IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smith v. Ries,*
2023 BCSC 1434

Date: 20230817
Docket: M183655
Registry: Vancouver

Between:

James Michael Smith

Plaintiff

And

Lily Ries

Defendant

Before: The Honourable Justice Thompson

Reasons for Judgment

Counsel for the Plaintiff:	L. Harris, K.C. R. Buchanan
Counsel for the Defendant:	L. Pan N. Badesha
Place and Dates of Trial:	Nanaimo, B.C. June 20-23 & 27-28, 2023
Place and Date of Judgment:	Vancouver, B.C. August 17, 2023

[1] This is an assessment of damages arising from a motor vehicle accident. The plaintiff James Smith was a passenger in an SUV that collided with the defendant's car at a Vancouver intersection on 13 September 2016. Mr. Smith suffered soft tissue injuries which have led to chronic pain, depression, and a stress disorder. His treatment has included a surgical rerouting of a nerve in his non-dominant arm. He remains partially disabled.

[2] Mr. Smith gave evidence, as did his mother and sister. He also called a manager from the accounting firm he began work with in September 2021. And, he presented three of his medical experts and his economist for cross-examination. The defendant called the plaintiff's employer at the time of the MVA, and the plaintiff's disability-claim adjuster. The defendant also produced her economist for cross-examination.

[3] The medical opinion evidence is, for the most part, not controversial. The principal issue that divides the parties is the quantification of the plaintiff's past and future loss of earning capacity. The plaintiff was 31 years old at the time of the MVA. He submits that his earning capacity has been severely damaged. His case is that if the MVA had not happened he would have been a construction manager years ago, and his reasonable efforts to mitigate losses arising from the damage done to his earning capacity have been only partially successful.

[4] The defendant argues that the plaintiff's loss of earning capacity claims are out of proportion to his earnings history, and she questions the causal link between the MVA and a portion of the plaintiff's psychological injuries and economic loss. Sensibly, the defendant's closing argument does not contest the veracity or reliability of the evidence of the plaintiff or his witnesses. This damages assessment comes down to the inferences from uncontested facts and non-contentious medical opinions.

Before the Accident

[5] The earning-capacity issues are at the forefront of this case, and this summary of the plaintiff's life before the MVA will emphasize his education and employment history. The evidence reveals a history of good physical and mental health, success in educational endeavours, and attachment to employment in the construction industry.

[6] Mr. Smith's family moved to the Sunshine Coast when he was five years old. Both sets of grandparents and other extended family lived close by. He remains very close to his mother and his younger sister, and her children. His father was a construction superintendent; when the plaintiff was in Grade 8, his father moved out and left the family in straitened financial circumstances. The plaintiff was by nature a happy and easy-going child. Although he was saddened by his parents' separation, he soon rebounded with the help of his supportive extended family and some counseling.

[7] School and athletics came easily to the plaintiff. He was an "A" student in his Gibson's Landing high school, and got along well with his teachers and classmates. During his school years, he perennially played all-star baseball, and played organized soccer and basketball; he also enjoyed football and street hockey with his friends. During high school he worked for his father, including doing drywall and painting.

[8] After high school, he worked at a sports clothing store for a few months. He then attended college in Calgary for two semesters, taking arts and humanities courses. This was followed by work at a warehouse in Calgary for six months, and then a return home to the Sunshine Coast to live with his mother and her new partner in Sechelt. The plaintiff worked for a time for his mother's new partner; he was a superintendent with a large construction company. He then moved to the Lower Mainland and worked for restoration companies doing demolition work, drywalling including textured ceilings, painting, some finish carpentry, and finish electrical and plumbing work.

[9] In the fall of 2012, when Mr. Smith was 26 and while doing this restoration work, he enrolled in a Commerce and Business Studies program at Langara College in Vancouver. He remained at Langara through the 2015 fall semester. Consistent with his career goal, he then attended the British Columbia Institute of Technology to take a Construction Management program. He was able to transfer credits from Langara to satisfy the first two years of this BCIT degree program. By the time of the MVA in September 2016, he had completed BCIT courses in surveying, construction drawings, and construction site processes. At the time of the MVA, he was enrolled in but ultimately withdrew from two classes: an estimating course, and a construction drawings and contracts course. His grades during these semesters at Langara and BCIT were very good – typically in the A- to B+ range.

[10] The plaintiff continued to work in construction jobs while taking these post-secondary classes at Langara and BCIT. Some of this work was with his father, as his right-hand man; this gave the plaintiff exposure to the business side of large-job renovation construction, including quoting work and dealing with customers. His earnings in the period from 2012 to 2016 were as follows:

2012	$47,091
2013	28,981 (including some EI and WCB)
2014	12,238 (EI)
2015	18,630
2016	36,050 (to date of MVA)

[11] Mr. Smith was in good health before the MVA. He was very busy: at the time of the MVA he was keeping up with his studies while working full-time for Vogel Construction Ltd. He was on the tools at this restoration company, but he also purchased and loaded materials and there was a degree of on-site supervision of other employees in his small crew.

[12] Mr. Smith's work and school schedule constrained his social and recreational life, but he was content to make sacrifices to achieve his ambition of becoming a

construction manager and enjoying a financially secure future. He did find some time in his busy life for his family; he was also able to get to the gym and was in good shape.

Injuries, Treatment, and the Medical Opinion Evidence

[13] In the immediate aftermath of the MVA, Mr. Smith experienced some disorientation, neck pain, and pain and tingling in his left arm. He was diagnosed with a concussion, but these symptoms soon cleared. However, his arm symptoms worsened, and he developed mid and low back pain. He ruminated about the MVA, had trouble sleeping, and eventually became depressed.

[14] Mr. Smith has been followed by his general physician, and has taken prescribed chiropractic treatment, physiotherapy, occupational therapy, and counseling. His neck pain and mid-back pain resolved by one year after the MVA. However, his low back pain persisted, as did his left arm pain and tingling. In February 2019, he repeated a nerve conduction study that had been conducted about six weeks after the MVA. It continued to show ongoing left ulnar neuropathy, and Dr. Andrew Tung performed a left cubital tunnel release and anterior transposition on 23 May 2019. Dr. Tung explained that this was essentially a rerouting of the left ulnar nerve from one side of the left elbow to the other. The surgery did not entirely ameliorate but did significantly reduce the numbness and pain in Mr. Smith's left arm, and this allowed him to sleep better.

[15] In August 2020, Mr. Smith underwent an initial psychiatric assessment, conducted by telephone. Mr. Smith was diagnosed by Dr. Jerome Lee with chronic pain and post-traumatic stress disorder. A trial of Effexor and group cognitive behavioural therapy was recommended, alongside advice that the plaintiff utilize healthy exercise, discontinue self-medicating with marihuana, and do some prescribed reading to learn to manage his chronic pain and sleep issues.

[16] The plaintiff obtained medical-legal reports from his general physician Dr. Gill, his surgeon Dr. Tung, and psychiatrist Dr. Darcy Muir who assessed Mr. Smith at the request of his solicitors. The parties jointly put in evidence the reports of

neurologist Dr. Frank Kemble, and physiatrist Dr. Ross Davidson – each of these two assessments was organized by the defendant.

[17] Dr. Gill's report was written in February 2019, over four years ago. It summarizes Mr. Smith's course of treatment to that point, and ventures opinions as to prognosis which, because of the passage of time, are of limited assistance.

[18] Dr. Kemble's report is based on his assessment of Mr. Smith on 1 February 2022. Mr. Smith presented as significantly deconditioned and overweight. Dr. Kemble's opinion is that Mr. Smith sustained a mild traumatic brain injury from which he fully recovered; any residual cognitive dysfunction is probably due to the distracting effect of his pain together with his anxiety and depression. He concluded that Mr. Smith has developed a low pain threshold which is limiting his function, as is the ongoing pain in the left ulnar nerve distribution. He suspects this nerve pain will be permanent, but will likely be reduced with treatment after assessment by a psychiatrist, and a physiatrist or orthopaedist.

[19] Dr. Tung examined Mr. Smith for medical-legal purposes on 22 June 2022. He noted some continuing sensitivity around Mr. Smith's left medial elbow was noted, along with paresthesia in the ulnar distribution. Physiotherapy was prescribed. An MRI and a further nerve conduction study were thought appropriate before consideration of further surgery – which would be mainly for the purpose of improving the paresthesia, but would not be expected to fully resolve his symptoms. In cross-examination, Dr. Tung testified that he has reviewed the results of these further studies since authoring his report, and it is not clear that further surgery would result in significant improvement.

[20] On 11 July 2022, Mr. Smith saw Dr. Ross Davidson, a specialist in physical medicine and rehabilitation. Dr. Davidson concluded that Mr. Smith will be indefinitely and significantly disabled from physical labour by his low back pain and arm symptoms. "In theory he could engage in administrative work in [the construction industry], but would require the requisite training and experience to do so." With respect to work as an accountant, Dr. Davidson expects mild limitations

because of reduced sitting-time capacity, and moderate limitations with respect to sustained typing tasks.

[21] Dr. Davidson diagnosed significant mood and sleep abnormalities. Mr. Smith has depressive and anxiety disorders requiring treatment. “Chronic pain can be associated with abnormalities of sleep and mood which interact with pain symptoms to create greater dysfunction and disability than the pain symptom itself.” The prognosis is for some improvement in his capacity to manage his chronic pain:

> It is likely that, with appropriate treatment, he will be able to achieve a reduced level of psychological distress, increased participation, and adaptive coping. I do expect this diagnosis to require the development and implementation of positive coping strategies to prevent recurrent limitations and restrictions in his life related to depression and anxiety symptoms.
>
> The greatest reversible pathology in the case of this patient is limited cardiovascular reserve. As an otherwise healthy young male he has a significant capacity to reverse his deconditioning which will help to manage chronic pain symptoms, improve mood, help manage anxiety, improve tolerance with home and work activities and improve participation in social and recreational function. As this modifiable factor has the greatest potential to reduce disability, I am highly supportive of ongoing access to a gym environment and guidance of a personal trainer or kinesiologist to develop this program.

[22] Dr. Muir assessed Mr. Smith on January 26, 2023. He diagnosed depression of moderate severity, and post-traumatic stress disorder. Neither condition has been treated, and various types of therapy and medications are available and important for the plaintiff to pursue. Dr. Muir described the effects of chronic pain on mental health:

> The repeated interference with tasks that are essential to achieving various life goals and maintaining a person’s status in society will impact on their sense of self, both their current self and perhaps more importantly their plans and ideas for who they might become. This understandably can have profound impacts on one’s mental health.

[23] Dr. Muir summed up this way: “I would not expect him to be permanently disabled from a psychiatric perspective but he will see some negative impact in his ability to be competitively employed as a result of his injuries. With appropriate treatment, he may be able to sustain his current work and there may even be some

improvements in his work function . . . However, as noted, it is possible that he will deteriorate and if that were to occur, his prognosis for recovery would be guarded." In cross-examination, Dr. Muir agreed that the relationship between chronic pain and depression is such that improvement in either one of these conditions may well improve the other.

[24] The cross-examination of Dr. Muir focused on the causation issue arising from Mr. Smith's grief after his grandmother's death on 3 August 2022. In fact, Mr. Smith went on leave from his work as an articled student at MNP, an accounting firm, and gave his grandmother's death as the reason for needing leave. And, he saw a grief counsellor seven times between 6 September 2022 and 14 November 2022. When Dr. Muir took a history from Mr. Smith on 26 January 2023, he was not told about these events. Although I accept the plaintiff's evidence that by the time he saw Dr. Muir his grief had passed, Mr. Smith should have told the psychiatrist about his grandmother's illness and death, and his significant grief reaction. In cross-examination, Dr. Muir said as much. And, he agreed that, amongst others events, the death of Mr. Smith's grandmother was significant.

[25] Counsel for the defendant pressed Dr. Muir for an opinion that Mr. Smith's reaction to his grandmother's death might have been disabling if the MVA had not happened. In response, Dr. Muir testified that the evidence indicates that Mr. Smith was struggling psychologically before his grandmother died and her death may have been "the straw that broke the camel's back" – the plaintiff was not a person that had difficulty coping prior to the MVA, and the essentially untreated psychological effects of the MVA left him in a fragile state.

[26] In argument, the defendant submits that some of the plaintiff's psychological disability and a significant portion of his consequent losses were caused by his grandmother's death in August 2022. The plaintiff has the onus of establishing on the balance of probabilities the injuries and resulting losses that he alleges: but for the defendant's negligence, would the plaintiff have suffered injury? Causation need not be determined with scientific precision; the "but for" test is to be applied with

robust common sense. See *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Clements v. Clements,* 2012 SCC 32 at para. 8; *Ediger v. Johnston*, 2013 SCC 18 at paras. 28-29.

[27] The defendant's negligence need not be the sole cause of an injury so long as it is part of the cause. The essential question to be answered is the extent to which the tortious conduct has changed the plaintiff's original position: *Athey*, at para. 32. As McLachlin C.J.C. said in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

> Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

[28] The defendant urges that little or no weight should be given to the causation opinions of Dr. Muir that emerged in cross-examination. Counsel for the defendant submits that Dr. Muir was arguing the plaintiff's case when he gave evidence about the interplay between the psychological effects of the MVA and grief following the death of the plaintiff's grandmother. I reject this submission. Dr. Muir testified throughout in a balanced and fair manner. One example of this balance is when he readily agreed with the cross-examiner's suggestions that the plaintiff's grief reaction was a significant event and the plaintiff ought to have told Dr. Muir about it.

[29] In any event, I do not need Dr. Muir's causation opinion to come to certain common-sense conclusions on the effect of the grandmother's illness and death on the plaintiff's claim. The medical-legal reports of Dr. Davidson and Dr. Muir, in conjunction with the evidence given by the lay witnesses, including the plaintiff, convince me that the plaintiff was struggling with MVA-related depression before his grandmother was diagnosed with kidney cancer in December 2021. And while I think it likely that the plaintiff would have been psychologically affected in some measure by his grandmother's illness and death if the MVA had not happened, I conclude that his grief was more difficult to cope with than it would have been absent the MVA. If

the MVA had not happened, it is highly likely that Mr. Smith would have missed little if any work after his grandmother's death.

[30] More generally, I draw the following conclusions that bear on the extent of the plaintiff's MVA-related past and future disability:

- Mr. Smith sustained a mild traumatic brain injury from which he fully recovered within months; I accept Dr. Kemble's opinion that any residual cognitive dysfunction is probably due to the distracting effect of his pain together with his anxiety and depression.

- There will likely be some improvement in his capacity to manage his chronic pain. I accept Dr. Davidson's opinion that with appropriate treatment, Mr. Smith will be likely be able to achieve a reduced level of psychological distress, and be better able to cope with pain. I accept Dr. Davidson's opinion that he has significant capacity to reverse his deconditioning; this will help to manage chronic pain symptoms, improve his mood, help manage his anxiety, improve tolerance with his home and work activities, and elevate his participation in social and recreational activities.

- Mr. Smith is highly likely to be indefinitely and significantly disabled from sustained physical labour. Physically, he will be able to manage accounting-type work, with only minor limitations caused by reduced sitting-time capacity, and difficulty with sustained keyboard use.

- He has depression of moderate severity, and post-traumatic stress disorder. I accept Dr. Muir's opinion that neither condition has been appropriately treated, and various types of therapy and medications are available and important for the plaintiff to pursue. It is likely that the plaintiff will be able to sustain accounting-type employment on a full-time or nearly full-time basis. It is possible, but not likely, that with appropriate treatment he may be able to resume his career with MNP. Even with appropriate treatment, there will almost certainly be some residual psychological damage from the MVA, and

this will challenge his ability to be competitively employable in a relatively high-pressure work environment like MNP.

Non-Pecuniary Damages

[31] Each case must be decided on its own facts. An individualized assessment is called for, and it is neither possible nor desirable to develop a tariff: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637; *Dilello v. Montgomery*, 2005 BCCA 56 at paras. 39-43. However, reference to awards made in similar cases can be of assistance in arriving at a fair award for non-pecuniary damages. The plaintiff submits that his non-pecuniary damages are in the range of $130,000 to $150,000, citing *Amer v. Geoghegan*, 2022 BCSC 1311 ($150,000); *Shaw v. Rogers*, 2023 BCSC 177 ($135,000); and *Bachynsky v. Quinnell*, 2020 BCSC 2066 ($135,000). The defendant argues that an award should be in the range of $70,000 to $120,000, and relies on *Abraha v. Suri*, 2019 BCSC 1855 ($70,000); *Wong v. Au*, 2021 BCSC 58 ($120,000); and *Bolduc v. Stratton*, 2022 BCSC 1168 ($120,000).

[32] The factors to be considered include Mr. Smith's age; the nature of his injuries; the severity and duration of his pain, disability, and emotional suffering; the impairment of his physical and mental abilities; the impairment of his family and social relationships; and loss of lifestyle: *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46, leave to appeal refused [2006] S.C.C.A. No. 100. Mr. Smith is a relatively young man who has endured physical pain and psychological distress. He has undergone various treatments, including ulnar nerve surgery. His confidence has been undermined by the effects of the MVA and this has affected his social relationships and his work. He has had to change career paths. Although it is likely that his chronic pain and psychological condition will improve with appropriate treatment, a full recovery is not in the offing. I agree with Ms. Pan's submission that *Wong v. Au* ($120,000) is a close comparator. Of the plaintiff's cases, *Bachynsky v. Quinnell* ($135,000) is nearest the mark. Of course, no two cases are the same and every case must be assessed on its own facts. I assess the plaintiff's non-pecuniary damages at $125,000.

Loss of Earning Capacity

[33] At the time of the MVA, Mr. Smith was in the midst of the Construction Management program at BCIT and was working full-time at Vogel Construction Ltd. In fact, the plaintiff was at work at the time the MVA happened. He was on his way to a job site with the driver, Eric Wong. The plaintiff suffered immediate and significant symptoms, but his co-worker did not. The plaintiff discontinued work for the day, but his co-worker was able to carry on.

[34] Brandt Hammond, the principal of Vogel Construction Ltd., was called by the defendant. His evidence reflected the Vogel Construction Ltd. report filed with WorkSafe BC: he suspects the plaintiff's injury claim was bogus from the outset. He testified that his conclusion was based on Mr. Wong's ability to continue working while Mr. Smith sought out medical treatment, and his assessment of the post-collision photos of the vehicles involved in the MVA. He also testified that the plaintiff had purchased personal tools on the company credit card. These allegations of dishonesty were not put to the plaintiff in cross-examination, and I attach no weight to them.

[35] The plaintiff testified that after the MVA, he was told by his employer not to bother coming back. Mr. Hammond denied terminating the plaintiff's employment. He said that employees who went on worker compensation or disability benefits rarely returned to work. He said that the plaintiff was only an average worker. I was not impressed with Mr. Hammond's evidence. After seeing him testify, I am quite sure that Mr. Hammond made it clear, expressly or otherwise, that Mr. Smith was not welcome to return to work for Vogel Construction Ltd.

[36] After the MVA, Mr. Smith tried to carry on with the two courses he was enrolled in at BCIT. He found that he was unable to focus on what the instructor was saying, and he felt overwhelmed and demoralized. He phoned the BCIT counseling department. He spoke with someone from the counseling department about what he going through, and after this concluded that a "short fix" was not going to happen and that he could not continue his two courses at BCIT. He made multiple

counselling appointments but cancelled most of them because he felt so anxious and overwhelmed.

[37] In 2017, the plaintiff took out student loans and attended a Youth Justice program at Douglas College for two full-time semesters. He discontinued this program. His anxiety was standing in the way of doing presentations. And, he concluded that he was not on a path that would adequately replace his pre-MVA career plans. He also worked briefly for a large construction company doing physical labour in 2017. He earned $2056 in 2017 while working a brief stint doing some construction work during which he experienced significant grip issues with his left hand.

[38] Mr. Smith decided that his best bet was to pursue a business administration degree. He enrolled at Langara College and took four courses in the spring and four courses in the fall 2018 semester. He also painted and did other physical work for Remdal Painting & Restoration Inc. through the summer months and earned $18,705. He worked at ground level because he could not safely use ladders or scaffolding.

[39] He continued with full-time studies at Langara in 2019 with four courses in each of the spring and fall semesters. He withdrew from one course in the fall semester. He had no earnings from employment in 2019.

[40] In 2020, he continued at Langara, taking five courses in the spring semester, three in the summer (withdrawing from one), and three in the fall. His income tax return shows “other income” of $14,000 in 2020. The evidence did not disclose the source of this income. I note the speculation in the report of the plaintiff’s economist, Peter Sheldon, that this was government-sourced pandemic relief money, but there was no testimonial or documentary evidence from which I may safely draw this inference.

[41] In 2021, Mr. Smith continued at Langara with three courses until his April 2021 graduation, with distinction; he finished his studies with a 3.63 grade point

average. On 13 September 2021, he began work with MNP in Nanaimo as a CPA articling student, at a starting salary of $40,000 per annum. The performance review conducted in December 2021, at the end of his probationary period, was good, and he was given a raise to $43,000. His total employment earnings in 2021 amounted to $12,128.

[42] In order to achieve CPA designation, a candidate must complete two “CORE” courses and elective courses. Like many others do, the plaintiff failed CORE 1 on his first attempt in December 2021. He attributed his failure to anxiety that led to difficulty understanding the exam questions, and to feeling overwhelmed. He testified that he felt devastated and embarrassed when he found out he had failed this course. And, it was just after Christmas of 2021 that he learned of his grandmother’s cancer diagnosis.

[43] In 2022, the plaintiff worked remotely so he could spend more time with his grandmother. In June 2022, on his second try, he passed CORE 1 – although after writing the exam he worried that he had failed again. On this second attempt, he had a doctor’s note that gave him more time and breaks during the exam.

[44] In July 2022, Mr. Smith received the results of the MNP evaluation of his performance for the period from when he started in September 2021 through May 2022. It was a poor review, and he was placed on a Development Improvement Plan. Alyssa Thomas was Mr. Smith’s performance coach. She explained that when an employee is not meeting expectations, the performance coach meets with a human resources team and the employee is placed on either a Development Improvement Plan or a Performance Improvement Plan. The implications of the different plans are that if a person does not meet DIP goals, they are placed on a PIP. If a person does not meet PIP goals, their employment is terminated.

[45] Mr. Smith was reassured that it was not uncommon to fail the CORE 1 on the first attempt. For her part, Ms. Thomas was very confident that Mr. Smith would be able to fulfil his DIP. She testified that she believes in him as an employee.

[46] However, Mr. Smith was crushed by his poor performance review. He described struggling and feeling low while working at MNP, and these results made him extremely depressed. He had an increase of suicidal thoughts. He did not want to return to work, and he perceived that important work assignments were being routed away from him. In early August 2022, shortly after he suffered this setback at MNP, his grandmother – who was responding well to her cancer treatment – fell ill with pneumonia and died.

[47] The plaintiff took the week off after his grandmother's death, and on 15 August 2015 he sent an email to an MNP human resources manager advising her that he was not coping and asking her about getting leave from work. Thereafter, he was placed on long term disability and he continues to receive LTD benefits.

[48] The plaintiff was asked about future employment. He testified that he knows he can do something, that he is not a "total write-off." However, he is very pessimistic about a return to MNP and completing his CPA certification even if he receives the treatment the experts suggest. He testified that his pain and anxiety were both at a level that interfered with his ability to concentrate. He felt like he was in "firefight mode" when working there, and that it detrimentally affected his mental health. He does not think he can manage it. And, he does not believe that he can cope with the remaining CPA exams, either.

[49] He is exploring the feasibility of teaching ESL, and perhaps teaching business English to incorporate some transferable skills. He expects that he can do this remotely, and can have icepacks and muscle massagers at hand if needed. He is confident that he could do this, at least on a part-time basis.

[50] While it is natural that Mr. Smith is fairly pessimistic about his future given his untreated chronic pain and depression, the damage to a plaintiff's loss of capacity is not necessarily equated with their own perception: *Kim v. Morier*, 2014 BCCA 63 at para. 8. I think Mr. Smith's prospects are fairly good, and that after treatment and foreseen improvement he will appreciate that his capacity is greater than he currently perceives. There remains the possibility that after treatment he may be

able to return to MNP and carry on to achieve CPA designation, especially since Ms. Thomas is still bullish about his potential. That said, as I will explain when addressing his future loss of capacity, I think it is more likely that he will find a niche or niches that better suit the more vulnerable state the MVA has left him in.

Past Loss of Capacity

[51] In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 30-31, the Court of Appeal explained that a claim for what is often described as “past loss of income” is actually a claim for past loss of earning capacity — i.e., “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”. The value of the loss may be measured in different ways: for example, by actual earnings the plaintiff would have received, by a replacement-cost evaluation of tasks that the plaintiff is now unable to do, or by an assessment of reduced business profits. The test to be applied to hypothetical events, whether past or future, is whether there is a real and substantial possibility that the events would occur: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Smith v. Knudsen*, 2004 BCCA 613 at para. 29; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 43-46; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. In measuring the value of the loss, the events are to be given weight according to the relative likelihood that they would have occurred: *Athey*, at para. 27; *Smith*, at paras. 29, 31.

[52] In closing argument, the plaintiff urges a finding that it is probable that he would have graduated in 2019 from the Construction Management program at BCIT. I think this submission is a sound fit with the facts. I also conclude that there is a very strong likelihood that he would have pursued a position in this line of work beginning in, say, July 2019. Using these strong realistic probabilities and the average earnings in Mr. Sheldon’s model as a starting point, I estimate the earnings that the plaintiff would have received and deduct the plaintiff’s actual earnings in order to value the past loss of capacity. The following table summarizes the arithmetic:

Time Period	**Est. Earnings Without MVA**	**Actual Earnings With MVA**	**Lost Earnings**
Sept to Dec 2016	$ 7,000	$ 0	$ 7,000
2017	30,000	2,056	27,944
2018	30,000	18,705	11,295
Jan to June 2019	15,000	0	15,000
July to Dec 2019	32,000	0	32,000
2020	66,000	14,500	51,500
2021	68,000	12,128	55,872
2022	70,000	26,500	43,500
Jan to July 2023	35,000	0	35,000
	$353,000	$ 73,889	$279,111

[53] With reference to the Estimated Earnings Without MVA, the annual amount is assumed to be $30,000 for the period from September 2016 to the assumed June 2019 graduation from BCIT. The assumption is based on the plaintiff's established pattern of working while going to school in the years leading up to the MVA and his average earnings of approximately $30,000 during this 2012-2016 period. The annual amount for the period from July 2019 to the trial is based on the statistical average earnings for construction managers as described and outlined in Mr. Sheldon's report.

[54] Labour market contingencies for the period from the MVA to June 2019 are sufficiently taken account of by using average earnings during the 2012-2016 period to base the $30,000 annual earnings assumption – recall that these earnings in 2013

and 2014 included EI and WCB benefits, indicating lost time from employment. Labour market contingencies for the period from June 2019 to trial will be adjusted for, including the possibility that in any event Mr. Smith would have taken a short break from work after his grandmother's death, as the analysis proceeds.

[55] Non-wage benefits are not included in the Estimated Earnings Without MVA. There is no evidence that Mr. Smith received non-wage benefits for the work he customarily did while attending school (and that he planned to continue doing until graduation). He likely would have received some non-wage benefits after beginning his career after graduation in 2019; on the other hand, he has been receiving non-wage benefits since beginning work at MNP in 2021. My sense of it is that the unaccounted-for labour market contingencies and the countervailing unaccounted-for non-wage benefits are in rough balance.

[56] With reference to the Actual Earnings With MVA for 2020, I have used Mr. Smith's income tax return figure of $14,500. I earlier referred to the possibility that most of this income might be government-sourced pandemic relief money (which would not be deducted on the authority of *Yates v. Langley Motor Sport Center Ltd.*, 2022 BCCA 398, and *McLean v. Redenbach*, 2023 BCSC 8 at para. 144), but, as I indicated, I cannot safely draw this inference.

[57] The Actual Earnings With MVA for 2022 appear in the table as $26,500. An EI form in evidence indicates that the last day MNP paid Mr. Smith was 15 August 2022, i.e. he was paid for 32 of the 52 weeks in 2022. His salary is $43,000 per annum, and $26,500 represents this 32/52 ratio.

[58] The defendant submits that the nearly $12,000 the plaintiff has received in long term disability benefits in 2022 and 2023 must be deducted from the past loss of capacity award. The defendant relies on the general rule that a plaintiff is only entitled to damages if a loss occurs — i.e., the plaintiff is entitled to be returned to their original position, not a better one. As applied to past loss of capacity damages, the general rule was established by the Supreme Court of Canada in *Ratych v. Bloomer,* [1990] 1 S.C.R. 940, and confirmed in *Cunningham v. Wheeler,* [1994]

1 S.C.R. 359, and *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7: to prevent overcompensation, “wage benefits paid while a plaintiff is unable to work must be brought into account and deducted from the claim for lost earnings”: *Ratych*, at 982. However, Mr. Smith relies on two recognized exceptions to this general rule. The first is the private insurance exception; the second is the subrogation exception. For the reasons that follow, I find the subrogation exception applies and the disability benefits are not deductible.

[59] Writing for the majority in *Cunningham*, Justice Cory explained the principle underlying the private insurance exception (at 401):

> Recovery in tort is dependent on the plaintiff establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the defendant, the tortfeasor. I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.

And, later in his reasons at 415-416, Cory J. addressed the subrogation exception:

> Generally, subrogation has no relevance in a consideration of the deductibility of the disability benefits if they are found to be in the nature of insurance. However, if the benefits are not "insurance" then the issue of subrogation will be determinative. If the benefits are not shown to fall within the insurance exception, then they must be deducted from the wage claim that is recovered. However, if the third party who paid the benefits has a right of subrogation then there should not be any deduction. It does not matter whether the right of subrogation is exercised or not. The exercise of the right is a matter that rests solely between the plaintiff and the third party. The failure to exercise the right cannot in any way affect the defendant's liability for damages. However, different considerations might well apply in a situation where the third party has formally released its subrogation right.

[60] The evidence led to support the private insurance exception is scant. The plaintiff makes a monthly payment in relation to his benefit package but there is nothing that establishes whether any part of this payment is attributable to the disability policy. However, I am satisfied that the evidence adequately supports the subrogation exception. There is a document in evidence that specifically refers to the subrogation right of the long-term disability insurer. It refers to Canada Life’s right of subrogation with respect to damages for loss of income when responsibility for the

insured's disability may be attributable to another party, and Canada Life's right to recover any benefits paid under the policy for loss of income for which the insured has been indemnified by this other party. And, the Canada Life adjuster affirmed in her evidence that the plaintiff has signed an income reimbursement agreement.

[61] The defendant argues that there is no proof that Canada Life has exercised or intends to exercise its right of subrogation, but the passage quoted above from *Cunningham* is a complete answer to this submission: it does not matter whether the right is exercised or not, and the failure to exercise the right does not affect the defendant's liability for damages – unless, perhaps, there has been a formal release of subrogation. And, there is nothing in the evidence to suggest that Canada Life has released its subrogation rights.

[62] Although there is much arithmetic employed in this assessment of the past loss of earning capacity, it is based on assumptions including the date by which Mr. Smith would have achieved employment as a construction manager and his earnings in that employment. Moreover, it is impossible to be sure that his career goal would have remained constant. However, if, for instance, he had chosen to discontinue his studies at BCIT, which I think is only a slight possibility, I think the plaintiff's work ethic points to the strong likelihood of full-time employment as a broadly experienced construction labourer with at least equal expected returns over the MVA-to-trial period.

[63] Taking a step back while reminding myself that even the past loss of capacity is an assessment rather than a calculation, I think the rounded sum of $280,000 is a fair and reasonable assessment of the plaintiff's past loss arising from the damage done to his earning capacity. This is a gross figure, and I expect the parties will be able to reach agreement on the s. 98 *Insurance (Vehicle) Act* adjustment that must be made to arrive at the net loss.

[64] Before leaving this head of damages, I will address the plaintiff's argument arising out of his student loans. The plaintiff's pre-MVA approach was to work while he went to school rather than taking on student loans. He submits that but for the

MVA, he would not have had to incur over $50,000 in student loans. However, I think adding the student loan amount to the loss of capacity damages or awarding it as an item of special damages would result in overcompensation.

[65] To the extent possible, my task is to return Mr. Smith to the same position he would have been in had the MVA not happened. The past loss of capacity award represents the MVA's deleterious effect on Mr. Smith's financial position. He took on debt that he otherwise would not have. This is the direct result of not being able to work, or work as much, and not being able to carry on with his pre-MVA career plans. To make an award that tallies up the lost income, and then add in the principal amount of the loans taken on by the plaintiff because of this lost income would be a double-counting.

[66] A claim advanced for school fees to retrain and mitigate might be tenable, but there has been no accounting presented in this case of the amount of tuition paid by Mr. Smith versus the amount of tuition he would have paid but for the MVA.

Future Loss of Capacity

[67] In *Rab v. Prescott*, 2021 BCCA 345, at paras. 47-48, the Court of Appeal prescribed a three-step analysis of future earning capacity claims: (1) deciding whether potential future events could lead to a loss of capacity; (2) if so, deciding whether there are real and substantial possibilities that the future events in question will cause a pecuniary loss; and (3) if so, valuing the loss, which must include an assessment of the likelihood of the events occurring. The first two steps address entitlement; the third step goes to valuation. In the case at bar, the defendant concedes entitlement.

[68] Once entitlement is established, the capacity loss is quantified using either the earnings approach or the capital asset approach. The earnings approach is generally used when a plaintiff has a history of stable pre-accident earnings and their future earnings can be determined post-accident, as in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.). The capital asset approach is appropriate

where the loss is not easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[69] The parties' positions on the value of Mr. Smith's loss of future capacity are widely divergent. The plaintiff submits that he retains only 30 to 40 percent of his pre-MVA earning capacity, and urges an award in the range of $1.26 million to $1.815 million based on the economists' sample calculations. The defendant argues that $100,000 to $150,000 would fairly compensate the plaintiff, based on two to three years of income at MNP.

[70] At the time of the MVA, Mr. Smith had not embarked on construction management work, although he had assembled some of the foundation for that career. In *McHatten v. Insurance Corporation of British Columbia*, 2023 BCCA 271 at para. 16, Justice Fenlon, writing for the division, endorsed the trial judge's decision to use the capital asset approach in circumstances where the plaintiff had not established a career by the time of the accident or by the time of trial. This describes Mr. Smith's circumstances; he had not established a construction management or any other career by the time of the MVA, and cannot be said to have as yet established a career working in accounting.

[71] In *McHatten*, Fenlon J.A. summarized the framework for assessing the damages using a capital asset approach:

> [19] As has oft been noted, assessing loss of future earning capacity is a particularly difficult exercise for a trial judge. The central task involves comparing the plaintiff's likely future working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133. That comparison must be grounded in the evidence before the judge, as limited as it may be.
>
> [20] The capital asset approach to valuing loss of future earning capacity is less exact and mathematical than an earnings approach. Nevertheless, the valuation cannot be done wholly at large; the judge cannot simply pluck a number from the air without any explanation as to how they got there: *Dornan v. Silva*, 2021 BCCA 228 at paras. 151, 158.

[72] There are cases where a plaintiff continues to earn similar income to their pre-accident income, but have an impairment that may affect their ability to continue

to earn at that level. Those cases are the ones best suited to awards of one or two or three years of income: *Rab*, at para. 72; *McHatten*, at paras. 21-22. While I agree that the capital asset approach to valuation of Mr. Smith's loss is the correct method, I reject the defendant's approach of awarding a multiple of the MNP annual salary to value the loss.

[73] I think the proper valuation method in this case is to draw inferences from the evidence about the impact of Mr. Smith's disabilities on his future employment, and use the available statistical data on earnings and labour market contingencies as a tool to making a fair and reasonable estimate of the loss. It seems that the proper approach to the capital asset method of valuation is to take notice of the statistical data but to avoid diving into it too deeply: i.e., the Court is to make "an evidence-based assessment, not a mathematical calculation": *Lun v. Hann*, 2023 BCCA 288 at para. 17.

[74] But for the MVA, the evidence points to the strong likelihood that Mr. Smith would have used the combination of his work experience and his physical and mental capacity to work as a construction manager or similar paying work in the construction industry. The economists have modeled the present value of his without-MVA career on this construction-management assumption, and I agree with the plaintiff that using statistical averages to age 65 is a sensible starting point.

[75] In his closing argument, the plaintiff submits that this without-MVA capacity should be found to be in the range of $2.0 million to $2.35 million, based on the economists' sample calculations. He urges that if an in-between number is chosen, it ought to be closer to his economist's higher figure. Some of the difference in the two economists' calculations of the present value of future capacity is accounted for by their different treatment of labour market contingencies. Another significant difference is their different technical approach to "smoothing" of data.

[76] The plaintiff's economist, Mr. Sheldon, was asked by the plaintiff's solicitors to include "risk only" labour market contingencies in his sample calculations. He explains the distinction between "risk and choice" and "risk only" contingencies:

> General negative [labour market] contingencies are:
>
> 1. restriction to part-time or other reduced hours of work, for reasons unrelated to the accident;
> 2. unemployment;
> 3. retirement or withdrawal from the paid work force before the age of 70.
>
> Average or "risk and choice" labour market contingencies take into [account] consideration of the average probabilities that a B.C. resident male may choose to be out of the labour market or work part-time. They also account for the average probabilities that risk factors may cause [a] B.C. resident male to be out of the labour market, unemployed, or a part-time worker. On your instruction I consider "risk only" labour market contingencies at this time.
>
> "Risk only" contingencies account for the average probabilities that a B.C. resident male could be forced out of the labour market, into unemployment, or into part-time work. They do not include choices that individuals make to work less hours or not to participate in the labour market.

[77] To entirely exclude the "choice" contingencies is to assume that Mr. Smith would never choose to be out of the labour market or to work part-time at any point in his career – for example, to take breaks from work to pursue education to make a career-change, or interests such as sports or travel, or to care for family. To include "choice" contingencies is to assume that Mr. Smith might take these decisions and would do so as often as the average B.C. resident male.

[78] The essential question when fine-tuning this assumption is the degree of attachment to the labour force that Mr. Smith would have exhibited. I bear in mind that Mr. Smith had not yet begun the postulated construction management career, but I accept that Mr. Smith was likely to have a somewhat greater than average attachment to the labour force. This finding supports a reduction but not a wholesale exclusion of the "choice" contingencies that the defendant's economist, Mr. Benning, has incorporated into his calculations.

[79] With regard to the data-smoothing issue, I think Mr. Benning is on solid ground. In the course of final preparation for his evidence, Mr. Sheldon ran new calculations without data smoothing. The new table is not in evidence, but I can conclude from his evidence that its "bottom line" showed a substantial reduction.

[80] I think a fair starting point is achieved by using Mr. Benning's $2.0 million estimate. However, I think the evidence supports two adjustments to this estimate of the present value of without-MVA earning capacity. First, it should be adjusted upward to account for the likelihood that Mr. Smith would have chosen absence from the labour market less frequently than the average BC resident male. Second, an allowance should be added for non-wage benefits. Mr. Sheldon suggests a ten percent allowance for non-wage benefits; Mr. Benning points to Statistics Canada data from the construction industry in British Columbia that indicates that this might be an aggressive assumption. I conclude that $2.2 million approximates the present value of the plaintiff's without-MVA future earning capacity.

[81] Moving forward with the analysis, I agree with the plaintiff's approach of attempting to roughly estimate the percentage lost of his without-MVA future earning capacity, and to do so by weighing the relative likelihood of the real and significant possibilities. The plaintiff's capacity for physical labour has been substantially damaged. However, the plaintiff is intelligent; he has been successful in his educational endeavours before and after the MVA. Even without the treatment that I foresee will likely improve his position, he has demonstrated significant residual capacity for good-paying sedentary work.

[82] The real and substantial possibilities, both positive and negative, must be weighed together. Over the course of his career, the plaintiff may earn as much or more doing accounting-type work than he would have made as a construction manager. Or, he may make substantially less. I think the most likely outcome is that a combination of further physical and psychological treatment will allow Mr. Smith to return to accounting-type work in the next year or so, and within the next few years be earning what he would have earned as a construction manager. I think it unlikely but possible that he will be return to MNP. As I indicated earlier in these reasons, I have my doubts that treatment will restore to him the psychological resilience necessary to thrive in a large accounting firm like MNP. (If he leaves MNP, he will trigger a liability to repay $6657 for CPA course fees, and I take this potential liability into account when assessing this head of damages.) I think it is likely that Mr. Smith

will resume his CPA articles in a smaller firm, or that he will make the same choice as others with accounting skills: doing the books for businesses on an in-house or contract basis. The combination of his work experience and education has positioned him well to do this work for construction firms, large or small.

[83] On the other hand, even with gains in treatment, the plaintiff will remain somewhat vulnerable psychologically, and a less confident and energetic person than he was before the MVA. Moreover, the possibility that the plaintiff does not achieve the predicted benefit from further treatment, or that he has serious setbacks in his recovery from time to time, must be weighed in the balance. I think these scenarios are unlikely but they remain real and substantial possibilities. If they occur, the plaintiff would have difficulty working full time even in some types of sedentary work.

[84] The assessment must also account for the loss of capacity to be competitively employable in physical labour occupations, and the loss of access to careers that are built on the ability to do physical work during one's early years. The plaintiff's planned career in construction management was unlikely to successfully launch with his physical disabilities, and he made a sensible choice to mitigate his damages by studying business administration. Finally, there is the evidence that the plaintiff hoped at some point to buy properties and fix them up for resale. This is a relatively minor but material and compensable result of the plaintiff's loss of capacity to do sustained physical work. Because of the plaintiff's work experience in construction, and his focus on financial security, I think this aspect of the plaintiff's claim crosses the boundary from speculation into the territory of real and substantial possibility.

[85] I estimated the present value of the plaintiff's pre-MVA earning capacity at $2.2 million. Weighing up all the real and substantial possibilities, I estimate that the plaintiff has lost about 25 percent of the value of this pre-MVA earning capacity. This loss amounts to $550,000 and I think this is a fair assessment of this head of damages.

Cost of Future Care

[86] The defendant does not contest the claims for the cost of therapies prescribed by Dr. Muir, with an estimated cost of approximately $7000, or the claim for $9732 for medications. The defendant also accepts the physiotherapy claim for 18 treatments a year for 28 years but contests the per treatment cost. The defendant disputes the claim for exercise-related costs.

[87] With regard to physiotherapy, the plaintiff claims $110 per treatment. The *Insurance (Vehicle) Act* regulations provide that ICBC pays $89 per standard treatment. His physiotherapy account statement shows that in the past six months between $17 and $22 of each treatment was “not covered.” The claim for $110 per treatment appears reasonable. The undiscounted total physiotherapy cost is, therefore, $55,440. The current prescribed discount rate for future care costs is 2%. Using the present value table in *CIVJI* to apply this discount rate to the steady stream of physiotherapy costs over 28 years yields the rounded discounted sum of $42,000.

[88] Dr. Davidson prescribes exercise, including regular non-impact activity for most days of the week. He suggests that Mr. Smith be provided with some form of cardiovascular exercise equipment such as an elliptical machine, treadmill, stationary bike, or rowing machine. He also suggests provision of basic gym equipment such as a mat, bosu ball, resistant bands, and a foam roller. As an alternative to the purchase of this equipment, Dr. Davidson endorses the idea of a gym pass during his working years to achieve the prescribed exercise goals.

[89] Dr. Davidson has in mind very regular exercise, and Mr. Smith is concerned about participating in sports or physical activities outside of a gym setting. I appreciate that Mr. Smith was no stranger to the gym before the MVA, but in the circumstances of this case, including Dr. Davidson’s emphasis on exercise and his strong support for ongoing gym access, I think the claim of a gym pass for his anticipated working years is a reasonable expense for the defendant to bear. As will be clear by now, I agree with Dr. Davidson that Mr. Smith’s commitment to exercise

will be important to his goal of reducing the continuing impact of the MVA on his life, both vocationally and otherwise. The undiscounted claim gym pass claim which comes to $8816. The rounded present value of this stream of monthly costs is $6750.

[90] The total cost of future care is assessed at $65,482.

Special Damages

[91] The agreed-upon special damages total $19,224. The plaintiff claims reimbursement of his student loans associated with his business administration program at Langara College ($50,174), and his potential liability to repay CPA school fees ($6657) as items of special damages. I have addressed these disputed claims when assessing the plaintiff's loss of earning capacity.

Summary and Costs

[92] The damages award is as follows:

Non-pecuniary damages	$125,000	
Past loss of earning capacity	280,000	(subject to adjustment for income tax)
Future loss of earning capacity	550,000	
Cost of future care	65,482	
Special damages	19,224	

The plaintiff is also entitled to court order interest on his past pecuniary losses. I am satisfied that this award of damages, taken as a whole, is fair to the plaintiff and the defendant.

[93] Unless there are matters of which I am unaware, Mr. Smith is entitled to the costs of the action on Scale B. The parties have liberty to apply, including on issues of s. 83 and s. 98 *Insurance (Vehicle) Act* deductions, and the implications for the form of the order (if any) of the fact that the Workers' Compensation Board has

brought this claim in the name of Mr. Smith, a worker, pursuant to s. 130 of the *Workers Compensation Act*.

"Thompson J."