

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Melvin v. Li*,
2023 BCSC 241

Date: 20230217
Docket: M173688
Registry: Vancouver

Between:

Nathan Melvin

Plaintiff

And:

Shuo Li and Zinzhi Wu

Defendants

Before: The Honourable Madam Justice Young

Reasons for Judgment

Counsel for the Plaintiff:

B. W. Lemer

Counsel for Defendants:

K. Armstrong, K.C.
and E. E. O'Dea

Place and Dates of Trial:

Vancouver, B.C.
January 3 - 6, 2023
January 9 - 10, 2023

Place and Date of Judgment:

Vancouver, B.C.
February 17, 2023

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OVERVIEW

[1] The plaintiff Nathan Melvin is a 39-year-old man who sustained an injury primarily to his upper back in a motor vehicle accident on November 14, 2015 (the “Accident”) which occurred seven years before trial. The defendants admit liability and causation. The plaintiff has not recovered and still suffers from chronic pain in the upper back and additional pain on the right lower lumbar area. At trial he is unemployed. His physical disabilities are confirmed by neurosurgeon Dr. Shahid Gul, who was called by the plaintiff, and physical medicine and rehabilitation specialist Dr. Abdul-Wahab Khan, who was called by the defendants. The plaintiff has become anxious and depressed but has never been diagnosed with depression or an anxiety disorder.

[2] Mr. Melvin is capable of undertaking physical activity for medium durations but does not have the durability to withstand a full day at work. Loss of earning capacity is a key issue in this trial.

THE ACCIDENT

[3] Mr. Melvin was driving home from his work with Skip the Dishes on November 14, 2015, and was driving straight through an intersection controlled by traffic lights. The oncoming traffic had a left-hand turn signal but the traffic light facing Mr. Melvin was green, so he proceeded. An oncoming car driven by the defendant Li turned left directly in front of him and he collided with the passenger side of that vehicle behind the right wheel well. Mr. Melvin’s vehicle was declared a write-off.

[4] Mr. Melvin described a dramatic flexion and extension movement of his neck and upper back such that his chin hit his chest and then snapped back. He immediately felt neck, chest and upper back pain. He was in shock but remembers a tingling sensation in his fingers. He was afraid to exit the vehicle and waited for paramedics to extract him from it. He recalled it took two or three of them to extricate him from the vehicle. The paramedics placed him on a backboard with a neck collar and transported him to the hospital, where he stayed for two to three hours.

The Treatment of the Injuries and Functioning Post-Accident

[5] The injury to Mr. Melvin's neck resolved within the first year after the Accident but the pain in his upper thoracic spine continues to the date of trial, seven years later. He described a painful cracking of his thoracic spine when he sits upright and pulls his shoulder blades together. He feels stabbing pain and a burning sensation in the region.

[6] Mr. Melvin had physiotherapy and took Tylenol 3 for pain and as a muscle relaxant, and was able to reduce his pain medication to non-prescription Tylenol after a few months. He found the physiotherapy particularly helpful for his neck injury but not as helpful for his upper back.

[7] Mr. Melvin attempted to return to work at the end of February 2016. He started working as an Amazon All Canadian Courier delivery contractor. He was still experiencing mild to moderate pain and burning, as well as tightness and soreness in his back.

[8] Mr. Melvin worked for Amazon for seven months and found that his pain increased in severity and duration. He was working ten-hour days delivering up to 100 packages per day. At the end of the day he would have to rest on the couch and have a long hot shower to get some relief.

[9] In the summer of 2016, he suffered an aggravation of his upper back pain after attending a chiropractic treatment. Initially chiropractic treatments had helped, but on this occasion, when he was lying on his side, the chiropractor was pushing on his rib cage and he experienced an intense aggravation of his upper back pain. After that, his upper back pain became worse and the cracking and burning sensations became more frequent. He started using Tylenol 3, anti-inflammatories and muscle relaxants in the fall of 2016 after the chiropractic treatments.

[10] After leaving his employment with Amazon, Mr. Melvin worked again for Skip the Dishes.

[11] In or around 2017, Mr. Melvin bought a food truck and trailer and started a business called Mel's Mega Fries. He started working in the food truck in the spring of 2018. He worked with other people but found the work was hard on his back. In the summer of 2018, Mr. Melvin hurt his back while working at a five-day festival and realized that he could not continue with the food truck business.

[12] When the food truck business failed, Mr. Melvin decided that he had to return to his home in New Brunswick because he could not support himself in British Columbia. He and his mother drove the truck back to New Brunswick, taking turns driving.

[13] Mr. Melvin's mother, Barbara Melvin, testified that the drive was so difficult on her son that some days he had a hot shower once they got to a hotel and went straight to bed without dinner because he was experiencing so much back pain.

[14] After the drive across Canada, Mr. Melvin noticed pain in his lower right back as well. This pain has never gone away.

[15] Haley Melvin, Mr. Melvin's sister, testified that he was really suffering. She recalls one incident where he was in her car in the passenger seat and started punching the dashboard, crying in pain.

[16] There has been little change in Mr. Melvin's condition from 2018. The pain is constant. He wakes up with it and is in pain all day. At one point he gained about 70 lbs. To his credit, after his vocational rehabilitation appointment was cancelled because of his high blood pressure, he changed his diet, started swimming and took his blood pressure medication and was able to lose the weight.

[17] Mr. Melvin described his current days. He starts his day doing stretching exercises for 30 to 40 minutes in bed. He then has coffee, feeds his cats and lays in a chair or couch for the day. He was exercising at a local hotel in the swimming pool, which he stated felt good, but he could not afford to continue doing so. He tries to do light housework at his mother's house such as laundry and cooking supper for his mother. He is able to do the dishes, clean the cat litter and take the garbage out, but

he is unable to shovel snow or mow the lawn. His pain worsens the more he does these activities, and it can range from mild to debilitating. When shopping, he often returns to the car before his mother or sister because of increased pain. He can walk for a maximum of 20 or 30 minutes. He gets frustrated when he cannot participate in activities with his nine-year-old nephew.

[18] Mr. Melvin described his social life as bleak. He was once a very social person and had a large group of friends in Vancouver. He was physically active and engaged in recreational sports. Now he only sees family members and does not have a social life at all. His pain is unpredictable and so it is difficult to plan an activity ahead of time.

[19] Both Barbara and Haley Melvin confirm this evidence.

[20] Mr. Melvin stated that he has suffered from depression and anxiety since the Accident. He described chronic pain as demoralizing. He experiences anxiety whenever he gets into a small car. He described himself as being moody and having anger issues. He has been using marijuana to help with the “mental element” of his condition. I note that he has never been assessed for clinical depression or an anxiety disorder and he has not been prescribed antidepressants. He has self-medicated with marijuana for the psychological effects of his injury.

[21] His former roommate Cody Getchell testified about living with Mr. Melvin in Vancouver from 2016-2018. They worked together on a food tent business and later the food truck. He remembered that Mr. Melvin rarely came out of his room and that he was grumpy all of the time. Mr. Getchell did not meet Mr. Melvin until after the Accident and he was aware that Mr. Melvin was suffering from back pain. He recalled Mr. Melvin laying on the floor to relieve back pain at times. He also confirmed that Mr. Melvin missed food truck engagements because of his back pain.

[22] Shortly after the Accident, Mr. Melvin started smoking marijuana frequently because of his mood.

[23] Mr. Melvin continues to take Tylenol 3 for his pain with diminishing relief. He uses hydromorphone occasionally if the pain is severe. He has tried cannabidiol (“CBD”) oil which provides some relief when the pain is moderate.

[24] Mr. Melvin has not been able to afford marijuana or CBD oil. He testified that if he did have the money to buy them, he would use them every day. He provided some evidence of the cost of marijuana and CBD oil from government agency stores. Initially Dr. Douglas Smith recommended that he use two grams of marijuana per day for pain, but now that Mr. Melvin has lost substantial weight he finds one gram of marijuana per day is sufficient. I note that he does not use marijuana for pain control but rather to manage his low mood and help him sleep.

TESTIMONIAL RELIABILITY

[25] I will exercise caution in accepting the plaintiff’s evidence and will look for corroboration.

[26] I accept the plaintiff’s evidence about his pain and suffering. His memory of historical events and dates is poor but I do not get the impression that he is intentionally evasive. Mr. Melvin’s evidence about his pain and suffering is well supported by other witnesses. He is a much different person after the Accident. Before the Accident he was physically and socially active and outgoing. He played many sports in high school and had a large group of friends in New Brunswick. He made a large group of friends in Vancouver and played recreational soccer and football frequently with them.

[27] The defendants submit that I should be skeptical about the plaintiff’s evidence with respect to his enjoyment of life in the two years prior to the Accident because it is not corroborated. I believe it is corroborated by his mother and sister, Barbara and Haley Melvin, who spent time in Vancouver with Mr. Melvin and kept in touch with him from New Brunswick.

[28] Because of chronic pain, Mr. Melvin is now completely sedentary and has little motivation. He has no social life.

[29] Mr. Melvin did misstate his employment history to various medical experts including Mr. Niall Trainor, a vocational rehabilitation expert. He asserted that he was working full-time at Salmon's Rental Service ("Salmon's") at the date of the Accident. This was untrue and potentially affected Mr. Trainor's opinion.

[30] I do not accept Mr. Melvin's testimony that his life goal was to get a stable job with a good company with good pay and benefits. That statement seemed rehearsed to me and contradicted his pre-accident work attachment evidence. When he did have a full-time job with a good company with good pay, he took voluntary lay-offs and quit his employment to enter into a joint business venture with that company to run a food tent.

[31] Mr. Melvin also misstated the purpose of his medical marijuana consumption to many experts. He sought prescriptions for pain management but his own evidence was that he used CBD oil for pain management and marijuana for mood management. He did not tell Dr. Smith that he immediately started using marijuana after the Accident for mood and he did not tell him that he has sought medical marijuana prescriptions from various medical marijuana producers.

PRE-ACCIDENT PHYSICAL CONDITION

[32] Mr. Melvin suffered from high blood pressure and sleep apnea/insomnia prior to the Accident. He was physically active. He was a recreational marijuana user.

Education and Employment History

[33] I have set out Mr. Melvin's work history in some detail because his attachment to work and participation in employment in the past is relevant to his claim for loss of earning capacity. I have concluded that he did not have a strong attachment to work. He frequently quit jobs and went home to New Brunswick for the winter. He left his longest employment to start a food business venture. Although he testified that his life goal was to work for a good employer with a good wage and benefits, his past conduct suggests that his preference is to be self-employed in the

food or hospitality industry. His real passion is to cook food and he enjoys the positive reaction he gets to it.

[34] Mr. Melvin completed high school in 2001. He described himself as an average student. He moved to Vancouver to attend the Vancouver Film School for a year. At the end of the year-long course in 2003 he realized he was not passionate about acting as a career and he moved back to New Brunswick for a few years where he worked as an aquaculture technician.

[35] Following high school, he worked at farm and fish farm labouring jobs. There were gaps in his employment between finishing film school and working between 2003-2004, 2005-2006 and 2007-2008. He quit each job looking for a change. He worked for 5th Avenue Cinemas in Vancouver and quit for a better job. He was off work for a few months and then started working at West Coast Pool Services for two and half years, quitting in November 2010 because he again needed a change. He did not return to work until April 2011 when he took a job in Grande Prairie, Alberta as a welder's helper. He worked for five months and quit when he was struck by a vehicle in a pedestrian crosswalk. He suffered an injury to his leg which took months to recover. He went home to New Brunswick to do so, and he did make a full recovery, although he was off work until May 2012.

[36] He returned to Vancouver and worked as a car lot attendant at Downtown Nissan.

[37] He worked at Salmon's as a driver/swamper from May 2012 to May 2015, delivering and setting up rented party equipment. He took voluntary layoffs in the winter of 2014 and 2015 to return to New Brunswick, as winter was the slow season in the party equipment rental business.

[38] In the spring of 2015 he left his employment at Salmon's to enter into a business venture with them operating a food tent using their equipment and his labour. According to his record of employment, he had not been employed by them since May 2015. Salmon's did not want to continue the food tent venture by the end

of the summer of 2015. Mr. Melvin and Salmon's had a dispute about the business venture's expenses and he chose to part ways with Salmon's.

[39] He was off work and taking occasional shifts from Skip the Dishes in 2015 when he was injured.

[40] As stated above, after the Accident he worked for Amazon All Canadian Courier as a delivery driver from February 2016 to September 2016. He continued to work sporadically for Skip the Dishes through 2016 and 2017. He found that company was more flexible with shifts and he could take breaks during his shifts. Although his shifts tended to last four hours, he was not able to continue this job; sometimes he could not finish his shift and had to call someone to cover for him. His back was getting worse, and he barely covered his vehicle expenses. Mr. Melvin quit working for Skip the Dishes in 2018 to start his own business.

[41] With the assistance of his parents' financing, Mr. Melvin bought a food truck and trailer and started Mel's Mega Fries. It took a year and a half to apply for licenses, buy the trailer and have it outfitted. The food truck was ready to use in the spring of 2018. He had a soft opening weekend and attended a few festivals. When he attended the Ska Festival in the summer of 2018 he worked five days and realized that this job was too demanding and seriously aggravated his upper back pain. The job included driving and parking the trailer, setting up the generator and propane tanks, cutting the potatoes into French fries, buying supplies such as drinks and mozzarella sticks and getting cash and condiments ready. He took orders and helped in the kitchen, and his business partner Mr. Getchell and his mother also helped run the food truck.

[42] He stopped work in August 2018 when it was clear to him that operating a food truck was too strenuous. Mr. Melvin has not looked for work since returning to New Brunswick in 2018.

[43] He tried to sell his homemade beef jerky at a farmer's market but because of the COVID-19 pandemic there were few opportunities.

[44] He and his mother have a plan to rent her house out as an Airbnb.

[45] Mr. Melvin testified that there are three Airbnbs in the area which are very busy. His mother's house has four bedrooms, with the deck right on the ocean, and he believes it could attract good tourist business in the summer. He and his mother Barbara Melvin testified that they expect to be able to earn between \$20,000 and \$30,000 per year after a year or two. Mr. Melvin would manage the business but would have to hire staff to do the cleaning between guests. Mr. Melvin and Barbara Melvin have not sorted out how the profits would be divided. Barbara Melvin is willing to assist with the business. Haley Melvin is not.

[46] Mr. Melvin is not interested in re-educating or looking for employment. His focus is on this Airbnb venture with his mother which would earn him a very modest income.

THE EXPERT EVIDENCE

Dr. Shahid Gul

[47] Dr. Gul was qualified to give opinion evidence as an expert in neurosurgery on behalf of the plaintiff. He filed three reports in this trial. The first report is dated May 5, 2017 after his assessment of Mr. Melvin on April 12, 2017. The second report is dated August 11, 2022 after his assessment of Mr. Melvin on May 18, 2022. The third report is dated November 21, 2022 and is a critique of the defendants' September 21, 2022 medical legal report authored by Dr. Abdul-Wahab Khan.

May 5, 2017 Report

[48] In April 2017 when Dr. Gul first saw Mr. Melvin, he complained of constant midline upper thoracic region burning and sharp back pain with an average intensity of 6.5-7/10. The pain made it difficult for him to sleep and was often worse first thing in the mornings. His neck was pain-free. His back pain was focused along the midline at T4/T5 level. Mild disc bulges were apparent at several levels of the cervical spine. There was a focal central disc herniation at T7-T8.

[49] Mr. Melvin advised Dr. Gul that he consumed marijuana and alcohol on an occasional basis.

[50] Dr. Gul described the injury suffered by the plaintiff as an injury involving the muscles and/or tendons that function to move and support the cervical and thoracic spines while supporting the weight of the head and neck. He gave the opinion that such injuries can be slow to heal due to the relatively constant biomechanical demands placed on this region of the spine in the upright position.

[51] He stated that mechanical neck pain can be aggravated by physical activities.

[52] Dr. Gul's opinion is that it is more likely than not that the Accident caused Mr. Melvin's cervicothoracic spine soft tissue injury which would account for his neck and upper back pain.

[53] Dr. Gul noted that Mr. Melvin experiences constant daily upper back pain that has affected his mood and continues to have a major negative impact on his quality of life. The ongoing pain has also made it difficult for Mr. Melvin to return to his previous work driving for Amazon due to the physical demands of the job and the associated aggravation of his upper back pain.

[54] He is also of the view that Mr. Melvin was unable to return to jobs that included physical labour. He anticipated that Mr. Melvin would have difficulties with jobs that result in increased biomechanical strain to the spine. Such jobs would involve activities that would aggravate his pain.

[55] Dr. Gul is of the opinion that most spine-associated soft tissue injuries secondary to trauma from motor vehicle accidents resolve within about 18 months from the time of the injury. In his experience, soft tissue injury-associated pain that persists beyond 18 months is likely to become chronic. Although Mr. Melvin's cervical spine soft tissue injury has resolved well, he continues to be disabled by constant pain secondary to the soft tissue injury localized to the upper thoracic region. There is no indication of a need for surgical intervention. He recommended

that Mr. Melvin continue with physiotherapy-based core strengthening and flexibility exercises and/or aquacize as long as the exercises do not aggravate his symptoms.

August 11, 2022 Report

[56] Dr. Gul noted that Mr. Melvin was working the food truck in May 2018 and complained to his GP of increased back pain. The GP ordered a trial of gabapentin.

[57] Mr. Melvin had experienced progression of his back pain to include the lower thoracic region, as well as the right lumbosacral region of his lower back.

[58] Dr. Gul noted that Mr. Melvin had two MRIs (2018 and 2021). Mr. Melvin saw Dr. Roop Randhawa at the Medical Cannabis Resource Centre in August 2018 and a trial use of synthetic cannabinoid agents was recommended. He saw Dr. Neil Manson, an orthopedic surgeon, in 2020 who recommended medications, fitness, weight reduction and activities as tolerated with no restrictions.

[59] In May 2022, Mr. Melvin reported his thoracic region pain at 4-5/10 (reduced from 2017) and lumbar pain at 2-3/10 (not present in 2017).

[60] He had been swimming 3-4 times a week with some relief but had to stop in December 2021 due to the cost of the activity. He continued to do yoga stretching exercises at home. He reported being quite limited in participating in household chores as cooking, cleaning, laundry and yard work as all of these activities aggravated his pain.

[61] As a result of his ongoing back pain Mr. Melvin was feeling miserable and irritable. He was avoiding social activities. He found that marijuana helped his stress and anxiety, and CBD oil was helpful in addressing his upper back pain. He was prescribed hydromorphone to help him with flare-ups in his back pain in 2021.

[62] Dr. Gul was of the opinion that it is more likely than not that Mr. Melvin's worsening back pain relates to his initial soft tissue injury to the cervicothoracic neck and upper back. It is more likely than not that the ongoing injuries to these areas have resulted in biomechanical muscular compromise to the more caudal (tail)

portions of the spine, resulting in the progression of pain to the lower thoracic back as well as the right lumbosacral region.

[63] Given the state of Mr. Melvin's spine, Dr. Gul anticipated ongoing limitations related to activities that increase the biomechanical strain to the spine. Such activities include but are not limited to heavy or awkward lifting, impact or jarring, strenuous upper extremity reaching, prolonged neck extension/flexion, strenuous lower back bending or twisting, and prolonged sitting/standing/computer work.

[64] He concluded that Mr. Melvin remained disabled as a result of his ongoing back pain caused by the Accident. As a result, he is still unable to return to work. His ongoing pain also has had an impact on his ability to partake in physical exercise and assist with household chores. Mr. Melvin's ongoing back pain has also caused him to become socially withdrawn as he finds it difficult to commit to plans with friends due to his back pain.

[65] It is Dr. Gul's view that Mr. Melvin will continue to have thoracic and lumbosacral region back pain for the foreseeable future as a result of his soft tissue injury caused by the Accident.

[66] I will review the defendants' report of Dr. Khan next before considering Dr. Gul's critique of Dr. Khan's report.

Dr. Abdul-Wahab Khan - September 21, 2022 Report

[67] Dr. Khan was qualified to give opinion evidence in this trial as an expert in physical medicine and rehabilitation at the request of the defendants.

[68] He examined Mr. Melvin on August 30, 2022.

[69] Dr. Khan agreed that Mr. Melvin has suffered from a cervical spine strain, thoracolumbar spine strain, right sacroiliac joint dysfunction and chronic myofascial pain as a result of the Accident.

[70] Given the duration of time that has passed since the Accident without complete resolution of his pain symptoms to date, Dr. Khan's opinion is that the prognosis for a complete recovery of Mr. Melvin's Accident-related physical pain symptoms is poor. The pain symptoms that he currently experiences will likely continue to persist into the future. He will likely continue to have a decreased physical capacity and endurance in comparison to his pre-accident status.

[71] His pain tolerance will determine the degree of functionality he demonstrates in the future. He was encouraged to pursue employment activities as tolerated while being cautious and mindful of flare-ups. He may resort to frequent breaks and ergonomic modifications and equipment, together with pain medication for symptom relief.

[72] Dr. Khan provided a list of possible treatment options for Mr. Melvin to try. They are set out on page 14 of his report. There is a list of medications, many of which Mr. Melvin has tried, and a list of injection-based therapies that Mr. Melvin has not tried.

Dr. Gul - November 21, 2022 Critique

[73] Dr. Gul was asked to comment on these treatment options. He performs radiofrequency ablation in his practice and said that there are risks to this treatment. Dr. Gul testified that one needs to test the nerve first to see if the patient receives pain relief from a cortisone shot before considering destroying the nerve. None of the specialists that Mr. Melvin has already seen have recommended needle-based treatments.

Crystal Fong - June 12, 2018 Functional Capacity Evaluation Report

[74] Ms. Fong was qualified to give opinion evidence in the field of occupational therapy and functional capacity evaluation at the request of the plaintiff. She assessed Mr. Melvin on March 23, 2018 and April 30, 2018.

[75] Mr. Melvin completed the physical portion of the evaluation on April 30, 2018. This was before Mr. Melvin started working in the food truck and before he

developed lumbar pain. He was optimistic at the interview that he would be able to perform all the activities required for the food truck business.

[76] Based on the assessment findings, Mr. Melvin was capable of competitively meeting all of the job demands at Skip the Dishes as a delivery driver. He was found to be suitable for work that allowed him to alternate between sitting, standing and walking throughout the day. He was also found suitable for work that involved frequent reaching from waist to overhead levels and frequent gross/fine dexterity at waist level. He could tolerate rare or occasional repeated kneeling, bending and crouching and frequent repeated twisting and stair climbing.

[77] Repeat testing showed there were some activity levels that Mr. Melvin could sustain over the day and some he could not. He could not sustain mobility at a competitive level over the course of the day and Ms. Fong found he was not currently suitable for alternated work that would require walking more than an occasional amount, standing/sitting beyond a frequent amount and lifting or carrying in excess of 25-35 lbs.

[78] Ms. Fong concluded that it is likely that Mr. Melvin will have difficulty obtaining work with an employer that is not able to accommodate his needs.

Niall Trainor

[79] Mr. Trainor was qualified to give opinion evidence in the area of vocational rehabilitation at the request of the plaintiff. He assessed Mr. Melvin on November 15, 2019. He prepared an updated report dated October 25, 2021 after interviewing Mr. Melvin on July 9, 2021.

April 8, 2020 Report

[80] By the time of Mr. Trainor's first assessment, Mr. Melvin had worked in the food truck business and had not tolerated the work. He was living with his mother in New Brunswick and was collecting income assistance. He had no vocational goals but said he was open to exploring possibilities. He presented well as a mature, competent and affable individual who was able to cast himself in a positive light by

mentioning several employment assets such as learning ability, work ethic, memory, communication and social skills. He identified his back injury as a potential weakness.

[81] Mr. Melvin's interests were for occupations that require creativity. He also has an affinity to occupations that involve managing and controlling business activity. Mr. Trainor also determined that he would experience job satisfaction from occupations that involve interacting with others.

[82] Mr. Trainor was able to identify several occupations as prospective vocational options for Mr. Melvin that were among the less physically demanding in the labour force. He also recommended that Mr. Melvin receive further vocational counselling and job search support, as well as financial support for retraining. He believed that these vocational rehabilitation initiatives would help to ameliorate the loss of employability that Mr. Melvin has experienced as a result of his injuries. Mr. Trainor pointed out that it was important to recognize that vocational rehabilitation will not be a panacea for Mr. Melvin's acquired employment barriers. In other words, as long as Mr. Melvin continues to suffer from chronic pain, functional impairments, discouragement, anxiety and depression, Mr. Trainor expected that he would continue to struggle to maintain a durable attachment to the labour force.

[83] In addition to pursuing less physically demanding occupations Mr. Melvin would need to find sympathetic employers who would be willing to accommodate his limitations. Reasonable accommodations in his case could include reduced hours, reduced productivity expectations, increased use of sick leave, support from co-workers and ergonomic aids including specialized office furniture and computer software. In his opinion, sympathetic employers do exist, but they are not abundant. Typically, workers with his kind of employment barriers need to make trade-offs in order to secure employment. These concessions can include accepting lower wages, fewer benefits, less job security, reduced hours of employment and less amenable working conditions.

[84] In Mr. Trainor's opinion, Mr. Melvin would benefit from further support from a vocational case manager to help him to explore and choose a specific job goal(s). A case manager could assist Mr. Melvin with revising his résumé; developing job leads; preparing for interviews; providing support to Mr. Melvin and a prospective employer with respect to job modification, training and accommodation needs; and post-placement support. On a one-time basis the cost of such support is in the range of \$3,000 to \$4,000.

[85] Mr. Trainor's opinion is that Mr. Melvin has the potential to pursue some entry-level occupations in business, sales and services. The majority of these do not pay as well as he was capable of earning before the Accident, but over time there is potential for advancement through on-the-job training into better-paid supervisory and managerial roles. Usually these occupations -- customer service representative, retail clerk, salesperson, etc. -- are accessed via on-the-job training provided by the employer.

[86] He recommended arranging a wage subsidy program in order to make Mr. Melvin more attractive to prospective employers. In brief, the vocational case manager would assist Mr. Melvin to find a sympathetic employer willing to provide on-the-job training. The employer would be reimbursed for wages paid to him during a probationary training period of between three and six months. This would give Mr. Melvin an opportunity to gain new transferable work skills and recent work experience and hopefully become employed at the end of the probationary period.

[87] Mr. Trainor provided a chart with a list of possible occupations that he thought were within Mr. Melvin's potential. They were less physically demanding but in most cases he would still require some accommodation and may require further education.

[88] Mr. Trainor also believed that Mr. Melvin has the potential to pursue post-secondary education, such as a diploma or degree in business administration, journalism, social work or education. The recommended occupations in Mr. Trainor's report require up to five years of formal training on a full-time basis. Due to his

chronic pain, Mr. Melvin may need to attend on a part-time basis but extend his enrolment through summer sessions in order to complete training as soon as possible. The anticipated cost of tuition, books and supplies is about \$7,000 per year.

[89] If Mr. Melvin opted to return to college in order to undertake formal skills training, Mr. Trainor recommended that he not attempt to pursue concurrent employment since a priority needs to be placed upon achieving a solid performance in retraining.

[90] Accordingly, some provision would need to be made for wage loss during retraining. The amount would depend on the length of training undertaken and whether he attends on a full-time basis.

[91] Mr. Trainor recognized that Mr. Melvin's chronic pain, functional impairment, anxiety and depression are acquired barriers to competitive employment. He had been unemployed at the time of the report for more than 1.5 years. This lengthy gap in his employment in turn led to a guarded vocational prognosis.

[92] Mr. Trainor identified barriers to Mr. Melvin's employment as follows:

- (a) He has fewer vocational options.
- (b) He will need accommodation from a sympathetic employer.
- (c) His feelings of anxiety and depression will affect his job search behaviour, job performance, and social functioning on-the-job.
- (d) The realities of the labour market in which employers have a preference for able-bodied workers with recent work experience.

October 25, 2021 Report

[93] On July 9, 2021, Mr. Trainor conducted a one-hour update interview with Mr. Melvin.

[94] Mr. Melvin reported that since his previous assessment with Mr. Trainor, he continued to grapple with chronic pain and related functional impairments, as well as anxiety and depressed mood. He remained unemployed. He formulated a plan to manufacture beef jerky and sugar-free products; however this plan did not manifest because he had no start-up capital.

[95] Mr. Melvin had registered for a property management program that he withdrew from when he realized that it was not consistent with his interests.

[96] Since his previous assessment Mr. Melvin's father had passed away and he and his mother developed a plan to renovate the family home in Beaver Harbour, New Brunswick with a view to creating a small self-contained suite for her in the garage space and renting out the main house for tourist vacation rentals through Airbnb. Mr. Melvin's employment plan was to oversee the renovation and manage the day-to-day rental of the home.

[97] Mr. Melvin's vocational interests were reassessed and his strongest interest was in "enterprising" which would include jobs such as salesperson, retail manager and small business owner. He still exhibited a preference for occupations that required creativity. The most likely areas of interest for him included entrepreneurship, culinary arts, athletics, marketing, advertising and performing arts.

[98] Testing of his personal style scale indicated he preferred practical experiential learning over academic learning through lectures and reading.

[99] Mr. Trainor has experience operating an employment program for aspiring entrepreneurs. In his opinion self-employment could provide Mr. Melvin with an opportunity to re-enter the labour force, offsetting the loss of employability that comes from being unable to access conventional employment. With his new business plan, one could see him managing reservations, greeting renters and coordinating repairs, cleaning and maintenance. Mr. Trainor was under the impression that Mr. Melvin would be providing renters with breakfast which

apparently is not the case. Because of his pain problems, Mr. Melvin anticipated hiring others to do the cleaning and laundry which would reduce his profit.

[100] Mr. Trainor cautioned about the risk of failure in entrepreneurship, which was significant in this case because Mr. Melvin has limited capacity to personally perform the physically demanding aspects of the job such as making repairs, performing routine maintenance and cleaning. He recommended that Mr. Melvin develop a written business plan.

[101] Mr. Trainor recommended that Mr. Melvin enroll in the New Brunswick Community College's Oasis program. This was a free 12-week mentorship program linking inexperienced aspiring entrepreneurs with seasoned business professionals.

[102] I note at trial over one year later, Mr. Melvin had no formal business plan but a vague idea of running an Airbnb after hiring someone else to renovate the two buildings. Mr. Melvin had done nothing to pursue the free training through the New Brunswick Community College.

[103] I also note that Mr. Trainor thought that Mr. Melvin was working for Salmon's when he was injured and thought that Mr. Melvin had been diagnosed with depression. Neither of these assumptions are true. Mr. Trainor said the fact that he did not have an accurate pre-accident work history could affect his opinion on without-accident employment opportunities. The fact that Mr. Melvin left his employ with Salmon's prior to the Accident due to a conflict could affect his opinion of employability because Mr. Melvin would be unlikely to get a reference letter from Salmon's.

OTHER MEDICAL EVIDENCE

Dr. Douglas Smith

[104] Dr. Smith is a treating physical medicine and rehabilitation physician who saw Mr. Melvin on September 25, 2020 and had further telephone conversations with him on May 12, 2021 and July 25, 2022. His medical legal report of September 7, 2022

was not admitted in this trial under the expert evidence rule but he was permitted to give evidence as a fact witness.

[105] Mr. Melvin complained to him of back pain which he described as degenerative disc changes at L5-S1 and chronic myofascial pain. He applauded Mr. Melvin's recent initiatives including swimming aimed at improving overall fitness. He prescribed medical cannabis for Mr. Melvin at his request.

[106] He prescribed two grams per day of cannabis for 12 months. He recommended a product high in CBD for daytime use which would not cause impairment or drowsiness and a product higher in tetrahydrocannabinol ("THC") at night for help with sleep.

[107] In May 2021, Dr. Smith spoke with Mr. Melvin. He noted that Mr. Melvin was out of the workforce and using an opioid prescription occasionally. He had been swimming regularly at a pool in St. Andrews, New Brunswick and felt comfortable when he was in the water.

[108] Dr. Smith said that Mr. Melvin was using cannabis for pain management and at Mr. Melvin's request Dr. Smith mailed him a medical document that would enable him to shop the market for a licensed producer. In that report Dr. Smith said "it is noted that he was not a regular cannabis user before the accident". This in fact was incorrect. Dr. Smith said in cross-examination that he was not aware that Mr. Melvin started using marijuana days after the Accident to control his symptoms. In cross-examination, Dr. Smith also said he was not aware that Mr. Melvin was smoking dry marijuana flower for mood management. Dr. Smith made the prescription for medical marijuana for the management of pain. He did not recommend it for mood management.

[109] On July 26, 2022, Dr. Smith again spoke with Mr. Melvin about his back pain and the fact that he had been using cannabis for pain management which Mr. Melvin reported to work well where other measures had failed. It is in this letter that

Dr. Smith wrote that Mr. Melvin is “awaiting settlement of his accident claim”. This was reported to Dr. Smith by Mr. Melvin.

NON-PECUNIARY DAMAGES

[110] The plaintiff seeks a non-pecuniary award for pain and suffering and loss of enjoyment of life of \$135,000 relying on the following cases:

Carrillo v. Deschutter, 2018 BCSC 2134 at paras. 89-99: \$115,000
(\$131,982.76 in 2022)

Erickson v. Saifi, 2019 BCSC 1120 at paras. 56-64: \$140,000 (\$157,140.76 in 2022)

Flores v. Burrows, 2018 BCSC 334 at paras. 101-107: \$115,000
(\$131,982.76 in 2022)

[111] The defendants submit that a non-pecuniary award in the range of \$90,000 to \$110,000 will be appropriate relying on the following cases:

Stanikzai v. Bola, 2012 BCSC 846 at paras. 41-43: \$85,000 (\$107,383.10 in 2022)

McConvey v. Hart, 2013 BCSC 1058 at paras. 272-298: \$80,000
(\$100,162.60 in 2022)

Bal v. Makichuk, 2022 BCSC 1695 at paras. 57-69: \$95,000

Chernichen v. Mundy, 2022 BCSC 1704 at paras. 43-52: \$110,000

[112] I find that Mr. Melvin was injured in a motor vehicle accident and that he has sustained soft tissue injuries in his upper back which have progressed to his lower lumbar spine. Seven years after the Accident his upper and lower back pain have become chronic. His pain varies in intensity. He suffers from episodic severe pain spasms and heat in his thoracic region. His lower back pain appears to be more in

the mild to moderate range and his upper back pain ranges from moderate to severe.

[113] I do not believe that Mr. Melvin has exaggerated his symptoms. Nor is there any evidence from any physician that he showed exaggerated pain responses. Although Mr. Melvin has not been diagnosed with anxiety and depression I find that the effects of chronic pain have made him feel depressed and anxious.

[114] Mr. Melvin has not pursued active rehabilitation in any meaningful way despite the fact that this has been suggested by a number of medical practitioners. He is now deconditioned after four years of unemployment and sedentary activity. What the future holds depends on how much energy Mr. Melvin is willing to put into his recovery. It is promising that he found some relief from swimming and it is not his fault that he had to stop that activity. He has been living in poverty waiting for the trial of this action and has been unable to afford a swim pass or gym pass. It appears today that he is only willing to rely on passive therapies and medication. He is not willing to try activities and push through the pain. However, I cannot find that he failed to mitigate his loss. Dr. Gul testified that one must be very careful when doing activities that can aggravate the spine as it could exacerbate the patient's condition.

[115] Mr. Melvin's chronic pain has severely affected his enjoyment of life. Since the summer of 2018 when he left British Columbia and moved back to New Brunswick with his mother he has led a very reclusive life, which is a dramatic contrast to his social and physically active life before the Accident.

[116] I accept the fact that Mr. Melvin's chronic pain is a permanent condition which will limit his ability to undertake physical activities and many forms of employment in the future.

[117] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, Justice Kirkpatrick set out a non-exhaustive list of factors to be considered in awarding damages under this head. These factors include: the plaintiff's age; the nature of the injury; the severity

and duration of the pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism.

[118] I have reviewed the authorities proposed by both the plaintiff and the defendants and have adjusted the awards of the older authorities to present day values. Taking into consideration Mr. Melvin's age, the duration of his pain and suffering and the fact that his condition is permanent and that he will suffer chronic pain indefinitely I find the plaintiff's request for non-pecuniary damages in the amount of \$135,000 is reasonable.

PAST LOSS OF INCOME

[119] A claim for "past loss of income" is compensation for the impairment of the plaintiff's past earning capacity that was occasioned by his injuries. The plaintiff must be placed in the original position he would have been absent the defendants' negligence. It is therefore necessary to assess what the plaintiff's original position would have been but for the Accident. It is the difference between the original position and the post-injury position which is the plaintiff's loss: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 32, 1996 CanLII 183.

[120] Hypothetical events such as how the plaintiff's life would have proceeded without a tortious injury or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Athey* at para. 27.

[121] The right process is to determine whether on the evidence the contingency or risk in question is a real and substantial possibility and if so, secondly determine the relative likelihood of it occurring: *Dornan v. Silva*, 2021 BCCA 228 at para. 133. This process must be tethered to the evidence, not to averages and approximations based on imprecise evidence: *Dornan* at para. 134.

[122] As Mr. Justice Goepel observed in *Grewal v. Naumann*, 2017 BCCA 158 at para. 48, an assessment of loss of both past and future earning capacity involves a

consideration of hypothetical events. The plaintiff does not have to prove these hypothetical events on a balance of probabilities. The hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation.

[123] In assessing the plaintiff's claim for past wage loss, the Court must consider the income earned by the plaintiff after the Accident and compare it with the income he might have earned had the Accident not occurred.

[124] The plaintiff submits that Mr. Melvin could and would have made at least \$35,000 per year after the Accident if he had not been injured.

[125] The defendants point to the plaintiff's on-again off-again history with work prior to the Accident as documented in his résumé as well as the history provided by Mr. Trainor and confirmed in cross-examination. Mr. Melvin's résumé shows numerous absences from work in the early years of his employment history. He then obtained a job at Salmon's where he was earning over \$40,000 a year. He took a substantial leave of absence from his work at Salmon's in the winter of 2014 and 2015 because they were slow periods. Leaves of absence were optional and Mr. Melvin was homesick and wanted to go home for Christmas. This does not show a strong attachment to the workforce; however, he did return to his employment in the spring of 2015.

[126] While earning a good wage, by his own choice Mr. Melvin left his employment at Salmon's to start a business venture operating a food tent at festivals. After having a disagreement with Salmon's about the division of business expenses, Mr. Melvin parted ways with Salmon's due to the conflict. Although he indicated that he intended to apply for work with a competitor company the following spring, I find that it was not likely that he would have received a good reference from Salmon's and consequently not likely that he would have been hired by the competitor company if he could not explain his reason for departing a company where he had worked for three years.

[127] If he was successful in obtaining employment with a competitor, I assess the likelihood of his staying in that line of work as not great given his past employment behaviour.

[128] I do not think it is reasonable to rely on Mr. Melvin’s income at Salmon’s to predict his without-accident income. Mr. Melvin had a stronger interest in being self-employed judging from his pre-accident and post-accident behaviour.

[129] I agree with the defendants that the most appropriate without-accident earning baseline should be the average of the plaintiff’s 2011 to 2015 earnings. I differ from the defendants in that I have included Mr. Melvin’s income and employment insurance income for 2015. Given his past absences from work, I think there is a real and substantial possibility that he would continue to work in the summers and take time off on employment insurance to go back to New Brunswick in the winters.

[130] Prior to and including the year of the Accident, the plaintiff earned:

2011	\$ 24,602.56	
2012	\$ 26,261.60	
2013	\$ 41,418.66	
2014	\$ 29,912.07	
2015	\$ 22,116.60	
TOTAL	\$144,311.49	= \$28,862.30 average

[131] Using that figure, in the seven years and 49 days or 7.134 years between the Accident and the trial commencing on January 2, 2023, he would have earned \$205,903.65. I apply an income tax rate of 14 percent which is what was charged in 2014 on similar income. This leaves a net income for that period of \$177,077.14.

[132] Mr. Melvin earned the following after the Accident:

2016	\$26,176.13	
2017	\$ 3,781.00	
2018	\$ 1,516.00	(identified as from Skip the Dishes in direct evidence)
2019	\$ - 462.00	net business loss
2020	Nil	
2021	Nil	
2022	Nil	
TOTAL	\$31,011.13	(no tax because of credits in the last 3 years)

[133] Subtracting the actual net earnings from his projected without-accident earning I arrive at a figure of \$146,066.01.

[134] I assess Mr. Melvin's past earnings loss at \$150,000.

LOSS OF FUTURE EARNING CAPACITY

Legal Framework

[135] An award for future loss of earning capacity is an assessment of damages which involves the comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened. The Court must compare the plaintiff's likely future working life with and without the accident: *Dornan* at paras. 156-157.

[136] This assessment will involve a consideration of hypothetical events. As with past loss of income, a hypothetical event that may cause a future loss of income need not be proven on a balance of probabilities but will be accounted for as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27;

Grewal at para. 48; *Kim v. Morier*, 2014 BCCA 63 at para. 8. 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 that event: *Grewal* at para. 48. The Court must make allowances for contingencies both positive and negative: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 11; *Kim v. Baldonero*, 2022 BCSC 167 [*Kim*] at paras. 88, 99.

[137] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, Justice Grauer set out a three-step process for considering claims for loss of future earning capacity as summarized by Horsman J. (as she then was) in *Kim* at para. 89:

- (1) Does the evidence disclose a potential future event that could give rise to a loss of capacity?
- (2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff? and
- (3) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

[138] In *Lo v. Vos*, 2021 BCCA 421 at para. 117, Grauer J.A. applied a final step in the damage assessment process, which is that the Court must determine whether the award is fair and reasonable.

[139] There are two approaches to the assessment of damages for loss of earning capacity: the earnings approach and the capital asset approach. In cases using the earnings approach, valuation of future loss involves the determination of the plaintiff's without-accident earning capacity using actuarial and economic evidence as well as the plaintiff's past earnings history: *Lo* at paras. 109-111; *Kim* at para. 91.

[140] The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial and where the plaintiff has established a work history and clear career trajectory: *Ploskon-Ciesla* at para. 16.

[141] The capital asset approach is particularly helpful where 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 the plaintiff's potential future: *Ploskon-Ciesla* at para. 17. In cases using the capital asset approach, such as where the plaintiff continues to earn income at or near pre-accident levels, loss of capacity in the future may be valued using one or more years of the plaintiff's pre-accident income as a tool: *Rab* at para. 72.

[142] Justice Finch set out a list of further specific considerations in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353 at para. 8, 1985 CanLII 149 (S.C.), which may be taken into account in making an assessment based on the capital asset approach:

[8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment 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.

The Plaintiff's Position

[143] In the case at bar, the plaintiff submits that the capital asset approach is best because, while the plaintiff identified an industry that he enjoyed and hoped to work at (event supplies and set up), he was unemployed (except for Skip the Dishes) at the time of the Accident. The plaintiff urges the Court to look at his employment history at Salmon's to provide information for the assessment of loss of earning capacity.

[144] The plaintiff calculates the future loss by multiplying an income of \$41,000 per year less potential nominal earnings of \$5,000 per year by the multiplier to age 67 and arrives at a loss of earning capacity of \$792,000.

[145] While I accept that the capital asset approach is a better approach given the plaintiff's unemployment and the fact that he has not yet established a career trajectory, I reject the plaintiff's argument that I should rely on his income at Salmon's to provide an assessment of loss of earning capacity. The plaintiff has expressed an interest in running his own business. He left secure employment at Salmon's to explore a business venture in partnership with Salmon's. After his unemployment he started another business venture running a food truck. During his unemployment, he also attempted a third venture selling homemade beef jerky.

[146] According to the opinion of Mr. Trainor, the plaintiff's interests lie in creativity and entrepreneurialism. At trial the plaintiff's only career goal was to enter into a business with his mother and operate an Airbnb out of his mother's home. Based on this evidence there is a real and substantial possibility that the plaintiff would have entered into some form of self-employment even absent the Accident.

The Defendants' Position

[147] The defendants' position is that Mr. Melvin is not completely disabled from work and has residual work capacity. Ms. Fong noted in her report that the plaintiff was suitable for work that allowed him to alternate between sitting, standing and walking throughout the day. During his testing the plaintiff was able to sit for one hour and 35 minutes and stand for over 50 minutes. While Ms. Fong stated in her report that it is likely Mr. Melvin would have difficulty obtaining work with an employer that is not able to accommodate his needs, she agreed that employers in British Columbia are required to accommodate workers with limitations.

[148] I would temper this opinion with the observation that the assessment was done in 2018 before Mr. Melvin stopped working and before his lower back pain started. His residual capacity may be lower now than what was assessed in 2018.

[149] Mr. Trainor also opined that the plaintiff has residual capacity. He identified a wide variety of employment opportunities, noting that the plaintiff was capable of post-secondary education including a business diploma or degree.

[150] Dr. Gul during cross-examination agreed that Mr. Melvin is not completely disabled from every line of work and that he would defer to vocational experts with respect to what work the plaintiff is fit for.

[151] Dr. Khan noted that the plaintiff can drive. He encouraged the plaintiff to engage in activities as tolerated to the best of his ability. He also noted that the plaintiff has not been prohibited by his treating practitioners from working to the best of his ability as tolerated.

[152] The defendants argue that I should reject the calculations of the economic expert, Mr. Peter Sheldon, of the average income of full-time full-year high school graduates in both British Columbia and New Brunswick as Mr. Melvin has never earned average income in either province. I note that the plaintiff does not rely on those average income earnings in their submissions.

[153] The defendants submit that the plaintiff has been idly waiting for the settlement of this case. The plaintiff told that to Dr. Smith on July 22, 2022, and apparently also his GP. The plaintiff has not explored numerous areas of employment available to him which include retail, tourism, food services and office work.

[154] The defendants submit that the plaintiff's loss of earning capacity is a lost capital asset and should be assessed accordingly. The defendants submit \$45,000 is appropriate to award the plaintiff under this head of damage. That is close to two years of his pre-accident earnings.

Analysis

[155] I accept that the plaintiff has suffered an impairment to a capital asset, as he meets the factors set out in *Brown*: he has been rendered less capable overall from earning income from all types of employment; he is less marketable or attractive as an employee to potential employers; he has lost the ability to take advantage of all job opportunities which might otherwise have been open to him but for the Accident;

and generally, he is less valuable to himself as a person capable of earning income in a competitive labour market.

[156] I will proceed through the three-step analysis outlined in *Rab*.

[157] At the first step I have found the plaintiff suffers from chronic pain and will continue to do so for the foreseeable future. This conclusion is supported by the evidence of Dr. Gul and Dr. Khan.

[158] Several practitioners have recommended that the plaintiff engage in an active rehabilitation program under the supervision of a kinesiologist. With the award that the plaintiff will receive in this matter, he will be able to afford to pursue swimming which he found helpful. It is clear on the evidence that Mr. Melvin is deconditioned. This was apparent as early as 2018 when he underwent a functional capacity evaluation. He was continuing to work at that point. By the time of trial, he was even more deconditioned as he has been more or less sedentary for four years. The treatment recommendations of Dr. Gul and Dr. Khan should be tried and may alleviate some of the plaintiff's symptoms. I agree that it will be a slow and arduous process as the plaintiff will have to take time off exercising when he suffers an aggravation of his symptoms.

[159] Relying on the evidence of Ms. Fong, Mr. Trainor and Dr. Gul, I find the plaintiff will be limited in the future in his ability to work at jobs that require him to perform physical tasks such as frequent lifting, standing and sitting, and he will require accommodation in any job that involves physical tasks.

[160] I will now consider the second step in the analysis which is whether the plaintiff has established a real and substantial possibility of future income loss as a result of his ongoing chronic pain. I find that he has. The plaintiff will have difficulty finding work, be restricted in his ability to perform certain types of work and likely cannot tolerate full-time work as a result of his physical limitations arising from the Accident. He may be able to pursue entrepreneurial ventures that do not require him to perform strenuous physical activity but this will require an outlay of capital to hire

others to perform those services for him and will result in a reduction of any profit payable to him.

[161] Based on the second assessment conducted by Mr. Trainor, it is apparent that the plaintiff, although intellectually capable, is not interested in pursuing formal educational advancement. That means that he is unlikely to increase his employment opportunities with more education.

[162] Based on the functional capacity evaluation of Ms. Fong and the vocational evaluation of Mr. Trainor, I find that Mr. Melvin has the capacity to work in the future but in a reduced capacity because of his chronic pain.

[163] Having found that the plaintiff has clearly lost capacity and income, 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: *Rab* at para. 29.

[164] In the third step of the analysis, I will value the possible future income loss that the evidence discloses while taking into consideration the relevant contingencies.

[165] With active rehabilitation, pain treatment, swimming and vocational counselling, Mr. Melvin's condition may improve as he is able to cope with chronic pain better. I assess the chances of this happening and allowing Mr. Melvin to earn some income at 33 percent. This is guarded optimism because Mr. Melvin has not tried active rehabilitation yet and many doctors have opined that this will help his condition. With exertion comes the potential for symptom aggravation which explains why my assessment is guarded. I rely on the evidence that Mr. Melvin does have residual capacities and could undertake employment opportunities where he can set his own hours to accommodate the unpredictability of his back pain.

[166] The chances of Mr. Melvin withdrawing from the workforce seasonally as was his pattern in the past is quite likely because I envision him following his passion of

working in tourism, entertainment or food services. There is a real and substantial possibility that the work or the business venture he pursues will be seasonal.

[167] Given Mr. Melvin's poor attachment to work I find there is a substantial likelihood that he would not work past age 65.

[168] I have taken all these factors into account in assessing what Mr. Melvin's future income might have been if he had not been injured. The only evidence in this case that provides a useful tool in assessing the lost capacity is the record of the plaintiff's past income: *Rab* at para. 78. I had found that his average past income per year between 2011 up to the date of the Accident in 2015 was \$28,862.30.

[169] I assess Mr. Melvin's without-accident future earnings at \$30,000-\$40,000 per year to age 65. I will rely on the average of \$35,000. Using Mr. Sheldon's multiplier of \$20,812 for work from trial to age 65 leads to a without-accident income calculation of \$728,420.

[170] Applying the 33 percent positive contingency that he might be able to work and earn \$12,000 (rounded) per year he would be capable of earning \$249,744 using the multiplier of \$20,812 for work from trial to age 65.

[171] I assess his loss of earning capacity at \$480,000 and consider that to be a reasonable and fair award in this case.

COST OF FUTURE CARE AWARD

Legal Framework

[172] Justice Gomery summarized the principles that govern the assessment of damages for cost of future care in *Gill v. Borutski*, 2021 BCSC 554:

[107] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 [*Gignac*] at paras. 29- 30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

- [108] Each part of the claim must be supported by the medical evidence. If the plaintiff relies on the report of an occupational therapist or rehabilitation consultant, there must be an evidentiary link between the medical evidence and the recommendations in the report; *Gignac*, at paras. 31-32. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for her to justify a claim in respect of that service; *Warick v. Diwell*, 2018 BCCA 53 at para. 55.
- [109] At the end of the day, an award for the cost of future care is assessed, not mathematically calculated; *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28-31.
- [173] Justice Horsman added the following points in *Kim* at paras. 104-105:
- [104] While a plaintiff's health and happiness are intertwined, an award of damages for future care costs is not intended to account for the cost of amenities which make the plaintiff's life more bearable or enjoyable, but which are not medically justified: *Warick v. Diwell*, 2018 BCCA 53 at para. 24.
- [105] Future care costs are a matter of prediction. The court must determine the present value of the future reasonable care needs of the plaintiff, allowing for contingencies to account for the fact that the future may differ from that suggested by the evidence at trial: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Pang v. Burns*, 2021 BCCA 478 at para. 58.
- [174] The plaintiff seeks the cost of housekeeping, medical marijuana, hydromorphone, the use of a pool, vocational rehabilitation consulting and housekeeping.
- [175] The plaintiff submits that he will need assistance with heavier household tasks such as lawnmowing and snow removal. He currently resides in his mother's home and either his mother or his sister does that work. It is unclear what sort of dwelling he will have in the future. He testified that lawn cutting costs about \$40 per cut. The plaintiff claims 15 lawn cuts for the five-month growing period from May to September and a fall cleanup totalling \$640 per year. Using Mr. Sheldon's multiplier to age 75 of \$24,538 equals \$15,700 rounded in present value. The plaintiff discounted this amount to \$10,000 as an appropriate award to take into account the possibility that he may live in a townhouse or an apartment without a yard in the future.
- [176] The defendants do not make submissions on this point.

[177] I find that the plaintiff's claim and discount are reasonable. The plaintiff has established that the expenses are medically justified as he cannot do this heavy work and relies on others to do it for him. I find \$10,000 is reasonable and I so order.

Cannabis Products

[178] The plaintiff has referred to three authorities where cannabis costs were awarded to plaintiffs where there was evidence of a prescription and a beneficial effect for the plaintiff: *Carrillo* at paras. 147-163; *Erickson* at paras. 79-82; and *Joinson v. Heron*, 2011 BCSC 727 at paras. 404-431.

[179] In *Carrillo*, Dr. Hershler recommended that Mr. Carrillo be put on medical cannabis for pain management, mood and sleep. He recommended a product high in CBD, a non-psychoactive cannabinoid, and low in THC, a psychoactive cannabinoid. The goal was to gradually wean Mr. Carrillo off his current pain medication. Dr. Hershler confirmed that the program should be supervised by a medical practitioner and the product would be purchased through Health Canada dispensaries.

[180] Justice Dardi was satisfied that Mr. Carrillo appreciated the necessity of being supervised by a medical practitioner. Mr. Carrillo's evidence was that he found cannabis products effective and was experiencing some pain relief. There was no evidence the consumption produced negative effects. She also noted that Mr. Carrillo had pursued more traditional modalities such as physiotherapy, chiropractic treatments, massages and injections without any significant benefit. Justice Dardi concluded that the medical cannabis program recommended by Dr. Hershler was medically justified within the meaning contemplated by the authorities and that it was reasonable to make an award for costs of cannabis as part of Mr. Carrillo's future pain management plan.

[181] In *Erickson* the plaintiff testified that Dr. Montaner recommended cannabis for her and she found it helpful in relieving her pain. Another doctor who testified said that she did not think it was useful. The plaintiff pointed to an approach in future care costs set out in *Thompson v. Helgeson*, 2017 BCSC 927 which notes that future

care items do not need to be expressly approved by medical experts and the Court must look to the whole of the evidence to determine whether the award is supported.

[182] Justice Baker awarded \$20,000 in total for the costs of cannabis to treat Ms. Erickson's pain symptoms into the future. She noted cannabis no longer required a prescription in Canada and that the use of cannabis for pain treatment is now more akin to self-medication with over-the-counter painkillers. She was satisfied that Ms. Erickson used cannabis to assist her with pain arising from her injuries and this was recommended to her by Dr. Montaner.

[183] In *Joinson*, which was a medical malpractice case, the plaintiff claimed \$822,308 for medical marijuana for the remainder of his natural life. Mr. Joinson testified that he smoked 10 grams of marijuana per day and used one capsule with marijuana in oral suspension per day. He also used marijuana blended into baked goods for pain in his back and knee. Mr. Joinson was spending \$700 per week on these products.

[184] Mr. Joinson relied on the evidence of Dr. Bright, his treating psychiatrist, pointing to her support for his use of medical marijuana of up to 20 grams per day. She testified that his use of marijuana had allowed him to reduce his consumption of morphine.

[185] Dr. Janke, a psychiatric expert called by the defendant, testified that reducing anxiety is not an authorized use of medical marijuana.

[186] Justice Brown accepted the medical literature was controversial and noted the conflicting medical opinions, scientific controversy, safety concerns and the concern about the amount of marijuana Mr. Joinson was using (20 grams being equivalent to about 27 joints a day).

[187] Justice Brown found that the medical evidence supported a finding that compensation for some medical use of marijuana was reasonably necessary in that case:

[421] There is no bright line distinguishing mere benefit and reasonable necessity in this case. But with basic reasoning and application of the above stated legal principles it can be drawn, if roughly. Pain control and its contribution to Mr. Joinson's ability to function to his maximum potential are core considerations here. Without use of medical marihuana or a synthetic substitute, Mr. Joinson would have to increase his use of morphine, which is detrimental, particularly to his functioning: he does not function as well, physically or mentally, without use of medical marihuana. His treating physicians endorsed this treatment option, supporting him in his use of medical marihuana. Other physicians may disagree, but his family physician and psychiatrist see him on a regular basis and, in this particular instance, are in the best place to consider what is medically necessary.

[188] Justice Brown awarded \$30,000 for the costs of medical marijuana, reducing the dosage of smoked marijuana to five grams per day in keeping with recommendations from Health Canada. He then discounted the total by 50 percent to subtract the personal use of smoked marijuana which Mr. Joinson would have consumed irrespective of any harm resulting from the surgery.

[189] The plaintiff submits that the evidence in this case is that standard medication became ineffective for Mr. Melvin and as a result he turned to CBD oil for pain. He used marijuana in plant form for mood. He would have continued to use CBD oil if he could have afforded it. He obtained his marijuana from his father.

[190] Dr. Smith confirmed Mr. Melvin's report that it is effective in reducing pain, and did also prescribe him cannabis for that purpose.

[191] The defendants submit the plaintiff confirmed during his testimony that he was a user of recreational marijuana prior to the Accident. He used marijuana on weekends and after work. Further, the plaintiff confirmed during his cross-examination that he was using marijuana in the days following the Accident.

[192] During the cross-examination, Ms. Fong agreed that during her functional capacity assessment with the plaintiff he advised her that he used marijuana for his mental state and not for pain. The plaintiff acknowledged that he did tell Ms. Fong, as documented in her report, that marijuana helps him pass out. Ms. Fong further confirmed that she was not aware of Mr. Melvin having been diagnosed with a mood disorder.

[193] Dr. Smith confirmed during cross-examination that the plaintiff advised him he was seeking medical marijuana for pain management. Dr. Smith was unaware that the plaintiff also smoked marijuana to treat mood.

[194] Dr. Gul in his August 8, 2022 report stated the plaintiff was using medical marijuana and CBD to manage his pain and symptoms.

[195] None of the experts were aware Mr. Melvin had been using marijuana for treatment within nine days of the Accident. Mr. Melvin did not tell Dr. Smith during his consultation that he was a regular user of marijuana.

[196] The defendants submit the plaintiff's use of marijuana was at least in part if not wholly recreational and was an expense that the plaintiff would have incurred even if he had not been in the Accident.

[197] I find that there is some medical justification for the use of cannabis products for pain management in this case. Mr. Melvin gave evidence that the CBD oil helps the pain management in his upper back. He smoked marijuana to control his mood.

[198] The plaintiff testified in direct examination that his use of medical marijuana in plant form is for his mental issues, namely regulating his mood. There is no indication of any medical record diagnosing the plaintiff with mood issues. Neither Dr. Gul nor Dr. Smith provide a diagnosis of any mood disorder such as depression or anxiety.

[199] I find Mr. Melvin would have smoked marijuana for mood recreationally even if he had not been in the Accident. Given there is no medical justification for its use I will not compensate him for the past or future purchase of marijuana in plant form.

[200] There is justification for using CBD oil for pain management and Mr. Melvin said it has been helpful and he would use it daily if he could afford it. This cannabis product is medically justified and reasonable in the circumstances.

[201] Mr. Melvin provided some evidence from the website entitled bccannabisstores.com. He identified two CBD oils that he found helpful. The cost

Mr. Melvin identified for those CBD products were \$19.99 for a 30 ml bottle of Dosecann CBD oil blend and \$38.99 for a 30 ml bottle of distilled Reign Drops 15:15 blend. He uses 1.5 to 2 ml per day. The plaintiff provided an average for the cost in the quantity that is \$30 for a 30 ml bottle and average use of 1.75 ml per day. If the product costs one dollar per ml then the plaintiff would be spending \$1.75 per day or approximately \$640 per year. Using the cost of care multiplier at page 11 of the AEC report to approximately age 77 which is \$25,199 the cost of CBD oil would be \$16,127.

Hydromorphone

[202] Mr. Melvin has paid \$108 in 2022 for hydromorphone. The evidence indicates this will be a continuing requirement. Using the \$25,199 multiplier that would amount to an approximate future cost of \$2,700. Mr. Melvin did testify that he needed hydromorphone a few times a month for aggravated upper back pain. This medication is prescribed by his family physician and is being used by Mr. Melvin to ease his more severe pain.

[203] This claim is not opposed. I find it is medically justified and reasonable and I so order.

Pool Costs

[204] Mr. Melvin was encouraged to exercise to build his core strength, flexibility and endurance by Dr. Manson, Dr. Gul and Dr. Smith and it was recommended that he lose weight. He did lose a significant amount of weight and exercised in the pool at a local hotel. The cost was high at \$200 per month but it was the only form of exercise that he found helpful and not aggravating. I find this cost is medically recommended and would be used by Mr. Melvin.

[205] I note unfortunately that Mr. Melvin is not asking for kinesiology treatments even though the experts believe that he would benefit from supervised strength training. He did try kinesiology and stopped after two sessions. The defendants' recollection of the evidence is that Mr. Melvin said it was "too much like exercise".

That is not my recollection of the evidence. The plaintiff was being cross-examined about the recommendations made by Dr. Manson. The plaintiff said that he went to kinesiology treatments twice but that workout regime was too intense and did not benefit his back. He agreed that it was recommended by the doctor. He agreed that the doctor likely knew better than he did what he needed.

[206] I agree with the defendants that there is no point in awarding the plaintiff costs that he will not use. I will therefore allow reasonable costs for the use of pool or fitness facilities and leave it to the plaintiff to choose which strengthening activity works for him. The plaintiff submits that such costs should be granted in the amount of \$200 per month. Using the multiplier of \$25,199 up to age 77 would amount to an award of approximately \$60,000 and not \$67,500 as the plaintiff submitted. That amount assumes that Mr. Melvin uses the pool or gym facility every month of every year until he is 77 years of age which I find to be unrealistic. I will discount the amount to an award of \$50,000 and encourage Mr. Melvin to use it for whatever physical activity benefits his back and strengthens his core.

Vocational Rehabilitation

[207] The plaintiff seeks an order for \$5,000 because of the barriers he will have in seeking employment. I am allowing this amount because I think it would be of assistance to Mr. Melvin to have a more in-depth counselling session with a vocational rehabilitation counsellor, irrespective of whether he pursues self-employment or employment in the future.

SPECIAL DAMAGES

[208] The plaintiff claims \$6,436.91 for drugstore prescriptions, medicinal cannabis prescriptions, physiotherapy, kinesiology, massage therapy, ambulance services, taxis, a tracker pillow and a medicinal cannabis membership. I will allow most of these expenses but I disallow expenses for plant form marijuana for the reasons I have disallowed it under cost of future care. I will allow costs for CBD oil. I will disallow the cost for the medicinal cannabis membership. The plaintiff will have to

provide the defendants with a new calculation under the medicinal cannabis prescription.

SUMMARY

[209] In summary I calculate damages at:

General damages	\$135,000
Past earning loss	\$150,000
Loss of earning capacity	\$480,000
Loss of housekeeping capacity	\$ 10,000
CBD oil	\$ 16,127
Hydromorphone	\$ 2,700
Pool or exercise costs	\$ 50,000
Vocational rehabilitation consulting	\$ 5,000
Special damages	To be revised (by counsel)
TOTAL	\$848,827

[210] The plaintiff is awarded his costs at Scale B subject to any additional information which is provided to me after the release of this judgment. Counsel have leave to apply to reappear before me on the issues of costs and deductions under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

“B. M. Young, J.”

The Honourable Madam Justice Young