

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shaw v. Rogers*,  
2023 BCSC 177

Date: 20230207  
Docket: M111777  
Registry: Kelowna

Between:

**Gerald Carl Shaw**

Plaintiff

And

**Christopher Michael Rogers, Monashee Electrical Services Ltd. and John Doe**  
Defendants

Before: The Honourable Justice B. Brown

## Reasons for Judgment

Counsel for Plaintiff:

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Place and Date of Trial:

Kelowna, B.C.  
October 11-14, 17-19 and 24-26,  
2022

Place and Date of Judgment:

Kelowna, B.C.  
February 7, 2023

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[1] Mr. Shaw seeks damages for personal injury, past and future loss of income earning capacity, cost of future care, loss of housekeeping capacity, interest, and special damages from a motor vehicle accident on July 29, 2014.

[2] Liability is admitted.

### **Background**

[3] Mr. Shaw was 43 years old at the time of motor vehicle accident. He and his wife, Christina Folvik-Shaw, have two children who were 15 and 17 years old at the time of the accident.

[4] Mr. Shaw is a red seal mechanic. He graduated from high school in 1989. Between 1989 and 1993 he was an apprentice automotive mechanic. In 1994 he married Ms. Folvik-Shaw. He worked at Kettle Valley Dodge in Grand Forks, BC, from 1993 until 2000. He was able to work quickly and efficiently, completing his assignments in less than book time. He was eventually appointed shop foreman and was responsible for supervising other mechanics.

[5] In 2000, Mr. Shaw and his wife purchased a gas station in Greenwood, BC, where they lived. They installed a mechanic shop. Formally, the business was purchased by Greenwood Auto Ltd., with Mr. Shaw and Ms. Folvik-Shaw acting as the principals of that company. For the first few years, Mr. Shaw also worked for the local school district as a mechanic and bus driver from 6 am to 2 pm. He did so for financial security, and would work in the business until 10 or 11 pm. Eventually, he left the school district job to work full time in the business.

[6] Mr. Shaw and Ms. Folvik-Shaw's intention in purchasing the gas station was to acquire the business as a means of funding their retirement. They would run the business, pay off the debt and eventually own the business outright. They could then sell or lease the business, generating funds to permit them to retire.

[7] Over time, the Shaws expanded the business to include groceries, a delicatessen, a tow truck, and a car crushing and parts recovery business as they worked to make the business more profitable.

[8] Before the accident, Mr. Shaw had two episodes of back pain. In 2007, he experienced back pain which continued for a few years. He was eventually prescribed Meloxicam and his pain improved.

[9] In 2011 or 2012 Mr. Shaw injured his back while working on a dump truck. His doctor sent him for imaging and the MRI showed a potential diagnosis of osteomyelitis or multiple myeloma. Over the next 10 months he was investigated medically to determine the diagnosis. He resumed taking Meloxicam and his pain resolved. He said that by the time of the accident he was confident that he did not have osteomyelitis or multiple myeloma. His pain had improved and he had been back to his normal working schedule for several months.

[10] Eventually he was diagnosed with psoriatic spondylitis.

[11] He said that his normal work schedule pre-accident was 12 hours or more, starting the day around 8:30 am doing prep work in the kitchen. Around 11 am or 12 pm he would start working in the shop and would work late. He would do this six days per week.

[12] Mr. Shaw was also involved in his children's sporting activities. He enjoyed coaching. He would take a break from work to attend the children's sporting activities or to coach, and then would return to work in the evening to complete his mechanical jobs.

[13] In addition, he was involved in municipal politics. He was first elected as a counsellor in Greenwood in 2002 until 2005. He was appointed to the Regional District Board in 2016 and 2018.

[14] The motor vehicle accident occurred on July 29, 2014. At that time Mr. Shaw was driving his 2012 Jeep Patriot to a hockey tryout with his son, Bailey, in Nelson, BC. Mr. Shaw was driving eastbound on Highway 3 through a construction zone when the vehicle in front of him came to a sudden stop. Mr. Shaw stopped his vehicle but was struck from behind. The impact pushed Mr. Shaw's vehicle into the rear of the van in front of him. The seats of his Jeep were broken. The vehicle was declared a write off.

[15] Mr. Shaw, his wife Ms. Folvik-Shaw, and their son Bailey each gave evidence. I found them to be honest and credible witnesses.

### **Issues**

[16] The issues in this case are:

1. The nature and extent of Mr. Shaw's injuries and resulting damages;
2. Past loss of earning capacity;
3. Future loss of earning capacity;
4. Cost of future care;
5. Housekeeping capacity; and
6. Special damages.

### **Injuries**

[17] Mr. Shaw says that he sustained a number of injuries in the motor vehicle accident. He said that he immediately felt back pain from his shoulders down. His head felt dull and numb. He had dull headaches. His neck was painful. His jaw bothered him so much that he could hardly chew. By his first medical appointment his neck and head were pounding. He was not in good shape cognitively and he does not remember a lot. He had a dull headache and found it difficult to focus. It was difficult to be motivated.

[18] For approximately a year he travelled to Osoyoos, BC, twice a week to attend physiotherapy. That required a minimum of four hours per day. He would not be able

to work afterward as he would be exhausted. His jaw required approximately four months of treatment and is now much better. He developed vertigo after the accident which is now resolved.

[19] He had pre-existing low back pain which improved with physiotherapy and is now better than it was before the accident.

[20] His mid-back pain is largely resolved.

[21] He still suffers from anxiety when driving.

[22] He continues to suffer from neck and shoulder pain and headaches such that he is only able to work from approximately 10 am to 3 pm, typically four days per week. If he works longer hours he will not be able to work the next day: he develops headaches, neck pain and a burning sensation in his shoulder. He loses his focus and he cannot think properly. He is not as productive as he was before the accident.

[23] Approximately a year after the motor vehicle accident he realized that he had hearing difficulties and went to a hearing specialist. He required a stapedectomy to remove a piece of bone. His hearing has improved but he has tinnitus.

[24] Eventually he realized that he was suffering from depression when one of the medical professionals inquired. He has not been able to obtain counselling because he finds that Zoom treatment is not effective for him. He would like to attend counselling in person.

[25] He also suffers from tingling in his arms and hands. He describes this as different from the carpal tunnel symptoms he had before the accident.

[26] He has emotional/cognitive symptoms since the accident. He is easily upset. He is frequently in tears. Before the accident he was not an angry person but he is now quick to lose his temper. He has memory and cognition issues: he cannot focus and forgets things. He is no longer efficient. The vehicles that he is working on sit unfinished longer than they did before.

[27] He has massage therapy twice per month which helps with his neck and shoulders and numbness in his fingers. He finds the massage therapy provides short-term relief.

[28] He also takes CBD and THC for sleep, perhaps three times per week. He sleeps reasonably well except when he is in pain, and then he uses CBD and THC.

[29] His most significant and disabling injuries are his head and neck pain and his cognitive/emotional issues, which impede his ability to work and his enjoyment of life.

### **Expert Evidence**

#### **Dr. Stephen Helper**

[30] Dr. Helper, a psychiatrist, saw Mr. Shaw in April 2015. Mr. Shaw complained of neck pain and headaches. Stresses and strains would aggravate his neck pain.

[31] He also complained of central and bilateral mid back pain.

[32] His low back pain had improved significantly and was better than it had been before the collision.

[33] Mr. Shaw returned to Dr. Helper in September 2020. At that time he continued to complain of neck pain and headaches. His jaw pain was resolved. His pain and intensity in his neck and head were similar to 2015. He had not noticed a significant improvement in his neck pain.

[34] He also had pins and needles in both hands, which continued to bother him. His symptoms were now more frequent. He awoke nightly with pins and needles in both hands. He was receiving massage therapy two to three times per month which helped temporarily.

[35] His mid back pain was resolved or nearly resolved.

[36] His low back pain remained better than it was before the accident. He was not experiencing any functional limitations from his low back.

[37] Dr. Helper diagnosed neck pain of a mixed diagnosis: a mixed clinical picture of soft tissue mediated pain (musculotendinous) and focal mechanical (joint type) neck pain.

[38] With respect to Mr. Shaw's mid back pain, which he said had resolved, Dr. Helper was of the opinion that the mid back pain was multifactorial:

1. Pre-existing inflammatory pain; and
2. Motor vehicle related soft tissue pain.

[39] With respect to the neck pain, Dr. Helper was of the view that the complaints were directly related to the motor vehicle collision.

[40] With respect to the mid back pain, Dr. Helper was of the view that Mr. Shaw experienced temporary symptoms of new or worsened mid back pain as a result of the motor vehicle collision which continued through the end of his physical therapy in July 2015.

[41] With respect to the pins and needles in his hands, Dr. Helper agreed that carpal tunnel syndrome was the primary diagnosis, enhanced by compression of the structures at the thoracic outlet.

[42] As to the prognosis for Mr. Shaw's neck complaints Dr. Helper said:

In meeting this gentleman six years following the MVC in question, it is more likely than not that his symptoms are static. I do not expect significant improvements nor worsening

It continues to be my opinion that Mr. Shaw would see some degree of improvement if he had an established fitness based program that is emphasizing the same goals listed in the previous paragraph [i.e. scapular stability, rotator cuff strength, and postural correction]. Quantifying the degree of expected improvement is difficult; especially at six years following the MVC in question.

[43] Dr. Helper suggested that, given that Mr. Shaw received a good degree of transient benefit from his massage therapy treatments and that he has a poor prognosis for resolving his neck pain, it is reasonable to use massage therapy for symptomatic benefit. It would be reasonable to support him for massage therapy twice per month for the foreseeable future.

[44] With respect to further interventions, Dr. Helper suggested a regular fitness-based program emphasizing posture. These activities are unlikely to resolve Mr. Shaw's condition but partial improvements are expected. Dr. Helper recommended 10 sessions of physical therapy with the establishment of a home-based program that could be carried out three days per week.

**Dr. Ann Pirolli**

[45] Dr. Ann Pirolli conducted a neuropsychological assessment of Mr. Shaw. It was her opinion that Mr. Shaw sustained a mild traumatic brain injury on July 24, 2014. On current neuropsychological testing, Mr. Shaw displayed no patterns of cognitive deficits. He presented with significant emotional distress and in her opinion he had developed an adjustment disorder with primarily anxious symptoms as a result of the accident and its sequelae. She thought that his father's failing health was also likely exacerbating his mood difficulties, but not solely accountable for his psychological distress. In her opinion Mr. Shaw's day-to-day executive dysfunction is more likely the result of ongoing psychological distress, pain and poor sleep. The impact of the pain and psychological distress on his day-to-day cognitive functioning would most likely make him not competitively employable. He is most likely less efficient and has reduced stamina (cognitive and physical) for his current work.

[46] She recommended that Mr. Shaw receive psychological therapy to help him with his ongoing anxiety and adjustment to the sequelae of the accident. She suggested 20 to 30 therapy sessions with more available if he is ultimately diagnosed with post-traumatic stress disorder. She recommended an additional 8 to 12 therapy sessions on a yearly basis for four to six years. She also recommended the involvement of an occupational therapist to assist Mr. Shaw with compensatory

strategies for cognitive difficulties encountered at work. The occupational therapist could also help him with organizing and pacing his activities with respect to his pain and fatigue. She hoped that with those recommendations Mr. Shaw would experience some improvement in his day-to-day cognitive difficulties, although that would depend in part on his ongoing pain levels. She considered his prognosis with respect to functional cognitive capabilities guarded to fair. She considered his prognosis with respect to his mood fair, with treatment. Without treatment, his prognosis with respect to his mood is poor and there may be worsening of his mood over time.

**Dr. Eugene Okorie**

[47] Dr. Eugene Okorie, a psychiatrist, saw Mr. Shaw at the request of the defence on July 3, 2019. The plaintiff relies on this report as well. Dr. Okorie opined:

He has become more irritable, sad and anxious since his subject MVA due to his accident related pain and dysfunction. He noted loss of enjoyment, pain disrupted sleep pattern, reduced motivation, low energy levels, poor concentration and some forgetfulness. He appeared painful and depressed with grossly adequate cognition during our meeting. These symptoms meet the criteria for adjustment disorder with mixed anxiety and depressive symptoms.

...

He would benefit from psychotherapy aimed at helping him adjust better with his pain. I would recommend 12 to 16 sessions of cognitive behaviour therapy for him to learn adaptive coping strategies to deal with his pain, trauma, anxiety and depressive symptoms. Effective physical rehabilitation treatments for his pain would help in his situation. He takes Meloxicam for his pain, and he does not need psychotropic medications, in my opinion ... The prognosis for his adjustment disorder is fair and would be enhanced by psychotherapy and completion of his MVA related claim process. It is important that his adjustment disorder is adequately treated to protect him from developing complicating major psychiatric disorders ...

**Dr. Rhonda Shuckett**

[48] Dr. Rhonda Shuckett, a rheumatologist, saw Mr. Shaw at the request of the plaintiff.

[49] She opined that the headaches he has experienced since the motor vehicle accident are causally triggered by neck and muscle injury of the motor vehicle accident.

[50] His neck pain is new since the motor vehicle accident and was not a feature of his pre-existing psoriatic spondylitis. She opines that he has mechanical neck pain related to the musculoligamentous and soft tissue injury from the motor vehicle accident. He likely has some facet of zygapophyseal joint injury of the neck. He does have a history of psoriatic spondylitis which affected his low back. This was quite stable at the time of the motor vehicle accident. She suggested that imaging of his neck with an MRI scan could help indicate if there are any inflammatory findings of psoriatic spondylitis or specific degenerative changes in his spine.

[51] She noted that his treating rheumatologist in 2015 felt that the neck pain after the motor vehicle accident was mechanical. She suspects that he has a new onset of inflammatory neck pain incited by the motor vehicle accident of July 29, 2014.

[52] As to the numbness of his upper extremities, he has a past history of relatively mild carpal tunnel syndrome. He could have progression of his carpal tunnel syndrome which would not be associated with the motor vehicle accident. The numbness and tingling are worse when he raises his arms and does overhead activities. She opines that Mr. Shaw has post muscle injury or post whiplash thoracic outlet syndrome bilaterally due to the effect from the motor vehicle accident.

[53] As to his low back pain following the accident, she opines that the accident probably led to mechanical soft tissue injury of the low back.

[54] With respect to prognosis, pain that has been as chronic as has Mr. Shaw's bodes poorly. She believes that he has probably attained maximum medical improvement. The fact that he has psoriatic spondylitis may be playing some role in his limited recovery from the motor vehicle accident. She recommended a referral to the Bill Nelems Pain Clinic in Kelowna, BC, to investigate injections for possible facet or medial branch blocks, which may lessen his neck pain and headaches at

least on a temporary basis. She suggested that Mr. Shaw undergo an electromyography nerve conduction study of his upper extremities to assess for progressive carpal tunnel syndrome.

[55] Dr. Shuckett believes that Mr. Shaw can probably maintain the level of work that he is doing at the current time. He may need to stop working earlier and be retired earlier than he otherwise would have chosen to. She believes that he will continue to have limitations with respect to exercising and recreational activities. He will continue to require intermittent courses of physiotherapy. He is going to have to continue to adapt his occupational activities and recreational activities as well as his activities around the home, all related to the motor vehicle injuries which he sustained.

**Dr. Osama Gharsaa**

[56] At the request of the defence, Mr. Shaw was seen by Dr. Osama Gharsaa, an orthopedic surgeon for an independent medical assessment on October 24, 2019.

[57] Dr. Gharsaa found no signs or symptoms of thoracic outlet syndrome. The signs and symptoms that Mr. Shaw reported were of soft tissue injuries which usually resolve within three months, but given his pre-existing low back pain, Dr. Gharsaa expected that his symptoms may take a few more months to resolve.

[58] Dr. Gharsaa's examination did not identify any radiculopathy, musculoskeletal pathology or any signs of ongoing objective orthopedic or organic involvement (which Dr. Gharsaa defined as something that he could see). He recommended that Mr. Shaw continue working on a self-directed exercise program to help with his overall conditioning. He should be encouraged to resume all pre-accident activities. He acknowledged that Mr. Shaw continues to experience some residual pain. He said that Mr. Shaw should be reassured that his current symptoms are benign, and are not manifesting themselves in any overt organic pathology.

[59] Dr. Gharsaa said in cross-examination that Mr. Shaw could do whatever he did before the accident from a structural point of view. He acknowledged that pain

does affect Mr. Shaw's ability to work. It is multifactorial. He said that if Mr. Shaw continued to work as a mechanic he would not cause himself structural injuries.

### **Melanie Vos**

[60] Melanie Vos conducted a functional capacity evaluation for Mr. Shaw. She examined him in November 2016 and then again in June 2022. She found that Mr. Shaw had reduced tolerance for overhead reaching, repetitive bending, repetitive crouching and sustained neck flexion. He had increased fatigue, headache pain and tinnitus at the end of the assessment. He demonstrated reduced tolerance for full-time work. Six and one-half hours of testing with a lunch break and breaks to manage his symptoms resulted in increased overall fatigue. He had a mild headache and tinnitus on the right side. These symptoms continued the following day. His symptoms returned to baseline two days after the assessment. Mr. Shaw advised her that he works approximately half time, being 20 to 25 hours per week, as a mechanic. He avoids heavy tasks and awkward positions by using equipment and the help of an assistant. His pain is increased with more strenuous activity. He has headaches and tinnitus. He has difficulty coping emotionally and difficulty with concentration and memory. He sometimes takes one to two days off work.

[61] In Ms. Vos's opinion Mr. Shaw's current schedule of 20 to 30 hours per week is sustainable. He does not demonstrate the capacity to work as a mechanic on a full-time basis. He would likely have difficulty working in a light strength demand job with deadlines and external expectations on a full-time basis as he needs to pace his activities when his symptoms increase.

### **Discussion**

[62] I am satisfied that as a result of the motor vehicle accident Mr. Shaw has suffered chronic neck and shoulder pain, chronic headaches, mid back pain (now mostly resolved) and low back pain (also mostly resolved). He has an adjustment disorder with anxiety and depressive symptoms which is ongoing. He has difficulty working overhead, he experiences problems with his memory, with concentration and multitasking, and he has frustration and difficulty coping. He has anger issues,

emotional lability, reduced self-esteem and confidence, sadness, increased irritability, social withdrawal, reduced motivation and drive, anxiety with driving and issues with his sleep. All of these complaints are a result of the motor vehicle accident.

[63] He complains of tinnitus. I have no medical opinion to relate his tinnitus to the motor vehicle accident.

[64] He also has problems with lifting his arms as described above. He develops tingling and numbness. I am satisfied that this is, at least in part, the result of thoracic outlet syndrome as described by Drs. Helper and Shuckett. I accept their findings. Each was satisfied that thoracic outlet syndrome plays a role in his complaints. Mr. Shaw described his current symptoms as different from the carpal tunnel symptoms he had before the accident.

[65] There is indication that Mr. Shaw's physical symptoms may improve somewhat with a guided exercise program and that his psychological symptoms may improve somewhat with counselling. There is no indication that Mr. Shaw's complaints will be significantly or fully resolved.

### **Quantification of Non-pecuniary Damages**

[66] The plaintiff submits that an appropriate award of non-pecuniary damages would be between \$135,000 and \$150,000.

[67] The defence argues that the appropriate award of non-pecuniary damages is \$80,000.

[68] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, 31373 (19 October 2006), Kirkpatrick J.A. discussed the principles to be considered in making an award for non-pecuniary damages. She said:

[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*, *supra*, at 637 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* at p. 284 of S.C.R.).

[Emphasis added.]

[46] The inexhaustive list of common factors cited in **Boyd** that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: **Giang v. Clayton**, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[69] Each of the parties has provided me with authorities with respect to the assessment of non-pecuniary damages.

[70] The plaintiff relies on *Biefeld v. Neetz*, 2016 BCSC 689; *Westbroek v. Brizuela*, 2012 BCSC 1955, rev'd on other grounds 2014 BCCA 48; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81; and *Stapley*.

[71] The defendant relies on *Cox v. Acapulco*, 2020 BCSC 1135; *Hoffman v. Luan*, 2021 BCSC 811; and *Barn v. Bird*, 2021 BCSC 389.

[72] I have considered each of these decisions carefully. While no two cases are identical, in my view, this case is very like that in *Biefeld*. In that case, Madam Justice Adair said:

[149] I find that, as a result of the September 2007 Accident, Ms. Biefeld sustained soft tissue injuries to her neck, left shoulder, mid-back and lower back. She also sustained a left thigh strain, which resolved within weeks. The soft tissue injuries to her low back also resolved within a relatively brief period. However, the soft tissue injuries to Ms. Biefeld's neck and left shoulder were significant. They developed into chronic myofascial pain, radiating from her neck to the shoulder and down her left arm, an aspect of which has been post-traumatic thoracic outlet syndrome on her left side. I find that, as a further consequence of the injuries she suffered in the Accident, Ms. Biefeld has developed chronic pain syndrome, kinesiophobia and depression, and has developed the psychiatric condition referred to as an adjustment disorder with anxiety and depressed mood. The opinions from the medical experts on these points are consistent with the evidence from Ms. Biefeld that I accept.

[73] In my view an award similar to that made to Ms. Biefeld is appropriate in this case. The current value of that award would be approximately \$135,000. I will make that award.

[74] The decisions to which the defence referred me do not include any psychiatric diagnosis, although there are references to emotional difficulties caused by the injuries. They also tend to have less aggravated physical consequences than those experienced by Mr. Shaw. In my view an award of \$80,000 would not adequately address Mr. Shaw's loss.

### **Past Loss of Capacity**

[75] Before the accident Mr. Shaw worked in the business six days a week, and 12 to 14 hour per day. His days would be broken up by some nonbusiness activities, such as coaching the children's activities. He worked in the shop, and when they added the kitchen he also did prep work in the kitchen.

[76] Mr. Shaw was also engaged from time to time as an elected official with the City of Greenwood and with the Regional District of Kootenay Boundary. He was city counsellor with the City of Greenwood from 2002 to 2005. In 2016 he was re-elected in a by-election as a city counsellor and appointed as director for the Regional

District of Kootenay Boundary. In 2018 he was re-elected as a city counsellor for Greenwood and reappointed as a director for the Regional District. He was re-elected as city counsellor again on October 15, 2022. His city counsellor work involves two regular meetings per month every second Monday, and four to five budget meetings per year. The position of director with the Regional District was an appointment that he held for two years. The board for the district meets a couple of times per month. There were additional meetings for economic development, waterworks, etc. Mr. Shaw estimated his time commitment was about eight hours per month for meetings and some additional time for reviewing materials.

[77] In 2019 Mr. Shaw earned \$5,400 from the City of Greenwood and \$17,425 from the Regional District.

[78] Mr. Shaw also operated a tow truck and salvage/wrecking business. He would recover wrecked cars and harvest parts. He would then crush the remaining bodies and sell them as scrap metal. He estimated he may earn \$14,000 per year from the car wrecking salvage business.

[79] After the accident, Mr. Shaw initially was in a lot of pain and not able to work. He did go to the shop to supervise his son finishing up a job.

[80] He later returned to work trying to do light duty work. He would do lighter work, such as oil changes and brake jobs. Currently he can only work for about four hours a day. He starts around 10 am, takes a morning break then works till noon. He takes lunch for about 45 minutes and then returns to work around 1 pm and works to 3 pm. He is less effective at work than he was before the accident. One day out of five he estimates he is not able to work. He often will not work on Fridays because his helper is not able to work on Fridays.

[81] He has difficulty with executive functions after the accident. He struggles with multitasking, is easily distracted and forgets what he has done, where he has placed items, etc. There are things that he can no longer do because it causes him pain in

his neck and shoulders. He sometimes makes mistakes with jobs. He has customer complaints which he never had before the accident.

[82] If he maintains his routine he can manage his pain. If he changes his routine he will normally develop a headache and if it is aggravated he often cannot work the next day.

[83] In April 2018, the Shaws sold the business. At that time the business required an upgrade which would cost approximately \$150,000. The gas company would have contributed approximately \$80,000 toward the upgrade. However, the Shaws recognized that doing this upgrade would require significant extra involvement on their part. Neither of them felt that they were able to do so. Fortuitously, one of their suppliers learned that they might be interested in selling.

[84] After the business was sold, Mr. Shaw set up a shop operating from his home property. He takes on as much work as he can cope with. He also has a helper who assists him with jobs. The helper works four days per week. It is apparent from the evidence of all of the witnesses that the home business is not operated efficiently. Mr. Shaw's strength was not paperwork, even before the motor vehicle accident. He is very poor with paperwork now. He also is struggling with other aspects of executive function such as memory and organization. Jobs are left undone. It takes him far longer than it normally would to complete jobs. While it is work that he can do for the most part, he operates at a level far below what he did before the accident. He no longer operates a tow truck or car crushing business. He continues to work as a city counsellor.

### **Position of the Parties**

[85] The plaintiff argues that even without the accident they would have sold the business in April 2018. The plaintiff says that there are two separate time frames to be taken into consideration in assessing Mr. Shaw's past loss of earning capacity. The first is from the accident July 29, 2014, until April 20, 2018, when the business was sold (approximately 45 months). The second is from the sale of the business until the start of the trial (approximately 54 months).

[86] The plaintiff argues that the extra wages that the business paid for employees replacing Mr. Shaw's labour is an appropriate measure of the loss to 2018. The plaintiff says that the extra wages to the sale are \$117,869.95. The plaintiff calculates the loss from the sale of the business to trial at \$229,666.67, using a median income of \$25 per hour. The plaintiff says that the award for past loss of earning capacity should therefore be between \$200,000 and \$300,000 (gross). The plaintiff concedes that his actual earnings since the sale of the business, being \$9,436.89, should be deducted from the award under this heading.

[87] The defendants submit that the court should rely on pre-accident personal income tax returns provided by Mr. Shaw to analyse whether or not he has demonstrated a past loss of earning capacity. They argue that his two-year pre-accident income tax returns indicate an average annual personal net income of \$7,950. They say that he was suffering from acute or insidious onset back pain in the decade preceding the trial. They argue that Mr. Shaw's earning capacity would have been essentially the same with or without the accident.

[88] The defence argues that Mr. Shaw's pre-existing psoriatic spondylitis had impacted his earning capacity prior to the accident. The condition has only been managed by the regular consumption of the prescription painkiller Meloxicam. The evidence at trial did not rule out a natural progression of Mr. Shaw's pre-existing condition, and the nature of human experience lends credence to the proposition that Mr. Shaw's condition would have worsened with age. The defence says that there is a real possibility that his pre-existing condition would have negatively impacted his earning capacity regardless of the accident. The defence also points to his pre-existing complaints of tingling in the hands and shoulders. The defence says that he suffered from numbness and tingling associated with carpal tunnel syndrome prior to the accident. It is common for automotive mechanics to develop physical problems due to the physical demands of the occupation. The defence says that the suggestion that without the accident his earnings would have been higher is highly speculative.

[89] Thus, the defence submits that aside from the three to eight weeks immediately following the accident, Mr. Shaw has not demonstrated a loss of earning capacity from the date of accident to the date of trial. They submit that the past loss of earning capacity is somewhere between \$496.88 and \$1,325.

[90] Alternatively, the defence argues that if the earnings approach is not considered workable for Mr. Shaw, a similar conclusion would be reached under the capital asset approach. Again, they submit that Mr. Shaw had a pre-accident annual net income of \$7,950. If one takes the 12 weeks Dr. Gharsaa concluded was a reasonable period of time away from work for soft tissue injuries, this would support a valuation of his lost capital asset in 2014 of \$1,834.62.

### **Expert Evidence**

#### **Neil Trainor**

[91] The plaintiff has provided me with the report of Neil Trainor, a vocational consultant from November 2019.

[92] Mr. Trainor opined:

Since the subject accident Mr. Shaw... is now attempting to work as a tow truck operator and automotive mechanic... Based on review of the medical information provided it is assumed that Mr. Shaw is going to continue to experience chronic pain and reduced physical capacity that is inconsistent with the physical demands of other occupations. Accordingly, in my opinion, I would anticipate that Mr. Shaw is going to continue to experience some further disruption of his employment should he continue to pursue either occupation. He likely can continue doing this for the foreseeable future, but if there is a further reduction of his physical capacity as he ages, he may be forced to retire sooner than planned.

I would not regard career change as a panacea for his pain problems but would anticipate the pursuit of occupations that are more consistent with his reduced physical capacity would improve his ability to work ... There are other occupations that would be more compatible with his reduced physical capacity than working as either a tow truck operator or automotive mechanic. As an alternative it is conceivable that he could work as a parts clerk or automotive service writer, vehicle salesman, commercial vehicle inspector or vehicle damage claim examiner. Access to these occupations may require relocation to a larger community with more robust labour market opportunities.

... assuming that the subject accident has contributed substantially to his ongoing pain problem and reduced physical capacity, I would conclude that

Mr. Shaw is less competitively employable than he was previous to the accident. He is less feasible for employment in his long-standing career as an automotive mechanic and tow truck operators and is a less attractive candidate to prospective employers for other occupations that remain within his grasp.

There are fewer occupations open to him, and because he is a less attractive candidate for employment, Mr. Shaw is more likely to encounter difficulty finding and keeping employment in a competitive labour market.... Moreover, on account of his chronic pain and functional limitations, Mr. Shaw may need to find sympathetic employers who are willing to hire him in spite of his problems... While such employers do exist, they are not abundant.

### **Dr. Denise Hall**

[93] The defence provided me with the rebuttal report of Dr. Denise Hall, a vocational consultant and occupational health specialist.

[94] She opined that Mr. Shaw has transferable skills in that Mr. Shaw ran a business from 2000 to 2018 which required business management skills and financial record-keeping. She noted that she had no details of the role his spouse performed and whether there were other employees in the business. It is possible, she said, that Mr. Shaw recruited and supervised other employees. She would include service station manager and retail and wholesale manager within his transferable skills.

[95] In cross-examination, she agreed that transferable skills were simply one part of the puzzle when looking at employability. She acknowledged that in the real world accommodation does not always happen. A person who frequently needs breaks would have to negotiate those with their employer, and unless the employer is sympathetic it would have an impact. She said that those with chronic pain who work within their limitations can usually perform the job, but if they exceed those limitations it can lead to absenteeism and flareups. She acknowledged that flareups are common in those who experience chronic pain.

## Discussion

[96] The Court of Appeal discussed a claim for loss of earning capacity in *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141:

[30] Thus, in my view, a claim for what is often described as “past loss of income” is actually a claim for loss of earning capacity; that is, 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.

[31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,

... The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. “Loss of the value of work” is the substance of the claim – loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the *actual earnings* the plaintiff would have received; sometimes by a *replacement cost evaluation of tasks* which the plaintiff will now be unable to perform; sometimes by an assessment of reduced *company profits*; and sometimes by the amount of secondary income lost, such as *shared family income*.

[Emphasis in original]

[97] In *Gao v. Dietrich*, 2018 BCCA 372, the court said:

[34] With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a “real and substantial possibility”. The standard of a “real and substantial possibility” is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.

[35] In *Athey v. Leonati*, [1996] 3 S.C.R. 458, the Supreme Court of Canada addressed “the fundamental distinction between the way in which courts deal with alleged past events and the way in which courts deal with potential future or hypothetical events” (at para. 26). While past events must be proved on a balance of probabilities, hypothetical events and future events need not be proved on that standard.

[36] A hypothetical or future event will be taken into consideration “as long as it is a real and substantial possibility and not mere speculation” (*Athey* at para. 27; see also *Rousta v. MacKay*, 2018 BCCA 29 at para. 17). Establishing a real and substantial possibility means that any employment loss must be shown to be realistic, having regard to what the plaintiff’s circumstances would have been absent the injury: *Graydon v. Harris*, 2014 BCCA 412 at para. 27. There must be an evidentiary foundation to the plaintiff’s claim: *Morlan v. Barrett*, 2012 BCCA 66 at para. 59.

[37] If the plaintiff establishes a real and substantial possibility, then the court must weigh the hypothetical or future event according to its relative likelihood: *Athey* at para. 27. For example, “if there is a 30 percent chance that the plaintiff’s injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk” (*Athey* at para. 27). In determining a fair and reasonable damage award, a court should make an assessment rather than a purely mathematical calculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 54.

[98] I must assess the value of the loss of earning capacity. Earnings are evidence of the value of earning capacity but they are not synonymous with its value.

[99] I agree with the plaintiff that the business would have been sold in April 2018 in any event. Although Mr. Shaw in his evidence said that there was “a chance” that the business would have been sold in 2018 without the accident, Mr. Shaw is clearly an optimist. He was proud of the business and was proud that they had increased the gross sales of the business over the period of time that they owned it. However, it was Ms. Folvik-Shaw who dealt with the bookkeeping and finances for the business. She had a much clearer view of the financial viability and what would likely have happened in 2018.

[100] Although they both enjoyed the business, Ms. Folvik-Shaw said that from the time of purchase in 2000 until the sale in 2018 it was a struggle financially. Paying suppliers was stressful. Sometimes they did not have the funds to make large supply expenditures which were required. She believed that they exhausted what savings they had supporting the business. She had been ready to sell the business before 2018. It was a fluke in 2018 that someone arrived wanting to buy the business. The motivation to sell the business was financial freedom and paying off debt. The offer appealed to them for several reasons. First, they could keep the shop equipment, the tow truck and car crushing/salvage business. Second, no environmental study was required. An environmental study would be expensive and a bad report would mean expensive remediation, potentially killing any sale of the business. Third, the gas company with which the business was associated required an upgrade to the premises, which would have cost them an additional \$70,000. They would have to borrow those funds, adding to their existing debt.

[101] Ms. Folvik-Shaw wanted to emerge from the sale of the business debt-free. Even if Mr. Shaw were healthy and uninjured it was her view that they would have sold. Ms. Folvik-Shaw's view of the financial viability of the business is much more realistic. In my view, Mr. Shaw would have agreed when the offer fell into their laps.

[102] Mr. Shaw would then have been able to move to more lucrative employment.

[103] In the first period from 2014 to 2018, I am of the view that the amount that the business paid to replace Mr. Shaw is a fair measure of his loss of capacity. The amount paid for additional wages and contract labour as summarized by the plaintiff is \$75,000 to \$100,000.

[104] After the sale of the business, Mr. Shaw said that he could have gone to work as a mechanic for a dealership as he had before he purchased Greenwood Auto; he may have gone to work in the Fort McMurray area or he could have opened an expanded shop on his home property. I think this latter scenario less likely. As Ms. Folvik-Shaw testified, Mr. Shaw enjoyed working as a mechanic but did not enjoy the business side of being a mechanic. He did not like invoicing or paperwork. He was poor at it. She would have to chase him to complete invoices, etc. etc. Even with an expanded shop, Mr. Shaw would still have to discount his services to reflect the lower income of the area. His issues with paperwork, invoicing and collections would still apply. In my view, the Shaws would have wanted to maximize his earnings with a view to retirement. Him continuing with his own mechanic's business would not realize this goal.

[105] If he took a job as a mechanic at a dealership, median mechanic wages would be around \$25 per hour. Working an average eight-hour day would generate monthly earnings of \$4,333 per month. The 54 months from the sale of the business until trial would result in a loss of approximately \$234,000.

[106] Combining these, the plaintiff seeks an award of \$200,000 to \$300,000.

[107] I am not persuaded by the submissions of the defence that Mr. Shaw has had no past loss of earning capacity. The defence argues that I should draw an adverse

inference from the fact that the plaintiff has failed to produce relevant evidence which was uniquely available to him. However, the defendants do not specify what this information is. I was not advised of its nature, how it was not available to the defence pretrial, whether by request or through application, or its significance to the trial.

[108] Moreover, the drawing of an adverse inference is discretionary and simply leads to a conclusion that the missing evidence would not have assisted the plaintiff, or would have been contrary to his case. It does not produce a particular result. See *Rohl v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316 at paras. 1–5.

[109] As to the suggestion that the years 2012 and 2013 are the best evidence of the financial health of Mr. Shaw, in 2012 to 2013 Mr. Shaw had suffered an injury and was also being medically examined for a possible cancer diagnosis. It was not until the spring of 2014 that Mr. Shaw felt himself to be recovered and back to his normal working pattern.

[110] Secondly, using Mr. Shaw's personal tax returns as the sole measure of his earnings is also not appropriate. Both of the Shaws testified that the business paid for a variety of personal expenses, including food, groceries, insurance, cell phones, payments for the Jeep that Mr. Shaw was driving at the time of the accident, gas, maintenance and repairs on the vehicles, etc. Mr. Shaw's tax returns do not reflect these amounts.

[111] I am also not persuaded, as suggested by the defence, that Mr. Shaw's condition, ultimately determined to be psoriatic spondylitis, is “an insidious back problem such that his earnings are the same with or without the motor vehicle accident” or that it is a disease “whose natural progression would have worsened with age”. There is no medical evidence to support this proposition. Mr. Shaw's own evidence suggests that his pre-existing back condition has not worsened over time and is controlled by medication.

[112] As to travelling north to work, Mr. Shaw testified that this was something he had considered before the accident to generate extra money so that the Shaws could afford the \$25,000 that they would require for their son's hockey activities. This is simply an option that was available to Mr. Shaw. In my view it is realistic, given that his brother-in-law works in the north and would be able to introduce him to work there. It is a measure of his past loss of capacity, nothing more.

[113] I assess the likelihood of Mr. Shaw selling the business in 2018 and moving to more lucrative employment at 80%. Past hypothetical events are to be valued based on their relative likelihood, provided the possibility is real and substantial: *Bhatti v. Ethier*, 2018 BCSC 1779 at para. 131, citing among others *Gao* at para. 39. Using this measure, Mr. Shaw's hypothetical wage loss from 2018 to trial would be 80% of \$230,000, or \$184,000. This together with the loss from 2014 to 2018 of between \$75,000 and \$100,000 totals \$259,000 to \$284,000. In my view the award sought by the plaintiff of \$200,000 to \$300,000 is therefore reasonable.

[114] I award the plaintiff \$250,000 for past lost of income/earning capacity. I view this award to be conservative. The parties may make necessary deductions.

### **Future Loss of Capacity**

[115] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court of Appeal considered the assessment of a future loss of capacity and said:

[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.

#### ***First Step***

[11] With respect to the first step, I note two considerations as outlined in *Rab* at paras. 29–30. First, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for

example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.

[12] Second, with respect to the second set of cases, that is, situations in which there has been no clear loss of income at the time of trial, the *Brown* factors, as outlined in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), come into play. The *Brown* factors are, according to *Rab*, considerations that:

[36] ... are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.

[37] If there has been a loss of the capital asset, the question then becomes whether there is a real and substantial possibility of that impairment or diminishment leading to a loss of income.

[13] For ease of reference, the *Brown* considerations set out at para. 8 of that decision include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[14] Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Rab*; *Perren v. Lalari*, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the *Brown* factors, and thus demonstrates a loss of earning capacity, this does not necessarily mean they have made out a real and substantial possibility this diminished earning capacity would lead to a loss of income in their particular circumstances. This is where the second step comes in.

### **Second Step**

[15] The reference to paras. 93–95 of *Dornan v. Silva*, 2021 BCCA 228, in para. 47 of *Rab*, above, regards the standard of proof at this stage: a real and substantial possibility. This standard of proof “is a lower threshold than a

balance of probabilities but a higher threshold than that of something that is only possible and speculative”: *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

### **Third Step**

[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.

[116] I am satisfied that Mr. Shaw has suffered a permanent injury which will continue to impact his ability to work for the future. Although the evidence indicates that his condition could improve with further guided exercise and therapy, there is no suggestion that he will recover from his injuries.

[117] Is there a real and substantial possibility that this will cause a pecuniary loss? As I indicated above, I am satisfied that without the accident, the Shaws would have sold the business and Mr. Shaw would have found more lucrative work elsewhere. His injuries preclude him from pursuing that more lucrative work.

[118] The plaintiff has clearly lost capacity and income.

[119] I must value that future loss, assessing the relative likelihood of the possibility occurring. Although Mr. Shaw had a history of earnings from the business, I do not view that history as representative of his future loss. I think it is highly likely that he would have sold the business when the opportunity presented itself and moved to more lucrative employment. (I have assessed the likelihood at 80%.) I agree with the plaintiff that in these circumstances the capital asset approach is more appropriate.

[120] The plaintiff argues that if Mr. Shaw were employed at a dealership, the wage he could have earned would be approximately \$75,000 to \$93,000 per year, or

\$939,000 to \$1,174,000 to age 65. The plaintiff suggests his residual employability at 50%. This is consistent with Mr. Shaw’s current schedule and the evidence of Mr. Trainor and Dr. Hall as well as the medical experts. In my view it is reasonable. The loss on these calculations is \$469,000 to \$587,000. As I have said, the likelihood of Mr. Shaw pursuing this type of employment was 80%, had the accident not occurred, leaving a loss of \$375,000 to \$470,000. These numbers provide a measure of this loss.

[121] I assess Mr. Shaw’s loss of future capacity, after considering positive and negative contingencies, at \$400,000.

**Cost of Future Care**

[122] Dr. Helper recommended ongoing massage therapy twice per month for the foreseeable future and an exercise program, starting with 10 physiotherapy sessions and occasional physiotherapy sessions thereafter. Dr. Pirolli recommended 20–30 psychotherapy sessions, followed by 8–12 sessions yearly for 4–6 years. These are reasonable to age 65, as is Mr. Shaw’s use of CBD/THC for sleep. Mr. Shaw has not been able to do the outdoor maintenance work he did before and an award to provide for this is also appropriate. Using the calculations provided by Ms. Vos, this yields a total of approximately \$70,000 and I will make that award for cost of future care.

**Special Damages**

[123] The parties have agreed that special damages are \$14,929.76.

**Conclusion**

General Damages	\$135,000
Past Loss of Earning Capacity	\$250,000
Future Loss of Earning Capacity	\$400,000
Cost of Future Care	\$70,000
Special Damage	\$14,929.76
TOTAL	\$869,929.76

[124] I have not netted past loss of earning capacity or calculated interest. If the parties are not able to agree on these figures they may speak to the matter.

[125] The plaintiff is entitled to his costs.

“B. Brown J.”