] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The award should be fair to all parties and fairness requires reviewing comparable cases. However, each case must be assessed on its own unique set of circumstances: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[108] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal outlined a non-exhaustive list of factors to consider in assessing non-pecuniary damages:

- (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;
- . . .
- (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...

[109] The plaintiff submits that his stoicism is a factor that should not penalize him: *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 at paras. 54–55.

Position of the Parties

[110] Plaintiff submits that he has endured physical and mental pain and suffering, loss of amenities, and loss of enjoyment of life. He says that the injuries have had a devastating impact on his quality of life and he continues to have chronic pain in his lower back. The plaintiff seeks \$150,000 in general damages and relies on the following comparable cases:

- *Manoharan v. Kaur*, 2016 BCSC 692 (awarded \$170,000);
- *Corness v. Ng*, 2022 BCSC 334 (awarded \$150,000 before 20% deduction for pre-existing conditions); and
- *Zen v. Readhead*, 2011 BCSC 190 (awarded \$110,000).

[111] The defendant submits that the plaintiff did not provide many details on how the Accident changed his daily activities. From the limited evidence, they submit that he was not a very active person, which was confirmed by his brother and partner. The defendant says the appropriate award for non-pecuniary damages is in the range of

\$85,000 to \$90,000. They have not asked the Court to make any deductions for pre-existing conditions. The defendant relies on the following cases:

- *Pepe v. Barker*, 2021 BCSC 2298 (awarded \$100,000 but reduced to \$90,000 for failure to mitigate);
- *Brown v. Gill*, 2021 BCSC 1734 (awarded \$90,000); and
- *Honeybourn v. Aghdasidehaji*, 2022 BCSC 258 (awarded \$90,000).

Determination

[112] I am satisfied the plaintiff sustained soft tissue injuries, which were caused by the Accident and diminished his quality of life. He continues to have low back pain with flareups. There is hope for improvement if he continues his fitness regiment. The injuries have affected his ability to do certain aspects of his job, affecting his ability to conduct inspections and drive for long periods.

[113] The plaintiff's personal life has also been affected, including his relationships with his children and partner. He testified that he is unable to complete a full round of golf or do much yard work anymore. I found that the plaintiff was not a very active person and while the plaintiff did do work around the home, it was mainly taken care of by his partner, brother or paid workers. The plaintiff says he is not able to play with his kids as much as he did pre-accident.

[114] I found that the plaintiff suffered some psychological injuries as a result of the Accident. While there was no medical evidence to support the plaintiff's claim regarding depression and irritability, it is not surprising that the plaintiff suffered mood changes as a result of the Accident.

[115] I find that the cases cited by the plaintiff are not particularly helpful because in those cases, the plaintiffs sustained more serious injuries and the impact on their professional and personal lives were more profound and long-lasting.

[116] In *Manoharan*, the Court found that the quality of all aspects of the plaintiff's life was diminished and their prognosis was not favourable. I am unable to conclude that

is the case for the plaintiff. The facts in *Corness* are also not comparable. In *Corness*, the Court found that the plaintiff was well known for the high quality of his work, will not regain the ability to do what set him apart from his peers, and will not be able to engage in the heavy labour work of renovating homes. Mr. Corness' prognosis was much worse than that of the plaintiff. Finally, in *Zen*, the plaintiff could no longer push himself athletically, which was a central part of his life and the way he managed stress. As well, the Court found Mr. Zen's role with his children and spouse was diminished and significantly affected him. I have not made similar findings in the case at bar.

[117] Although each case is unique, I find *Pepe* and *Brown*, cases cited by the defendants, helpful because they have factual backgrounds that most closely align to the case at bar. In *Pepe*, the plaintiff sustained chronic soft tissue injuries, had a guarded prognosis, was able to continue working as a chef with modifications to pre-accident work activities, and faced a significant impact to his recreational and family life. In *Brown*, the plaintiff sustained chronic soft tissue injuries with some prospect of improvement, could function at a lower-level than pre-accident with daily activities, and also had an intervening event which caused an increase in symptoms.

[118] Considering the circumstances of the present case, the cases relied upon by the parties, and the factors in *Stapley*, I award the plaintiff \$90,000 in non-pecuniary damages.

Loss of Earning Capacity

[119] The parties do not agree with respect to the plaintiff's loss of earning capacity, both past and future. The plaintiff submits that Mr. Johnston's salary and benefits should be used in assessing his loss of earning capacity.

[120] The plaintiff seeks an award of \$606,116.08 for past loss of earning capacity, which represents Mr. Johnston's full salary, bonuses and benefits paid to him up to December 31, 2021.

[121] He further seeks an award of \$1,807,854.03 for future loss of earning capacity (\$117,000 per year (average annual salary plus benefits x 17.1686 (20 yrs. at 1.5%))).

This amount has considered a negative contingency of 10% to account for life expectancy.

[122] The defendant submits the plaintiff is entitled to no award under either head of damages, or in the alternative a modest amount.

[123] For past loss of earning capacity, the defendant's alternative position is that Mr. Johnston's net earnings from 2016 would be appropriate.

[124] For future loss of earning capacity, the defendant's alternative position is that any award should be based on the capital asset approach and the award should be in the range of 6-12 months of the plaintiff's pre-accident salary from UEAA or 6-12 months of Mr. Johnston's salary.

Past Loss of Earning Capacity

Legal Framework

[125] Chief Justice Hinkson recently considered the law on claims for loss of earning capacity in *Leach v. Insurance Corporation of British Columbia*, 2022 BCSC 557 at paras 231–233, 263–67 and 286–287. In *Leach*, the Chief Justice summarized the loss of earning capacity analysis:

[231] A plaintiff is only entitled to recover as damages the net amount of their past income loss as per s. 98 of the *Insurance (Vehicle) Act*.

[232] The claim for past wage loss is more properly referred to as a past loss of capacity, the loss of which can be measured in many different ways. It is not actual strict income loss but “a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[233] In *Smith v. Knudsen*, 2004 BCCA 613, the Court of Appeal confirmed that a plaintiff must prove on a balance of probabilities that an injury affected their past ability to earn income; however, once that is established, past hypothetical events—like future hypothetical events—by necessity can only be proven on the basis of a real and substantial possibility and their likelihood of occurring: at paras. 28–29.

[126] Projecting what a plaintiff would have earned in the past had they not been injured is a hypothetical exercise. Establishing a real and substantial possibility means

that any hypothetical loss must be shown to be realistic considering the plaintiff's likely circumstances without the injury: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 34, 36.

Position of the Parties

[127] The plaintiff claims the cost of hiring Mr. Johnston as a reasonable measure of loss of capacity from the date of hire, October 2016, to December 31, 2021. He has calculated that amount based on Mr. Johnston's salary as follows:

2016- \$20,384.65
2017- \$111,923.24
2018- \$114,000.00
2019- \$124,000.16
2020- \$113,000.16
2021- \$107,807.87
Total: \$591,116.08

[128] The plaintiff also claims \$250 per month for Mr. Johnston's benefits, or \$3,000 annually, which amounts to \$15,000 for the period of 2017 to 2021.

[129] The plaintiff claims total past loss of earnings to December 31, 2021 to be:

\$591,116.08 - Mr. Johnston's salary
\$15,000 - Mr. Johnston's benefits
Total: \$606,116.08

[130] The plaintiff submits that no negative or positive contingencies ought to apply.

[131] The plaintiff argues that between October 29, 2015 to October, 2016, he was restricted in his ability to perform site inspections and the other physical duties of his job. As a result, his company UEAA had reduced revenues and profit decreased from 34% to 32.9%. The plaintiff also submits that but for the Accident, he would have obtained at least the same revenue for UEAA that he did the year before.

[132] UEAA's revenues and retained earnings for the period were:

Fiscal Year	Gross Revenues	Retained Earnings
2012	\$2,301,299	\$320,298
2013	\$3,529,249	\$948,682
2014	\$3,741,695	\$1,091,093
2015	\$3,875,126	\$729,557
2016	\$3,663,056	\$586,868
2017	\$4,078,105	\$866,868
2018	\$4,800,449	\$1,331,910
2019	\$5,146,108	\$1,655,233
2020	\$3,649,504	\$2,098,310
2021	\$4,161,069	\$2,527,048

[133] The defendant disputes that but for the Accident, the plaintiff would not have hired Mr. Johnston and that his salary was a “loss” to the business.

[134] The defendant submits the plaintiff has failed to produce any evidence to support his position that he would not have hired Mr. Johnston but for the Accident. As well, the defendant says the plaintiff did not lead any evidence to support that he lost clients or sales; no bookkeeper, accountant, or other employees were called to support his position.

[135] In the alternative, defendant submits that if there was a loss, it was exceedingly modest and would cover, at most, the period from when Mr. Johnston was first hired to the date when he began to focus on the renovations and the work he brought in, rather than replacing the plaintiff as a project manager. The defendant suggests that Mr. Johnston’s net earnings from 2016 would be an appropriate award for this period.

Determination

[136] The plaintiff agreed that his businesses have grown since 2014. In fact, he created another company, UEWM to reduce the costs of disposing waste.

[137] I find that by the time of the Accident, the plaintiff was an industrious and hard-working individual who was able to grow his business substantially. I also find that he was an extremely hands-on owner, working alongside his employees while also taking the time to train others to eventually replace him.

[138] I will first address the past earning capacity for the period October 29, 2015 to October 2016. The plaintiff testified in regards to who conducted site inspections after the Accident but before he hired Mr. Johnston, stating that he would call on his existing staff to conduct this work or do it himself “arduously”.

[139] Relying on *Leach* and *Gao*, I agree with the defendant that evidence is needed to establish a hypothetical business loss as a real and substantial possibility.

[140] I find the plaintiff’s assertion that UEAA had reduced revenues and gross profit for this period, and that but for the Accident he would have obtained at least the same revenue that he had the previous year, to be speculative.

[141] The plaintiff has not identified any evidence to support that the plaintiff lost business because he could not perform the number of site inspections that he did prior to the Accident. The plaintiff relies on the *Corness* case. However, a regular client of Mr. Corness’ testified that the plaintiff never turned down work before the accident, but did after the accident. As well, additional evidence was called to support that Mr. Corness had turned down \$450,000 in contracts since the accident.

[142] The Court was not provided with any expert evidence relating to the value of the plaintiff’s past income loss. The plaintiff only produced financial statements of UEAA and his personal income tax returns. As well, the plaintiff did not tender evidence of lost clients or sales. The plaintiff could have called witnesses to provide evidence to support his position.

[143] The plaintiff has not met the burden of a real and substantial possibility. It would be speculative to conclude that the reduction in revenues and decrease in profit was due to the Accident. The defendant points to a number of equally rational explanations, such as higher labour costs or materials and increased competition.

[144] With respect to the period October 2016 to December 31, 2021, there is no dispute the plaintiff hired Mr. Johnston one year after the Accident. The question is whether Mr. Johnston was solely hired to do the work the plaintiff was unable to do because of the Accident. In answering this question, I have considered the evidence

of both the plaintiff and Mr. Johnston. With respect to this issue, I prefer Mr. Johnston's evidence over the evidence of the plaintiff.

[145] Despite trying to convince Mr. Johnston for almost a year to join UEAA, there is no evidence that the plaintiff hired Mr. Johnston to replace all of his work. I accept that Mr. Johnston initially did take on some of the duties that the plaintiff was finding difficult to perform because of the Accident. However, Mr. Johnston built his own book of business at UEAA which was supplemented by performing the previous plaintiff's work duties.

[146] However, I do not accept that Mr. Johnston was hired solely for that reason. Rather, I find the plaintiff primarily hired Mr. Johnston because UEAA was growing and he needed someone like Mr. Johnston, who was experienced and would be a good fit in managing and mentoring the plaintiff's workers. I have also considered the fact that around the time Mr. Johnston was hired, the plaintiff had established his second company, UEWM, and even after Mr. Johnston joined UEAA, he continued to employ Trevor and another employee as project managers. Based on his own evidence, the plaintiff delegated some of his work to other staff even before he hired Mr. Johnston.

[147] I find that Mr. Johnston took on some of the plaintiff's work when he was first hired to replace the work that the plaintiff was unable to do as a result of the Accident. However, there is no evidence to support that all of Mr. Johnston's duties were to replace all of the plaintiff's work. In fact, to the contrary. It is fair to say that Mr. Johnston made the company more profitable because he brought in his own work, which soon took over the majority of his duties at UEAA.

[148] It is not at all certain how much work done by Mr. Johnston was required to replace the plaintiff's work as a result of the Accident. What is clear is that the plaintiff said his duties were reduced from 4-6 hours to 2-3 hours per day after he hired Mr. Johnston. I find that from 2016 to 2017, Mr. Johnston's work consisted of a majority of the plaintiff's pre-Accident duties that he was unable to do because of the Accident, and from 2018 to 2021, Mr. Johnston's work consisted of 25% of the

plaintiff’s pre-Accident duties that he was unable to do because of the Accident. The plaintiff has shown that there was a real and substantial possibility that, but for the Accident, he would have performed his pre-Accident work duties.

[149] Overall, I find that the plaintiff required some assistance from 2016 to 2021 from Mr. Johnston, resulting in a loss of earning capacity. However, I do not agree with the plaintiff that all of Mr. Johnston’s salary claimed from 2016 to 2021 was for that purpose. Accordingly, for past loss of earning capacity, I award 70 % of Mr. Johnston’s 2016 and 2017 salary, and 25% of Mr. Johnston’s salary from 2018 to 2021, as follows:

Year	Mr. Johnston’s T4 Salary	Percentage Awarded	Total
2016	\$20,384.65	70%	\$14,269.25
2017	\$111,923.24	70%	\$78,346.27
2018	\$114,000.00	25%	\$28,500.00
2019	\$124,000.16	25%	\$31,000.04
2020	\$113,000.16	25%	\$28,250.04
2021	\$107,807.87	25%	\$26,951.97

[150] Accordingly, I assess the plaintiff’s damages for pre-trial loss of earning capacity in the amount of \$207,317.57.

[151] Section 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, requires that tax must be deducted to the past loss of earning capacity award. The parties are at liberty to return within 30 days of the date of this judgment if they are not able to come to agreement on the appropriate deduction.

Future Loss of Earning Capacity

Legal Framework

[152] Assessing a parties’ loss of future earning capacity involves comparing a plaintiff’s likely future, had the accident not happened, to their future post-accident. This assessment will depend on the type and severity of the plaintiff’s injuries, and the

nature of the anticipated employment in issue: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7 [*Ploskon*].

[153] As stated in *Rab* at para. 47, a tripartite test should be used to assess damages for loss of future earning capacity:

- a) First, whether the evidence discloses a real and substantial possibility that a potential future event that could lead to a loss of capacity.
- b) Second, whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. After establishing that the plaintiff may suffer from a long-term loss of capacity at the first step, the Court then evaluates the likelihood that this loss of capacity will affect the plaintiff's ability to earn income.
- c) Third, assess the value of the possible future loss. This step must include assessing the relative likelihood of the possibility occurring, and the plaintiff's likely future had the accident not occurred (see also *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157). It is at this stage that the trial judge should consider the basis for compensation (*i.e.*, capital versus earnings approach), contingencies, and the relative likelihood of the loss occurring.

[154] At the third stage, there are two methods of valuation: the “earnings approach” and the “capital asset approach”. In *Ploskon*, the Court stated:

[16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the “earnings approach” or the “capital asset approach”: *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.

[17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[155] Finally, the Court must also ensure that the award is fair and reasonable. The assessment is a matter of judgment, not a mathematical calculation.

Position of the Parties

[156] The plaintiff says but for the Accident, he would have worked to age 60. The plaintiff is currently 40 years old. Given Mr. Johnston's age and his plans to retire in the next 2-3 years, the plaintiff say that it is reasonable to expect that the plaintiff would have worked to at least age 65. He says that but for the Accident, he would have continued with his inspections and managing projects and would not have had to hire Mr. Johnston.

[157] The plaintiff uses the approach set out in para. 123 of *Corness* and at para. 20 of *Engel v. Salyn*, [1993] 1 S.C.R. 306, 1993 CanLII 152, to claim as follows:

\$117,000 per year (average annual salary plus benefits x 17.1686 (20 yrs. at 1.5%)) = \$2,008,726.70

[158] With respect to contingencies, the plaintiff says there is no real and substantial possibility of any pre-existing condition causing a future loss. As well, he submits that there are no real negative possibilities and nothing in the economy to suggest that his services will not be needed in the future. The plaintiff accepts a negative contingency of 10% to account for life expectancy. Accordingly, he calculates the award as follows:

\$2,008,726.70 – 10% = \$1,807,854.03

[159] The defendant concedes that the plaintiff has demonstrated a potential future event that could result in a loss of capacity in that he has shown that he suffers from modest, albeit chronic, low back pain as a result of the Accident.

[160] However, the defendant argues there is no real and substantial possibility that this future event will cause a pecuniary loss and there is no real difference between the Plaintiff's trajectories with and without the Accident. Because his business was growing substantially before and after the Accident, by age 40, he would have moved

into a managerial position and would have hired an additional project manager in any event.

[161] As well, it was argued that although Mr. Johnston required a salary, he also generated revenue to offset the salary. Finally, the defendant argues that there is not any real and substantial possibility that the plaintiff's multiple businesses will fail, sending him back into the labour market.

[162] In the alternative, the defendant argues that if the Court accepts that the Plaintiff has shown a possibility of a future economic loss, the value of that loss is difficult to determine, given the growth in the Plaintiff's business and income and the dearth of evidence, and says the best approach is a capital asset approach.

[163] The defendant submits that any award based on the capital asset approach should start at 6-12 months of the Plaintiff's pre-Accident salary from UEAA; or 6-12 months of Mr. Johnston's salary.

Determination

[164] The plaintiff seeks an award of \$1,807,854.03 for his loss of future earnings capacity. He relies on *Corness*. I find this case to be distinguishable. I have not been provided with expert evidence, such as an assessment by an occupational therapist, on work capacity and the plaintiff has not lost his career as Mr. Corness did as a floor installer.

[165] Mr. Johnston's evidence does not support the plaintiff's position that he only hired Mr. Johnston to do the work that the plaintiff could not do anymore because of the Accident. He seeks Mr. Johnston's full salary and benefits for the next 20 years as an appropriate award. I do not agree and find the facts do not support that it would be appropriate to make such an award. I repeat my finding that Mr. Johnston was not solely hired to replace the work the Plaintiff could no longer do, but rather to grow UEAA by soliciting his own work and clients. However, the plaintiff's absence from the business has resulted in a capital loss, as discussed further below.

[166] The plaintiff's position is similar to the one that was advanced in *Stark v. Bartier*, 2021 BCSC 1347. In that case, the plaintiff argued that hiring an operations manager after the accident was an extra expense that his company would not have incurred but for the accident. Mr. Stark argued that he would have done that work himself. The plaintiff also makes the same argument.

[167] In *Stark*, while accepting that the plaintiff was unable to perform all of the physical aspects of the landscaping work as he was prior to the accident, Justice Steeves did not accept the costs of an operations manager represented an appropriate method of determining the plaintiff's claim for loss of earning capacity: *Stark* at para. 64. He held that to accept the plaintiff's position would require the Court to conclude that the plaintiff was ostensibly redundant and brought no value to his company, which the evidence did not support: *Stark* at para. 64.

[168] After assessing all of the evidence, I find that the plaintiff was unable to perform all of the physical tasks that he did before the Accident. However, I am unable to accept the full cost of Mr. Johnston's salary as an appropriate method to determine his claim for loss of future earning capacity. If I were to accept this, I, too, would have to conclude that the plaintiff was "ostensibly redundant" and that he brings no value to his companies. That was not the evidence from either the plaintiff or other witnesses including Mr. Johnston and the plaintiff's brother.

[169] Mr. Johnston testified that within 3 months he was not only doing some of the plaintiff's work but also doing about 30-40% labour work and took over the task of the new warehouse construction. Mr. Johnston's evidence is not consistent with a one to one replacement for the plaintiff's lost capacity.

[170] In assessing the plaintiff's claim for an award for future loss of earning capacity, I am required to apply the three-step analysis outlined in *Rab*.

[171] At the first step, I must assess whether the evidence discloses a potential future event that could lead to a loss of capacity. The defence concedes that the Plaintiff has met this step of the tripartite analysis.

[172] Based upon all of my findings in this case, I am satisfied that the plaintiff's soft tissue injuries restrict him from performing certain activities that he was able to do before the Accident, and will continue to do so for the foreseeable future. These injuries limit his ability to perform his role at UEAA to his pre-Accident level, especially the tasks associated with inspection work.

[173] At the second step of the analysis, I must consider whether the plaintiff has established a real and substantial possibility that the injuries arising from the Accident will cause a pecuniary loss. I conclude he has. As a result of his injuries, the plaintiff was not able to perform tasks at pre-Accident capacity. He prided himself in getting into the trenches with his employees to mentor and motivate them. The plaintiff was also able to do 4-6 hours of site inspections a day, whereas after the Accident he was only able to do 2-3 hours. I find that there is a real and substantial possibility that he will continue to not be able to do these tasks in the future and will have to rely on others to do those specific tasks, causing pecuniary loss.

[174] The defendant argues that the plaintiff's businesses were growing and eventually he would have moved into a managerial role and hired additional project managers with or without the Accident. I do not agree. I conclude given that the plaintiff was a hands-on owner, there is a real and substantial possibility he would have continued to conduct site inspections and work alongside his employees but for the Accident. The Accident has made him less valuable to his companies. As a result of the injuries sustained in the Accident, Mr. Johnston has assumed some of the plaintiff's work of conducting inspection work. But for the Accident, the plaintiff would have grown UEAA in parallel with Mr. Johnston's efforts, leading to a real and substantial possibility of increased profits. As a result of the plaintiff's inability to perform physical tasks at his pre-Accident level, part of Mr. Johnston's time is now occupied with completing tasks the plaintiff would have otherwise done, leading to actual pecuniary loss.

[175] The third step in the assessment is to value the possible future income loss, while taking into account the relevant contingencies. In the circumstances, the

defendant says that the plaintiff's loss should be valued using a capital asset approach. I agree. Where losses are difficult to determine, the capital asset approach is best: *Rab* at para 30. The same approach was used in both *Pepe* and *Stark*, facts most similar to the case at bar.

[176] I find that the earnings approach does not fit within the circumstances of this case and the capital asset approach is preferable because the plaintiff's loss is not measurable by comparing pre- and post-Accident income but his capacity to work has diminished. While the plaintiff continues to have difficulties because of his injuries, his income at trial is similar or higher than what it was at the time of the accident. In 2015, the plaintiff gave himself a salary of \$114,600 from UEAA. In the years 2016 to 2021, his salary increased each year to a high of \$118,000 in years 2019 to 2021.

[177] In my assessment at this third stage, following *Stark*, I do not accept that Mr. Johnston's salary is the appropriate method of determining the plaintiff's future loss of earning capacity. The plaintiff continues to be involved in his business and Mr. Johnston did not replace all of the plaintiff's work. The plaintiff has not been made redundant as a result of the Accident.

[178] In *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 at para. 43, the Court considered the capital asset approach and the resulting calculation of loss:

[43] The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of year remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so.

[179] Subsequent cases have relied on this passage to establish the '*Pallos* approach', applicable where the plaintiff continues to earn income at or close to their pre-accident level, but has suffered an impairment that may affect that plaintiff's ability

to continue doing so at some point in the future, resulting in a loss that is difficult to calculate with any mathematical certainty: *Rab* at para. 72. Under this approach, the typical award is one to two years' income: see *Daleh v. Schroeder*, 2019 BCSC 1179 at para. 146; *Kania v. Evans*, 2021 BCSC 797 at para. 91.

[180] I have also considered that the plaintiff developed serious heart health issues unrelated to the Accident. He took time off work (one to two weeks each time) after two heart surgeries. These health issues will have an impact on his future and I have factored that into my assessment.

[181] Taking into account the plaintiff's age and his health after the Accident, his employment background and injuries, I conclude that two years of the plaintiff's pre-Accident salary from UEAA is fair and reasonable compensation for his diminished income earning capacity.

[182] Accordingly, I award \$229,000 in future loss of earning capacity.

Cost of Future Care

Legal Framework

[183] In *Golkar-Karimabadi v. Bush*, 2021 BCSC 990, Justice Adair summarized the principles that apply to the assessment of future cost of care claims:

[107] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

[184] The purpose of an award for cost of future care is to restore the injured party to the position they would have been in, but for the accident. Assessing future care

costs is not a precise accounting exercise, rather, it is a matter of prediction: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. A common sense approach must be taken: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13.

Position of the Parties

[185] The plaintiff makes claims for a personal trainer and medication. He uses the 2.0% present value table in arriving at the amount:

- Personal trainer: \$100.00 per session, 52 x per year to age 70 x (22.3965 x \$5,200) = \$116,461.80
- Medication: \$200 per month to age 70 (22.3965 x \$2,400) = \$53,751.60

Total cost of future care: \$116,461.80 + \$53,751.60 = \$170,213.40

[186] The defendant says no award is appropriate given that the majority of the plaintiff's present complaints requiring treatment are now unrelated. As well, the defendant submits that the plaintiff has not produced any evidence on the cost of the medications, even though this was readily available to him.

[187] Although Dr. Simonett and Dr. McCann recommended 8-15 sessions of personal training, the defendant submits that the plaintiff did not begin personal training session until years after the Accident. They point to Ms. Van Edmond's evidence that the plaintiff began working out because of his heart issues, when it became mandatory that he get healthy.

[188] Furthermore, the defendant says the plaintiff has produced no evidence about the cost of that personal training, or the amounts he has spent to date, although such evidence would have been easily available to him. Finally, the defendant points out that the plaintiff has now surpassed all medical recommendations for treatment.

[189] In the alternative, any award for future care should be significantly reduced to account for the effect of these unrelated injuries and symptoms.

Determination

Personal Trainer

[190] Dr. McCann recommends a fitness program with a personal trainer for approximately 8-15 sessions. In cross-examination, Dr. McCann agreed that after those initial sessions, the plaintiff should be able to maintain exercise in the ordinary course. The plaintiff also testified that he has a home gym which he used when gyms were closed during the COVID-19 pandemic.

[191] Dr. Simonett recommends that the plaintiff engage in core stability exercises to strengthen his core and provide support for his lower back. She recommends that between 8-15 sessions with a personal trainer over a period of six months to progress his exercise program.

[192] Neither of these experts, which were tendered by the plaintiff, recommended personal training once a week until the plaintiff turns 70. As such, I decline to make such an award as it not medically justified or reasonable.

[193] It is appropriate to award 15 sessions with a fitness trainer. After that the plaintiff should be able to maintain the exercises in his home gym. Accordingly, at \$100 per session for 15 sessions, I award \$1,500 for a personal trainer.

Medications

[194] The plaintiff testified that he uses anti-inflammatory cream for his pain. His partner confirmed that she applies it on his neck and back. While the plaintiff may also use this medication for other areas not associated to the Accident, it is reasonable to award the plaintiff costs for pain medication.

[195] The difficulty is in quantifying the amount used for pain related to the Accident. The plaintiff has not produced any evidence to support the \$200 per month until the age of 70 that he is seeking. Despite the fact that no evidence was led on how much the plaintiff spent on the topical cream and pain medication, I have found there is a real possibility that he will continue to experience pain from his injuries. As such, it is

reasonable that he will require the use of this medication for his pain associated to the Accident, they are medically justified, and are likely to be incurred in the future.

[196] However, I do not agree with the amount the plaintiff seeks. On a common-sense basis, it is not reasonable that the plaintiff would spend \$200 per month on non-prescription creams and pain medicine. In the absence of specific evidence of the cost of the medications, I find \$500 per year until the plaintiff reaches the age of 70 to be reasonable in the circumstances. Accordingly, I conclude that \$15,000 is a fair and reasonable award for medications.

[197] I must calculate the present value of the award for cost of future care for medication, which will cover a duration of 30 years. In doing so, I will apply the set rate of interest of 2% pursuant to s. 56(2)(b) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 and the *Law and Equity Regulation*, B.C. Reg. 352/81. As such, the present value of the award for medications is \$11,198.25.

[198] The total award for future cost of care is \$12,698.25.

Special Damages

[199] There is an agreement on special damages at \$8,148.

CONCLUSION/ORDERS

[200] In summary, I award the plaintiff the following damages:

Non-pecuniary loss	\$90,000
Loss of past earning capacity	\$207,317.57
Loss of future earning capacity	\$229,000
Cost of Future Care	\$12,698.25
Special Damages	\$8,148
Total	\$547,163.82

COSTS

[201] As the successful party, the plaintiff is presumptively entitled to his costs from the defendant, 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.

“Girn J.”