

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smith v. Hoekstra*,
2023 BCSC 2074

Date: 20231127
Docket: M198594
Registry: Vancouver

Between:

Michael James Smith

Plaintiff

And

Benjamin Hoekstra

Defendant

Before: The Honourable Mr. Justice Thomas

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial:

Vancouver, B.C.
October 23–27, 30–31 and
November 1–2, 2023

Place and Date of Judgment:

Vancouver, B.C.
November 27, 2023

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[1] This action concerns an accident involving Mr. Smith on July 24, 2018 in Delta, British Columbia.

[2] The defendant admits he was responsible for the accident and that Mr. Smith suffered injuries as a result. The extent and impact of those injuries are disputed.

Pre-Accident Issues

[3] Mr. Smith had had a previous concussion, wrist injury and anxiety issues. However, none of these conditions impacted his level of function at the time of the accident.

July 24, 2018 Accident

[4] Mr. Smith was driving to work in his truck over the Alex Fraser Bridge when a truck pulling a trailer in the opposite lane crashed into the concrete median between the lanes. Concrete was knocked into Mr. Smith's lane, and his truck suffered a significant impact.

Credibility Concerns

[5] The main issue in dispute between the parties is the credibility of Mr. Smith and his partner, Ms. Moir. I am convinced this is a credibility issue despite it being characterized as reliability issue by counsel.

[6] The extent and impact of Mr. Smith's injuries are largely subjective. Therefore, the scope of his loss is largely dependent upon the credibility of their testimony.

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

[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), 1919 CanLII 11 (SCC), 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 CanLII 324 (SCC), [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).

Ms. Moir

[8] The defendant submits I should approach Ms. Moir's evidence with caution as she is Mr. Smith's wife and not an impartial witness. I recognize Ms. Moir's relationship with her husband, but I found her evidence to be consistent with the independent evidence, reliable and persuasive. She struck me as an honest and forthright witness.

[9] I reject the defendant's assertion that a friend or partner of a plaintiff, solely due to their relationship with the plaintiff, cannot provide honest and reliable evidence. Although there were some minor contradictions between her evidence and the evidence of other witnesses, these instances were of little import.

Mr. Smith

[10] A key contradiction in the evidence relied upon by the defendant in attacking Mr. Smith's credibility was that there was no record of cognitive issues in Mr. Smith's general practitioner's notes on his visits shortly after the accident. Mr. Smith was adamant that these issues were present during this time period and that he advised his general practitioner of them on these visits.

[11] I accept Mr. Smith's evidence on this point for the following reasons:

- a) Ms. Moir testified that she told Mr. Smith on several occasions to raise these issues with his doctor because she was concerned about them;
- b) Mr. Smith's general practitioner was not called as a witness by either side;

- c) Dr. Cameron, a neurologist, testified that it was common for these complaints not to be recorded in a general practitioner's notes following a motor vehicle accident as general practitioners are primarily concerned about physical issues. Therefore, he placed little reliance on the absence of the complaints in the medical records; and
- d) Dr. Medvedev, a neurologist, testified that it was important to discuss what symptoms were present directly with the patient in these types of situations to ensure that you obtain an accurate history.

[12] The main credibility concerns I have with respect to Mr. Smith after applying the *Bradshaw* factors is that he understated the extent and impact of his injuries.

I say this for the following reasons:

- a) The evidence as a whole indicated that he missed more work after the accident than he acknowledged, and in particular that he had to leave some four-day "tours" or shifts early;
- b) He minimized the amount of hockey he played prior to the accident in comparison to the independent witnesses;
- c) He understated the impact that his symptoms had on him while at work in comparison to the two independent co-workers, who testified specifically that he was less talkative and spent time alone in a dark room complaining of headaches. Mr. Russel expressed concerns that Mr. Smith's problems made his job more difficult for him;
- d) He understated the impact that his symptoms have on his partner and children in comparison to the evidence provided by both Ms. Moir and his sister; and
- e) Prior to the accident, Mr. Smith was a stoic, self-sufficient man who took great pride in being a firefighter, a caring partner and a good father and providing for his family. It was clear during his testimony that Mr. Smith was emotional

and had difficulty speaking about his limitations and the impact his injuries have on him, his family and his ability to work as a firefighter. This is consistent with his pre-accident character and attitude.

Injuries

Soft Tissue Injuries & Chronic Pain

[13] Mr. Smith sustained musculoskeletal strain injuries to his cervical spine, thoracic spine and lumbar spine, which have progressed to become a chronic pain disorder. I accept Dr. Wang's opinion evidence on this issue. Dr. Wang was Mr. Smith's treating physiatrist and an expert at this trial. Her opinion is consistent with the results of the functional capacity evaluations Mr. Smith underwent prior to the trial.

[14] Dr. Aube also opined on this issue. She is a clinical psychologist. I do not accept her opinion with respect to Mr. Smith's chronic pain condition. Her opinion is essentially based on Dr. Wang's diagnosis. It is apparent that Dr. Aube was not up-to-date on the diagnostic principles underlying this disorder; nor was it entirely clear how she diagnosed the condition.

[15] Mr. Smith's soft tissue injuries were initially debilitating, but they improved and plateaued by the time Mr. Smith returned to work as a firefighter less than a year after the accident. He has daily pain in his left leg, hip, lower back and neck. The pain worsens with activity. If significantly aggravated, he requires time to recover.

Post-Concussion Syndrome

[16] Dr. Cameron diagnosed Mr. Smith with a mild traumatic brain injury and ongoing post-concussion syndrome, which is associated with headache, irritability, mood swings, decreased memory, decreased concentration, decreased libido, problems with being overwhelmed with crowds of people, photophobia, phonophobia, nausea and anxiety.

[17] Mr. Smith had a brief period of unconsciousness when his truck was struck and then had mainly a good recall of many events immediately after the accident.

However, he had several gaps in his memory. I accept that this pattern of good recollection with discrete periods of no memory are consistent with post-traumatic amnesia and support Dr. Cameron's diagnosis.

[18] As noted earlier, I accept Mr. Smith's cognition problems started immediately following the accident despite the fact they were not recorded in the clinical notes. Therefore, I prefer Dr. Cameron's evidence over the opinion provided by Dr. Medvedev on this issue.

[19] Mr. Smith suffers from all of the symptoms of post-concussion syndrome. He uses strategies to assist with his cognition problems so that the functional impact of these symptoms is minimized. Photophobia, phonophobia, anxiety, being overwhelmed, irritability, mood swings and headaches are significant issues for Mr. Smith, and he is unable to avoid many of them due to his employment and young family. I accept Dr. Cameron's opinion that if Mr. Smith does not have an opportunity to rest mid-morning or mid-day, his symptoms will increase due to fatigue.

[20] I accept Dr. Cameron's opinion that problems with cognition, memory and concentration may also be caused by chronic pain or psychiatric issues.

Headaches

[21] All of the experts agree that Mr. Smith has a traumatic headache disorder as a result of the accident.

[22] I find that Mr. Smith suffers from traumatic musculoskeletal headaches and migraneous type headaches. In addition, I find that initially he suffered from headaches due to his post-concussive syndrome disorder. I agree with Dr. Cameron that it is difficult to untangle these conditions and isolate one cause of the headaches, but it is most likely that Mr. Smith's current headaches are traumatic musculoskeletal headaches with migraneous features.

[23] Mr. Smith suffers from daily constant headaches. The headaches worsen with his post-concussion symptoms and with aggravation of his soft tissue pains. When his headache is aggravated, he has to isolate himself in a darkened room.

Post-Traumatic Stress Disorder

[24] Dr. Aube has considerable expertise in diagnosis and treating people with traumatic psychological disorders. I accept her opinion that Mr. Smith suffers from post-traumatic stress disorder along with impaired physical and psychological energy as a result of the accident.

[25] Dr. Aube was mistaken with respect to the extent of Mr. Smith's intrusive symptoms, noting in her report that Mr. Smith had regular occurrences of them, when in reality he did not. However, I am not convinced that this error substantially impacts her overall diagnosis.

[26] Mr. Smith has suffered from two anxiety attacks while at work and struggles with reduced psychological and physical energy and low libido. His anxiety symptomatology vacillates from mild to moderate and mainly expresses itself as hypervigilance. He has low mood but does not suffer from clinical depression. His stress disorder can cause decreased concentration and other cognitive impairments.

Prognosis

Soft Tissue Injuries

[27] Dr. Wang opined that she did not expect any further medical improvement in Mr. Smith's soft tissue injuries. She recommended, but did not prescribe, antidepressant medication. She noted that the efficacy of passive treatments decrease over time and that long-term functional improvement requires active rehabilitation.

[28] Mr. Smith was diligent in doing a physical routine prescribed by his physiotherapist and remained active in his job. Despite this activity, which I find to be synonymous with active rehabilitation for many years, there has been no further improvement in his chronic pain condition.

[29] When cross-examined on the likelihood of future deterioration in Mr. Smith's symptoms, Dr. Wang opined that it is "most likely", or "probable" that Mr. Smith's soft tissue pain will deteriorate as he gets older. This was consistent with the concerns expressed by Ms. Craig.

Post-Concussion Syndrome

[30] There is no treatment for Mr. Smith's post-concussive syndrome given that more than two years have passed since he suffered the injury. Counselling is designed to assist people with coping with their symptoms, such as strategies for dealing with memory problems and discipline in pacing oneself throughout the day.

Headaches

[31] Mr. Smith's treating neurologist suggested that he take medication to assist with his headache disorder. However, the medications would interfere with Mr. Smith's ability to work and operate a motor vehicle. I accept that these medications do not represent a feasible treatment at this time given Mr. Smith's work and family demands. This is consistent with Dr. Medvedev's testimony that Mr. Smith has been compliant with treatment recommendations.

[32] Dr. Cameron and Dr. Medvedev recommended Botox injections for Mr. Smith's headache disorder. I accept Dr. Medvedev's opinion that his prognosis for improvement was guarded, although some future improvement with Botox "is not out of the question".

[33] This is consistent with Dr. Cameron's opinion, which I accept, that statistically one is most likely to have a better response or some improvement in symptoms if treatment is started within two years of the onset of the headaches. The likelihood of improvement is much less after two years.

Post-Traumatic Stress Disorder

[34] I accept Dr. Aube's opinion that it is very rare that treatment will resolve post-traumatic stress disorder; however, treatment may provide some further improvement. There is a strong comorbidity between psychological symptoms and

chronic pain, so improvement in Mr. Smith's pain may facilitate improvement in his stress disorder. On this basis, Dr. Aube concluded that Mr. Smith may benefit from a multidisciplinary chronic pain clinic. Dr. Aube would defer to a physiatrist with respect to what, if any, improvement would be associated with such treatment and was not qualified to provide an opinion on the efficacy of such treatment.

[35] Although Mr. Smith has attempted some counselling through his work, Dr. Aube is of the view that this counselling lacked the specialized nature required to treat post-traumatic stress. It is not uncommon for patients to become frustrated with this type of counselling and discontinue the therapy because it does not treat the disorder. Mr. Smith requires intensive, sustained counselling from a post-traumatic stress specialist, for two years, for any chance of improvement.

Failure to Mitigate

[36] Our Court of Appeal set out the law on failure to mitigate in *Haug v. Funk*, 2023 BCCA 110. This requires a defendant to prove, on a balance of probabilities, that failure, in this case, to follow medical recommendations would have reduced Ms. Smith's damages or symptoms.

[37] The defendant says that Mr. Smith has failed to mitigate his damages by failing to obtain counselling for his psychological symptoms and not following an active rehabilitation program.

[38] I have found that Mr. Smith has engaged in an active rehabilitation program by following the 45-minute exercise routine prescribed to him by his physiotherapist three to four times per week.

[39] Mr. Smith tried counselling as recommended. However, the counselling that was recommended, and that he went to, was not specialized for post-traumatic stress disorder. In my view, it was reasonable and expected that Mr. Smith would discontinue the recommended counselling. Mr. Smith had not been referred to the specialized counselling recommended by Dr. Aube and was not aware of the necessity for it.

[40] Mr. Smith has not failed to mitigate his damages.

Functional Limitations

[41] Mr. Smith underwent functional capacity evaluations by Ms. Craig and Mr. Gander. The results of these evaluations were substantially similar. Both opined that Mr. Smith could not meet the physical demands of working as a plumber. Mr. Smith had difficulty with heavy work demands, prolonged repetitive activity and working in awkward body positions.

[42] Ms. Craig opined that Mr. Smith could only partially meet the demands of firefighting. She opined that Mr. Smith was not capable of working overtime and needed his time off to recover from the strains and stresses that his work placed on his injuries. She felt that his “adrenaline” got him through his work as a firefighter. Although he is able to manage working now through his stoicism, she is concerned that he can only maintain this for so long and that he is at risk for not being able to continue working as a firefighter.

[43] Mr. Gander opined that Mr. Smith could maintain full-time work as a firefighter but that he would experience aggravation of his symptoms that would reduce his work tolerance and require him to be off work from time to time.

[44] I prefer Ms. Craig’s opinion to Mr. Gander’s opinion for the following reasons:

- a) Ms. Craig’s opinion is more consistent with the evidence of Mr. Smith, Ms. Moir and Mr. Smith’s co-workers with respect to the need for Mr. Smith to take time to recover while working as a firefighter;
- b) Ms. Craig’s opinion is more consistent with the evidence of Mr. Smith, Ms. Moir and Mr. Smith’s friends and sister for his need to recover and inability to work following his four-day firefighting shift; and
- c) Ms. Craig’s opinion is most consistent with Dr. Wang’s opinion that Mr. Smith’s chronic pain will increase as he ages.

[45] The fact that Mr. Smith was promoted does not impact the functional capacity analysis, as this promotion was solely due to his seniority as opposed to relative or competitive job performance.

[46] Due to injuries suffered in the accident, Mr. Smith is:

- a) unable to work as a plumber;
- b) unable to work a second job; and
- c) initially unable to work as a firefighter; although
- d) currently able to work as a firefighter, but will experience symptom aggravation requiring time off work as a firefighter from time to time in the future.

Assessment

Loss of Past Earning Capacity

Legal principles

[47] In *Bolgar v. Fraser*, 2023 BCSC 468 [*Bolgar*], Justice Hughes summarized the proper approach to assessing damages for past loss of earning capacity:

[79] An award of damages for past or future loss of earning capacity compensates for a plaintiff's pecuniary loss. Compensation for past loss of earnings is based on what a plaintiff would have—not could have—earned but for the accident-related injuries: *Sekhon v. Cruz*, 2023 BCSC 319 at para. 78, citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. A claim for loss of earning capacity is in substance 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* at para. 30.

[80] The burden of proof of actual past events is a balance of probabilities. However, an assessment of past loss of earning capacity also involves consideration of hypothetical events, which are then accounted for by contingencies. Such hypothetical events need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and substantial possibility and not mere speculation: *Dornan v. Silva*, 2021 BCCA 228 at paras. 63–64, citing *Grewal v. Naumann*, 2017 BCCA 158 at para. 48; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27, 1996 CanLII 183.

Discussion

[48] Mr. Smith has had a functional impairment from the time of the July 24, 2018 accident.

[49] Mr. Smith did not suffer a pecuniary loss due to his inability to work as a firefighter from the date of the accident until trial.

[50] However, both parties agree that the accident caused Mr. Smith to suffer a pecuniary past loss due to his inability to work as a plumber from the date of the accident until trial.

[51] There are three factors that form the basis for calculating Mr. Smith's past pecuniary loss due to his inability to work as a plumber: the amount of time he would have worked; how far he would have progressed through the training program; and what wage he would have received.

Hours of work

[52] The plaintiff says Mr. Smith would have worked full time as a plumber had the accident not occurred; subject to a larger than normal contingency. Counsel suggests a 20% contingency (a contingency discussed and rejected in *Gray v. Lanz*, 2022 BCSC 2218) is appropriate in these circumstances given that it would have been a second job, with Mr. Smith primarily focused on his work as a firefighter.

[53] The defendant says that Mr. Smith's historical earnings form the best predictor of how he would have worked following the accident and suggests that 700 hours per year would be the best predictor of his income from plumbing had the accident not occurred.

[54] I agree with the defendant that Mr. Smith's historical work hours form an appropriate starting point for calculating the number of hours he would have worked but for the accident. However, his historical earnings include time that Mr. Smith took off from plumbing to renovate his own home, time that he was laid off from plumbing, and a period of leave he required around the time of the birth of his second son.

[55] In my view, his historical work hours need to be adjusted to remove the impact that these discrete absences had on his historical working pattern. When his historical record is adjusted for these absences, which I am satisfied would not have occurred again following the accident, Mr. Smith was working the equivalent of approximately 1,000 hours per year as a plumber. In my view, this is an appropriate number of hours with built-in contingencies that apply to Mr. Smith's circumstances.

Progression through training

[56] Mr. Smith required 4,560 additional hours to obtain his red seal in plumbing and would have had to pass the required examination. Having estimated the amount of hours that he would have worked had the accident not occurred, I find that he would have obtained his red seal approximately five years after the accident, or at approximately the time of the trial.

Wage rate

[57] The current wage rate for journeyman plumbers is \$45 to \$48 per hour. At the time of the accident, the wage rate was \$35 per hour. This represents an increase in wages of approximately 33%. However, the increase incurred over the years since the accident to trial.

Net loss of past income

[58] Mr. Benning, the plaintiff's economist, calculated a net loss of income of approximately \$100,000 using a wage rate of \$35 per hour and 1,000 hours of annual employment. Modifying his calculations to reflect the higher wage rate results in an approximate net loss of income of \$120,000. I am satisfied that this is a fair assessment of the loss, and I acknowledge the approximate nature of my calculations which have served as a rough guide of my assessment.

Loss of Future Earning Capacity

Legal principles

[59] In *Bolgar*, Hughes J. also summarized the proper approach to assessing damages for loss of future earning capacity, including the three-part test, following the recent trilogy of decisions on this issue from our Court of Appeal:

[106] The proper approach to assessing damages for loss of future earning capacity was clarified by the Court of Appeal in the trilogy of *Dornan*; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. The approach to this assessment post-trilogy was aptly summarized in *Rattan* as follows:

[146] The assessment of a claim for loss of future earning capacity involves consideration of hypothetical events. Hypothetical events need not be proved on balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event. Allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., in dissent, in *Grewal* at para. 48. The assumptions may prove too conservative or too generous; that is, the contingencies may be positive or negative.

[147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 1990 CanLII 7005 (ON CA), 74 D.L.R. (4th) 1 (Ont. C.A.).

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

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

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

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

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

Discussion

1. Is there a loss of capacity?

[60] I have found that Mr. Smith has a functional impairment that will extend past the trial date. This satisfies the first part of the *Rab* test.

2. Is there a real and substantial possibility that the loss of capacity will cause a pecuniary loss?

[61] Both parties agree that Mr. Smith will suffer a pecuniary future loss due to his inability to work as a plumber after the date of trial. The parties disagree as to whether there is a pecuniary future loss associated with Mr. Smith's firefighting career.

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

Loss of work as a plumber

[62] The parties agree that the appropriate method for assessing this loss is the lifetime earning approach.

[63] Mr. Smith says that he would have continued to work both as a firefighter and a plumber until his mandatory age of retirement from firefighting of 60, at which point he would have transitioned to working only as a plumber until age 65. I accept Mr. Gander's evidence that minimum full-time work as a plumber would be 30 hours a week, which I estimate in Mr. Smith's case to be 1,400 hours. In my view, this is an appropriate number to use as a rough estimate for how much Mr. Smith would work per year after retiring from firefighting.

[64] I accept this career path for the following reasons:

- a) Given the age of his children, Mr. Smith will be required to continue to working to age 65 to support their education;
- b) He has a strong work ethic and is driven to provide for his family financially;
- c) He enjoyed working as a plumber, enjoyed working for his employer, and had a close personal relationship with him; and
- d) It is common for firefighters to work two jobs.

[65] I have already determined for the period of past loss of earning capacity that appropriate work contingencies for Mr. Smith's employment as a plumber while working as a firefighter are based on his adjusted historical work pattern for the years that he worked as both a plumber and a firefighter. This amounts to 1,000 hours of work as a plumber per year until age 60, and then 1,400 hours of plumbing per year from ages 60 to 65.

[66] I find that an additional 10% labor force contingency is appropriate for the entirety of Mr. Smith's loss of future earning capacity as a plumber. I say this for the following reasons:

- a) Plumbing would have been a second job for Mr. Smith until age 60, which would have given rise to a greater possibility of his being laid off or quitting plumbing due to the other demands on his time;
- b) Further, Mr. Smith's increased chance of injury as a firefighter might have prevented him from working as a plumber or reduced his ability to work from this baseline; and
- c) After age 60, I am of the view that more absences should be built into the estimate to reflect the physical nature of the job and the expected increase in difficulties one would expect a worker to have managing those demands after age 60.

[67] This reduces the number of hours of work as a plumber to 900 hours per year until age 60, and then 1,260 hours per year from ages 60 to 65.

[68] The defendant says that there should be significant positive contingencies for the fact that Mr. Smith's injuries may improve with treatment; specifically with medication, Botox injections, counselling, active rehabilitation and a pain clinic.

[69] I do not accept this proposition for the following reasons:

- a) I have found that it is not reasonable for Mr. Smith to pursue medication which would impair or prevent his ability to work;
- b) He has pursued active rehabilitation without improvement of his soft tissue injuries for many years. The prognosis is that his soft tissue injuries will likely worsen over time, not improve;
- c) There are significant comorbidities between his pain and other symptoms;
- d) There is no further treatment for his post-concussion syndrome;
- e) There is a possibility of some improvement in his headaches with Botox injections, but the prognosis is guarded. The efficacy of the treatments is significantly reduced because they were not started within the initial two-year period;
- f) He has a chance of improvement with his post-traumatic stress syndrome with intensive specific counselling.

[70] When I consider the medical evidence with respect to Mr. Smith's future, I am forced to conclude that even with treatment it is likely that there will be a deterioration in his chronic pain. Given the associated comorbidities between his chronic pain condition and his other injuries and symptoms, this worsening of his condition outweighs all of the possible benefits of the various treatments.

[71] I have determined that Mr. Smith would have obtained his red seal at the time of trial had the accident not occurred. I accept that the wage for a journeyman or red seal plumber is \$48 per hour. This is the wage that Mr. Smith would have earned for his plumbing work during the future loss of earning capacity period.

[72] Therefore, Mr. Smith would have made an additional \$43,000 per year as a plumber up until age 60 and then \$60,000 per year from ages 60 to 65. I accept Mr. Benning's economic multipliers of 11.262 up to age 60 and 2.223 from ages 60 to 65. This results in a total calculated future loss of earnings for loss of plumbing work of \$484,266 plus \$133,380 for a total of \$617,646.

[73] In my view, considering all of the circumstances, \$620,000 is an appropriate amount for this aspect of the future loss of earning capacity.

Early retirement from firefighting

[74] The plaintiff says that given the likelihood of a deterioration in Mr. Smith's symptoms, there is a real possibility of an early retirement from firefighting. As Mr. Smith's mother stated, "he will push through until he can't and then he'll pack it in because he won't put his friends in danger because of his own health."

[75] The defendant says that early retirement would only occur if there were a deterioration in Mr. Smith's symptoms. I agree. As noted, I have found that it is likely Mr. Smith's symptoms will deteriorate further.

[76] Plaintiff's counsel suggests that a reasonable quantification of this loss would be a 65% chance that Mr. Smith retires three years earlier than expected or alternatively an award for Mr. Smith having to retire approximately two years earlier than expected.

[77] I agree with this proposition. Dr. Wang opined that it is "probable" and "most likely" that there will be a deterioration in Mr. Smith's chronic pain symptoms. As noted previously, given the high comorbidity between his chronic pain and other issues, a deterioration in his chronic pain would have a significant impact.

[78] Mr. Benning has calculated this loss at \$172,250. In my view, considering all of the circumstances, \$170,000 is an appropriate amount for this aspect of the future loss of earning capacity.

Special Damages

[79] The parties have agreed that Mr. Smith is entitled to \$3,864.49 in special damages.

Cost of Future Care

[80] The “test” for future care awards is essentially that there must be a medical justification for an item and the award must be reasonable in the circumstances: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.), aff’d (1987) 49 B.C.L.R. (2d) 99, 1985 CarswellBC 13 at paras. 210–211.

[81] The parties agree that a chronic pain program is an appropriate expense. I agree with the defendant that \$14,000 is an appropriate amount for this program.

[82] The parties agree that payment for Botox is appropriate. I accept Dr. Medvedev’s evidence that an initial trial of two to three attempts would be useful to determine efficacy, and that if successful, continued injections for three to five years would be appropriate. I accept Ms. Craig’s revised estimate that Botox injections would cost on average \$2,680 per year. Given the low prospect of improvement through Botox, in my view a three-year contingency for the treatment is appropriate, for a total of approximately \$8,000.

[83] In my view, a contingency for headache medication is not necessary as I have found that it is reasonable for Mr. Smith not to pursue this treatment option given his employment as a firefighter.

[84] In my view, an award for a gym membership or physiotherapy is not necessary. Mr. Smith worked out regularly before the accident and continues to work out and follow an active rehabilitation program.

[85] In my view, Mr. Smith is entitled to the specialized counselling for trauma recommended by Dr. Aube, the present value of which is \$26,588.

[86] There is a dispute between the parties over whether Mr. Smith requires assistance for housekeeping and house/yard maintenance services.

[87] These services are appropriately awarded in situations where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work: *Kim v. Lin*, 2018 BCCA 77, at paras. 33–34.

[88] This is to be distinguished from circumstances where a plaintiff is able to perform housekeeping tasks with some difficulty or decides they need not be done because performing the work causes discomfort. This type of loss is more properly compensated as part of non-pecuniary damages.

[89] Mr. Smith is capable of doing household and gardening tasks with difficulty. However, in these circumstances it is not appropriate for Mr. Smith to do these tasks as he needs his off days to recover from the rigors of working as a firefighter given his injuries. In essence, the services are provided to enable Mr. Smith to continue working as a full-time firefighter. In my view, this provides an appropriate basis for the award.

[90] Ms. Craig recommends \$4,184 in such services each year. This was based on her experience as to what is typically provided and a general interview of Mr. Smith. Although her interview was short on specifics, I find Ms. Craig's recommendation to be an appropriate award in the circumstances, given Mr. Smith's high involvement in household services and yard maintenance prior to the accident.

[91] Since the award is based on services Mr. Smith could perform if he was not injured, it should be limited until age 58, the date upon which I have found that he will no longer be able to continue working as a firefighter. In my view, Mr. Smith will be able to provide household and yard services after he retires despite a likely increase in his somatology.

[92] Mr. Benning provides a future cost of care multiplier of 9.68 until age 58. This results in a present value calculation of approximately \$40,500 for these services.

[93] Therefore, the total value of Mr. Smith's cost of future care award is \$89,088 (\$14,000 + \$8,000 + \$26,588 + \$40,500).

Non-Pecuniary Damages

[94] Both parties relied upon the factors and methodologies set out by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34. I will not review counsel's submissions on the law. The principles are well-known.

[95] Mr. Smith is 48 years old. I have set out the injuries caused by the accident, and the impact that these injuries have on his function. I will not repeat them.

[96] Mr. Smith's enjoyment of life has been significantly impaired due to his injuries. He is a stoic individual, but in my view, his sense of self-worth has been shattered by his inability to work and care for his wife, children and household as he did prior to the accident. His recreational pursuits have been severely curtailed. The primary focus of his time off work is to recover in order for him to be able to maintain his employment.

[97] Mr. Smith's counsel referred me to a number of cases analogous to the injuries suffered by his client which provide a range of non-pecuniary damages from \$207,597 to \$232,925 in current dollars. After reviewing the cases, I found the *Martin v. Steunenberg*, 2021 BCSC 1411 [*Martin*] case to be of most assistance. In that case, a 46-year-old male firefighter was injured. He suffered similar injuries to Mr. Smith but unlike Mr. Smith was unable to continue with his firefighting tasks on a sustained basis. However, the non-pecuniary award was decreased by a contingency to reflect improvement in Mr. Martin's injuries due to treatment. I have found it is likely that Mr. Smith's injuries will worsen despite treatment. Mr. Martin was awarded approximately \$230,000 in current dollars for non-pecuniary damages.

[98] The defendant's counsel referred me to a number of cases with non-pecuniary damage awards ranging from \$70,000 to \$85,000. In support of this range of damages, the defendant points out that there is little objective evidence supporting Mr. Smith's injuries such that the Court must rely on Mr. Smith's subjective reports. They say the Court should be skeptical of Mr. Smith and that he was not a reliable witness.

[99] I acknowledge the concerns of such evidence as summarized by this Court in *Price v. Kostryba* (1982), 70 B.C.L.R. 397, 1982 CanLII 36, but I have found that there is convincing evidence supporting Mr. Smith's injuries and have accepted him to be a reliable witness. Given these findings, the cases provided by the defendants are not analogous to Mr. Smith's circumstances.

[100] Considering the impact of the injuries on Mr. Smith and the cases that I have been referred to, specifically *Martin*, I am of the view that \$200,000 is an appropriate assessment of Mr. Smith's non-pecuniary loss.

Summary of Award

[101] I award the following damages to Mr. Smith:

- a) \$200,000 non-pecuniary loss;
- b) \$89,088 cost of future care;
- c) \$3,864.49 in special damages;
- d) \$790,000 in loss of future earning capacity; and
- e) \$120,000 in loss of past earning capacity.

[102] This amounts to a total award of \$1,202,952.49.

Costs

[103] The parties may apply to appear before me if they are unable to resolve the issue of costs and/or deductibility of benefits within 30 days.

“Thomas J.”