

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Reeve v. Brown*,  
2024 BCSC 596

Date: 20240411  
Docket: M207446  
Registry: Vancouver

Between:

**David Erik Reeve**

Plaintiff

And

**Freeman Brown and Robert Brown**

Defendants

Before: The Honourable Justice MacNaughton

## Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.  
September 25–29  
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Place and Date of Judgment:

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**Introduction**

**The Accident**

[1] On August 15, 2018, the plaintiff, David Reeve, was rear-ended by the defendant, Freeman Brown (“Mr. Brown”), while stopped at a crosswalk in Prince Rupert, British Columbia (the “Accident”). Mr. Reeve was the seat-belted driver of his 2006 Chevrolet Silverado 2500HD truck. Mr. Brown was the authorized driver of a 2002 Pontiac Grand AM owned by the other defendant Robert Brown.

[2] Mr. Reeve testified that he had been stopped for three to ten seconds when he heard a loud screech. He thought someone was “doing a burnout” and he turned to his right to look over his right shoulder when his car was hit. He was pushed forward in his seat, and his seatbelt locked. Based on the sound and the result, he assumed his brakes locked. After the Accident, Mr. Reeve was confused, but he pulled over, got out of his truck, and walked on his own. He and Mr. Brown exchanged details. Mr. Reeve took photographs of both vehicles, neither of which was significantly damaged.

[3] Liability for the Accident is admitted. These reasons deal with the damages to which Mr. Reeve is entitled.

**The Issues**

[4] The issues I have to decide are:

- a. the nature and extent of Mr. Reeve’s Accident-related injuries, their role in his pain and functional limitations since the Accident, and their anticipated future impact on him;
- b. the nature and extent of Mr. Reeve’s low back pain and ulnar nerve issues, the extent of their role in his pain and functional limitations since the Accident, and the extent, if any, of their anticipated future impact on him;
- c. the role that Mr. Reeve’s failure to engage in exercise programs had on his recovery from his Accident-related injuries;

- d. Mr. Reeve's income prior to the Accident; and
- e. damages, including: non-pecuniary damages; past and future wage loss; loss of capacity and loss of opportunity; future care costs; loss of housekeeping capacity; and special damages.

**The Witnesses**

**Mr. Reeve's Witnesses**

[5] Mr. Reeve testified and called lay evidence from: his wife, Lindsay Reeve; Adriano Lupini, who currently works with Mr. Reeve; and Will Grainger and Jeremy Pierce, who previously worked with him.

[6] I also heard from the following experts: Dr. Lisa Caillier, Natalie Hull, and Darren Benning.

[7] Dr. Caillier was qualified as a specialist in physical medicine and rehabilitation, with a subspecialty in neurophysiology and electrodiagnostic medicine. On October 20, 2022, she conducted a medical-legal physical examination and interview of Mr. Reeve. She prepared an October 20, 2022 report.

[8] Ms. Hull was qualified as an expert in occupational therapy, work capacity evaluation, and evaluation of the cost of future care. Ms. Hull conducted a Zoom interview with Mr. Reeve on April 18, 2023, and an FCE on April 19, 2023. She prepared a June 28, 2023 report.

[9] Mr. Benning was qualified as an expert economist with respect to the quantification of pecuniary damages in civil litigation. He prepared a July 4, 2023 report. However, the assumptions on which his report was based were not proven at trial. Nonetheless, his tables, data, and multipliers are useful in determining Mr. Reeve's pecuniary claims.

**Mr. Brown’s Witness**

[10] I heard from Dr. Jonathan Hawkeswood, an expert in physical medicine and rehabilitation. He prepared two reports. The first, dated May 19, 2023, reported on his April 19, 2023 medical-legal interview and physical examination of Mr. Reeve. The second, dated August 11, 2023, responded to Dr. Caillier’s report.

**David Reeve’s Pre-Accident Life, Education, and Work**

[11] At the time of the Accident, Mr. Reeve was 34 years old, married, and the father of two young boys. He is now 39 years old. He was born in Williams Lake on November 30, 1983.

[12] As a child, Mr. Reeve was diagnosed with and medicated for attention deficit hyperactivity disorder (“ADHD”). He testified that he was a “respectful” student but did not enjoy school and did not do well academically. Although never diagnosed with anxiety, he described being an anxious teenager and said that his anxiety and ADHD affected his ability to complete high school assignments.

[13] Following high school, Mr. Reeve worked in low-skill, heavy labouring jobs, including roofing, in different locations in BC and Washington, USA. He never did office or administrative work. He briefly took introductory courses at the University College of the Caribou, but did not complete them. He returned to physical labour jobs.

**Chosen Work**

[14] Mr. Reeve testified that, as a child, he had an interest in building things. While roofing, he identified that carpentry would be a good fit for him. In the lead up to the 2010 Vancouver Olympics, BC was aggressively training individuals in the building trades. He began training as a carpenter in a “pre-apprenticeship” program. Under the supervision of a skilled instructor, he and other trainees built a house. He was credited with one year towards a carpentry apprenticeship and obtained his Red Seal designation on April 4, 2011.

[15] Initially, he worked for a Vancouver-based general contractor that had high-end clients. He worked as a member of a crew, mentored by two senior carpenters. He started as a labourer doing demolition and helping other carpenters, but eventually graduated to doing finishing carpentry on an unlimited budget. He testified that he enjoyed doing trim and fine finishing work.

[16] In 2012, Mr. Reeve moved to Prince Rupert. Initially, he worked for a number of construction companies, but he enjoyed working by himself or with a small group. He struggled with authority. He held others to high standards and found it difficult to rely on others' work. He realized that he could earn more working for himself.

[17] Throughout Mr. Reeve's career as a carpenter, he focused on residential work, working with smaller crews. He operated his own small construction business from 2013 to 2015, usually hiring two or three workers to assist him. When self-employed, he was in charge of project management but always "worked on the tools", putting his trade and his skills to use. He was uncomfortable delegating work to others and struggled with managing employees. He did not have an office. Most of his managerial work was done at the job site.

[18] Ms. Reeve testified that Mr. Reeve was passionate about building and the quality of his work. She said he is a perfectionist who can be very critical of poor-quality workmanship, wherever he sees it. He let workers go who did not measure up to his standards. Her evidence in that regard was compelling.

[19] On the date of the Accident, Mr. Reeve operated Laxmoon Builders Inc. ("Laxmoon"), a Prince Rupert residential construction business. It was incorporated on February 5, 2015, and had a fiscal year end of January 31. Ms. Reeve was Laxmoon's sole director, officer, and shareholder. Laxmoon's contracts were never large enough to warrant a full-time administrative position, and Mr. Reeve typically worked beside his labourers. Laxmoon did one commercial contract for the school district, building a playground to detailed specifications. Mr. Reeve testified that the contract was very profitable and he enjoyed the detailed nature of the work. There

was an opportunity for future projects. He also testified about the possibility of bidding on LNG projects that were being developed in Prince Rupert.

[20] Very little of Mr. Reeve's work was quoted on a fixed price basis. He charged himself out at \$65 an hour and charged an added administration fee of 10–15 percent, depending on the project.

[21] Because Ms. Reeve is Indigenous, Laxmoon qualified as a First Nations' owned business for contract bidding purposes and was eligible for grants and other government programs.

[22] In addition to construction, at some point Mr. Reeve began selling cedar. He used cedar in deck construction. As a sideline, he bought cedar in Terrace, where it was cheaper, and sold it in Prince Rupert at a 20% markup. In later years, he planed the rough cedar before delivering it to purchasers. He estimated that cedar sales amounted to about five percent of Laxmoon's revenue. He testified that he hoped to grow the cedar sales business as it was an "easy add on" to his construction work.

[23] Mr. Grainger, who is also a Red Seal carpenter, worked for Mr. Reeve in Prince Rupert on one or two construction projects a year, from 2005 or 2006 until about 2013.

[24] Mr. Grainger testified that he worked together with Mr. Reeve on framing, foundation work, hand excavating, forming and pouring concrete, stair and deck construction, and roofing. He testified that, pre-Accident, Mr. Reeve had no physical limitations or pain performing construction work.

[25] Mr. Pierce, who has a background as a drywall contractor, met Mr. Reeve in 2007. Before the Accident, Mr. Pierce worked with Mr. Reeve on two or three projects a year. He testified that before the Accident, Mr. Reeve was able to perform all aspects of construction work, interior or exterior, without physical limitation or observable pain.



[26] From about 2014 to 2016, Mr. Pierce and Mr. Reeve participated in boxing and conditioning classes at least three times a week. The classes involved skipping, burpees, squat jumps, shadowboxing, and punching bag work. Mr. Pierce did not observe that Mr. Reeve had any physical limitations or pain during the classes.

**Marriage, Family, and Household**

[27] Mr. Reeve met Ms. Reeve in Prince Rupert. They married in September 2013, and that year, purchased the house they were living in on the date of the Accident. Ms. Reeve is a trained teacher, but, since 2019,

[28] has worked for the Language Authority in Prince Rupert. She continues to do that work in Half Moon Bay, BC, where the Reeves now live. Ms. Reeve testified that after their marriage, the Reeves merged their finances.

[29] The Reeves have two sons, now eight and five years old. On the date of the Accident, their eldest son was about three, and their youngest, an infant.

[30] The Reeve's Prince Rupert home was 1,250 square feet in size and was located on a 5,600-square-foot lot with a large, rolling, grassy yard. Pre-Accident, Mr. Reeve did most of the yard work (lawn-mowing and weeding). Ms. Reeve was primarily responsible for the children and maintaining their home.

[31] In 2015, the Reeves began a significant home renovation, almost doubling their home in size. They added a second story, and installed new plumbing, wiring, doors and windows, and siding. Mr. Reeve testified that the renovation was largely complete by 2018 but, on the evidence, I conclude that renovations carried into 2019 and, perhaps, early 2020.

[32] During the renovations, Laxmoon had four employees, and they undertook most of the demolition work while Mr. Reeve ran Laxmoon's other jobs. Mr. Reeve hired one worker to assist with framing. Once roofed and insulated, and up until the Accident, Mr. Reeve worked on the rest of the home on his own. He participated in the demolition, framing, insulation, deck and stair construction, drywalling and

plastering; assisted the electrician and the plumber; painted; hung doors; installed countertops; drilled pot lights; and prepped the bathrooms for shower and tile work.

**Pre-Accident Health**

[33] Mr. Reeve testified that pre-Accident he was in “pretty good shape”. As he worked full time in a physically demanding job, he did not need to go to the gym or workout to feel fit and strong. He had no pre-Accident neck, shoulder, upper back, or jaw problems, and did not have noticeable headaches.

[34] At some point between 2013–2015, Mr. Reeve injured the L5-S1 joint of his spine. It was not a traumatic injury. He was very open about his injury when speaking to the experts and during his evidence. He testified that his recovery took a couple of months and that he was “careful” for about a year afterwards. He described being “good to go” in 2015, at the start of the home renovations. He testified that while he had not experienced any great lower back discomfort since then, he visited a chiropractor about once every six months for a sore back, after a hard week of work.

[35] Ms. Reeve recalled that Mr. Reeve hurt his back after a long day of driving on a trip to California in 2013 or 2014. She said it was tough on him as he had not been injured like that before. He worked through it with chiropractic treatment and some time off work. She does not recall low back pain as an issue when their eldest son was born in 2015.

[36] Mr. Reeve testified that, pre-Accident, he had no difficulties with the work on his home or otherwise, other than “wear and tear from a hard day’s work,” which he managed by “going to sleep and waking up fine.” He said that he was not limited physically in his work and never asked for assistance. He was always there to encourage his crew to get the tough work done. I accept that Mr. Reeve’s low back had not been a limiting factor to his work as a journeyman carpenter or contractor.

[37] With respect to pre-Accident anxiety, Mr. Reeve described anxiety over the administrative side of running Laxmoon. He struggled to manage the administration

in a timely way and found making time for it a “big stressor”. He was the bookkeeper, which he found difficult. He hired an accountant to manage WorkSafe filings, and CPP and EI employee deductions. The accountant also did the Reeves’ personal, and Laxmoon’s corporate, taxes.

**Recreational and Social Activities**

[38] In the years before the Accident, Mr. Reeve focussed on fatherhood rather than on personal hobbies or recreational activities. He spent time in the backyard with his kids, went beachcombing with them, and took them fishing at a family cabin. He had no difficulties with these activities.

[39] Ms. Reeve testified that being a good father is very important to Mr. Reeve. She said he is a great dad who is very playful with his children.

**Retirement Plans**

[40] The Reeves were a young family who had not turned their minds to retirement. Mr. Reeve expected significant growth in the projects available to Laxmoon and described the LNG construction work that was starting in Prince Rupert and on which general contractors were likely to hire local companies for some of the work.

**Post-Accident**

**Symptoms**

[41] Immediately after the Accident, Mr. Reeve testified that he was in shock. He had never been in an accident before. He did not feel any immediate symptoms and thought he was okay to return to work but, after feeling a “twinge” in his neck, he called to book an appointment and went home to ice his neck, at his chiropractor’s suggestion.

[42] Mr. Reeve saw his chiropractor on August 20, 2018, five days after the Accident. He was then experiencing neck and jaw pain and headaches. His pain was primarily in his neck and shoulder area, starting on his left side, migrating to the

right, before settling on his left. He felt pain in his scalene, mastoid, and trapezius muscles. He described his pain as ebbing and flowing, but getting progressively worse over the next two years. He also experienced headaches.

[43] Mr. Reeve testified that his neck and shoulder symptoms still ebb and flow, varying from muscle fatigue to constant muscle pain and tightness, which causes his shoulder to raise up. He testified that he has a constant “hum” of pain that varies in intensity depending on his activities; it is concentrated on his left side, from his jawbone down to his shoulder blade and underneath his shoulder blade. He experiences less headaches now and is most likely to notice them when he misses a treatment.

[44] Chiropractic treatment provided Mr. Reeve with short-term pain relief, but the symptoms returned to pre-treatment levels after three to five days. He continued chiropractic treatment after he moved to Half Moon Bay but later discontinued it as he said he experienced shortening periods of relief. Mr. Reeve did not continue physiotherapy. He found that physiotherapy was focused on exercise, and, as he was involved in physically challenging work, he felt he did not need more exercise. He tried IMS but found the relief to be too brief to be of any effect. Following his move to Half Moon Bay, he has continued massage therapy and started acupuncture.

[45] While undergoing massage therapy, his therapist told Mr. Reeve that he may have temporomandibular joint disorder (“TMJ”). In 2019, he became aware that he was clenching his teeth and got a referral to a TMJ specialist. Due to a number of circumstances beyond his control, he did not see the specialist until mid-July 2020. When Covid-19 restrictions were in place, he could not receive massage treatment. He described the pain in his jaw as excruciating and reducing him to tears. He was getting bursts of pain three times a day. He sought treatment from a dentist who told him that he may have TMJ.

[46] After seeing a Vancouver TMJ specialist, he was fitted for an appliance from which he benefitted immediately. His pain reduced to once a week and continued to decline in frequency and intensity.

[47] Mr. Reeve was not covered by insurance for the \$6,000 cost of the appliance and treatment. He also received cold laser treatment and was prescribed stretching exercises that he still does. He avoids tough or hard food.

[48] I do not agree with the defendants that Mr. Reeve “changed” his evidence about the resolution of his TMJ. He acknowledged that it resolved but noted that he has experienced a resurgence of jaw pain in the past three months, a fact confirmed by Dr. Caillier.

[49] At present, Mr. Reeve describes neck pain/tension all day. His pain is triggered by activity. Any activity involving raising his left arm above his shoulder triggers pain. When he is not in pain, he feels noticeable discomfort in his neck and shoulders. Mr. Reeve’s headaches are related to his neck pain. He notices that when he misses chiropractic or massage appointments, the tension creeps up and his pain worsens, which may lead to headaches.

[50] On a daily basis, Mr. Reeve stretches and massages himself. He purchased a “Theragun” that he uses every other day. When his pain flairs up, he takes Tylenol. He took Tylenol before testifying and before a recent date with his wife so that he would not be bad-tempered.

[51] Since June 2023, Mr. Reeve swims every day in a home pool. He said that his shoulder has improved and that he is building muscle. He is increasing his number of laps. Swimming has not improved his neck muscles as he is not a strong swimmer and dog-paddles with his head above the water.

[52] Mr. Reeve testified that he wants to get better and that he is “definitely on the mend” and feels “pretty good” despite experiencing daily neck pain. He always feels a low-level “hum” of discomfort and pain in his neck and shoulder.

[53] Since the Accident, Mr. Reeve has travelled to Europe, Hawaii, and Italy. He experienced some difficulty when travelling, involving his lower back, neck, and shoulder.

### **Employment and Future Plans**

[54] Mr. Reeve continued in contracting post-Accident. He hired others to do the work that his pain prevented him from doing. He was unable to work over his head for much longer than a minute. He avoided work from shoulder level and above. Anything involving his left shoulder was painful. He was unable to carry sheets of plywood as he had in the past; often up to 10 sheets under each arm. After the Accident, he only used his right arm to carry.

[55] Post-Accident, Mr. Reeve continued to work on the renovations to the family home in Prince Rupert, but he hired help to finish them. He was able to do the work except for the heavier jobs. He did not miss any work, but altered his workload, and hired others to assist with work that he was normally able to do on his own.

[56] Mr. Grainger testified that after the Accident, he assisted with the renovations to the Reeves' home. Mr. Reeve hired him for two to three weeks of work in 2018, 2019, and 2020. Mr. Grainger completed the siding and other above-shoulder work, and Mr. Reeve needed a labourer to assist with installing the flooring.

[57] In August 2020, the Reeves moved to Half Moon Bay, where they continue to reside. Ms. Reeve testified that she was reluctant to leave her family in Prince Rupert, but she recognized that the Sunshine Coast presented more opportunities for their children. They moved to a neighbourhood with lots of families.

[58] At the time, Mr. Pierce was living on the Sunshine Coast. He told Mr. Reeve that there was lots of available carpentry work of the type Mr. Reeve enjoyed. Mr. Reeve testified that, unlike Prince Rupert, where construction jobs were limited by the financial resources in the community and the age and quality of the houses, residents on the Sunshine Coast were more affluent and were interested in the detailed finishing work that Mr. Reeve preferred to do.

[59] Near the end of 2020, Mr. Reeve hired Mr. Grainger to assist with renovations to the Reeve family home in Half Moon Bay at a rate of \$65 an hour. Mr. Reeve also hired Mr. Grainger to do carpentry work, building two waterfront decks, on a project in Saanich, BC. Mr. Grainger did not recall Mr. Reeve helping with the physical aspects of that work. Mr. Grainger worked eight to 10 hours a day, five to six days a week, and was paid \$80 an hour.

[60] After the move, Mr. Reeve operated Laxmoon as Reeve Construction Ltd. as there was no local advantage to using the Laxmoon name in Half Moon Bay.

[61] Based on what he saw as a business opportunity and an opportunity for less physical work, he started a new company called Sunshine Bins Co. (“Sunshine Bins”). He got the idea because, in Prince Rupert, he borrowed a friend’s truck to remove construction debris from his projects. He realized that if he bought his own truck, he could rent it when he was not using it. The concept of Sunshine Bins grew from there.

[62] On February 22, 2022, Mr. Reeve registered Sunshine Bins as a sole proprietorship. He bought a truck with a bin. Sunshine Bins and Reeve Construction Ltd. are currently incorporated as 1026853 BC Ltd. Mr. Reeve hired Adriano Lupini, a neighbour, as Sunshine Bins’ operations manager. Mr. Lupini is paid \$5,000 a month, plus benefits.

[63] Sunshine Bins has three lines of business. The first involves renting large garbage bins to contractors or homeowners doing renovations or yard cleanups. The bins are rented on a minimum weekly basis. Bins are delivered using a specialized truck. They are mechanically hoisted, loaded, and unloaded. After a bin is fully loaded, it is mechanically picked up and taken to the appropriate disposal facility.

[64] The second line of business, residential and commercial recycling, involves Sunshine Bins providing 65- or 95-gallon, bag-lined, recycling bins. Because Half Moon Bay did not have a recycling program and, after “crunching the numbers”, Mr. Reeve saw it as a viable adjunct to their first line of business. They bought another

truck, suitable for recycling bins, and eight 16-yard recycling bins. Recycling is picked up at curbside, either weekly or biweekly, depending on the contract. The bags are removed from the bins by hand, tied, tossed into a truck, and delivered to a recycling depot. When cardboard recycling does not fit into a bin, it may be left tied up on the curb.

[65] About half of Sunshine Bins' business is hauling construction and other waste, and the other half is recycling.

[66] Mr. Reeve is primarily responsible for the bin rental business and Mr. Lupini for the recycling business, although both men help each other out when they have downtime. Mr. Lupini said that the bags he lifts out of the recycling bins weigh between 15 and 40 pounds. During Mr. Lupini's vacation, Mr. Reeve hired someone to assist him with the recycling pickups. Mr. Reeve drove the truck, and his helper loaded the recycling bags.

[67] The recycling truck has since been equipped with dual steering and that has reduced the need for assistance.

[68] The third line of business is relatively new. It began in the late summer of 2023 and involves house and estate clear-outs. It allows Sunshine Bins to be busy on the "off" weeks when they are only dealing with 50 recycling bins as opposed to the 200 they deal with in an "on" week. Mr. Lupini testified that they did two estate sale clear-outs in the two months before trial. Mr. Reeve hired the same assistant who helped him with recycling to assist Mr. Lupini with the heavy physical labour in the clear-outs, such as moving furniture. He is paid \$30 an hour. Mr. Reeve assisted in carrying lighter loads of not more than 30 pounds. After about three hours, he was unable to continue. They hope to grow this aspect of the business and are marketing it to real estate agents.

[69] Mr. Lupini testified that he observed Mr. Reeve experiencing physical limitations while working. He described Mr. Reeve as being slow at picking up bins



and climbing into and out of the truck, and relying solely on his mirrors when backing the bin truck up, to avoid doing shoulder checks.

[70] While Mr. Reeve's initial intention was to take some time off from carpentry to get Sunshine Bins off the ground, he found that the work at Sunshine Bins did not aggravate his neck and shoulder symptoms as much as carpentry did, and he has not returned to carpentry in any meaningful way.

[71] While I accept that Mr. Reeve's work with Sunshine Bins has a physical element, the majority of his work involves driving, collecting bins using hydraulic lifts, administrative work, and sales. When Mr. Reeve was required to do the more physical work during Mr. Lupini's vacation, he hired a labourer to assist him.

[72] Mr. Reeve is responsible for administration and sales. Ms. Reeve assists with the administration, including invoicing, client tracking, paying bills, and marketing.

[73] Mr. Reeve testified that Sunshine Bins has reached the break even point and he anticipates that, in the near future, he will be able to take draws from it.

[74] Mr. Reeve has also set up a children's "bouncy castle" rental business. Dollies are used to move the inflatable castles, and Ms. Reeve assists him.

[75] The Reeves have started major renovations to their Half Moon Bay home. Mr. Reeve hired a contractor with whom he negotiated a reduced administration fee of 10% on the basis that Mr. Reeve would do some of the work. However, about a month into the renovations, the administration fee was renegotiated to 15% because Mr. Reeve was not putting in the work that he and the contractor expected.

[76] Mr. Pierce hired Mr. Reeve to do some home renovations for him on a project in Sechelt, BC, including kitchen and living room renovations, installing new flooring, painting, and building a fence. Mr. Reeve was not involved in the physical aspects of the interior work, but did the fence construction.

[77] Mr. Reeve testified that throughout the day, he feels constant low-level pain and jaw tightness, and he worries that he will do something to cause a flare in his

pain. He does physical work all day, including fixing tarps on the bins, and he may have to lift and load additional material, or rearrange scraps in the bin.

[78] Mr. Reeve testified that the lack of improvement in his neck pain causes him anxiety, as does the litigation process. He worries about his career change, because being a carpenter had always been a reliable source of family income, and Sunshine Bins is a risk, especially given other bigger market competitors. He testified that he “constantly” worries about his work. This, along with his increased administrative responsibilities, made his ADHD worse, and he sought medication to manage it.

#### **Effect of Accident-Related Injuries on Mr. Reeve’s Marriage and Non-Work-Related Activities**

[79] Ms. Reeve described that Mr. Reeve’s injuries prevent him from being as “rough and tumble” with their kids. He is more careful when playing with them, and they are more careful when playing with him or climbing on his back.

[80] Ms. Reeve testified that Mr. Reeve’s pain causes him to be cranky and short-tempered. She described him pre-Accident as being the kind of man she could ask to do anything for her. Post-Accident, she is more careful about what she asks him to do. She described marrying a young, strong guy, who had no limits on what he could do, but said post-Accident they are conscious about how he moves his body. Post-Accident, her household tasks have increased. She takes out the garbage and started mowing the lawn, until they hired someone to do that.

[81] In 2020 and 2021, Mr. Reeve’s anxiety worsened. He was not recovering the way he thought he would, and the longer the pain and stiffness continued, the more anxious he became. He was concerned about becoming addicted to opioids and losing everything. When he learned that he would have to wait years for trial, his anxiety was out of control, and he began catastrophizing. He asked his doctor about CBD and was referred to a cannabis coach who recommended a blend of CBD and THC that has helped with his anxiety. At trial, his anxiety was under control.

[82] Mr. Reeve purchased a motorcycle in 2022, and, on three or four occasions in 2022, he and Mr. Lupini trailered street legal dirt bikes to the start of logging roads and rode them. Mr. Reeve said it was not physically challenging. Mr. Lupini confirmed Mr. Reeve's evidence. He described the terrain as relaxing, not rough. They took lots of breaks. On one occasion, when they were on rougher terrain, Mr. Reeve stopped and turned around after 10 or 15 minutes.

[83] Mr. Reeve and Mr. Lupini also spend time together with their children. When they are shooting basketballs, Mr. Reeve experiences shoulder pain after one or two shots.

[84] In early 2023, Mr. Pierce and Mr. Reeve started taking private jiu jitsu lessons, one-on-one with an instructor. The classes are less physically strenuous than group classes. Mr. Reeve testified that the instructor was advised of his limitations and adapted the lessons accordingly. The instructor directs them through different positions and holds. Mr. Pierce has not observed Mr. Reeve experiencing any pain during the lessons.

[85] Ms. Reeve testified that Mr. Reeve has benefited from jiu jitsu because it is physical exercise, it interests him, and he has a focus.

### **Credibility Assessment of the Lay Evidence**

[86] Mr. Reeve's ADHD affected the manner in which he delivered his evidence; sometimes losing the question, or his train of thought, in his answers. He self-described as distractible and tended to go off on tangents. He was visibly relieved to be able to finally describe the Accident and his injuries. He did not evade answering questions. He tried hard to provide thoughtful, accurate evidence.

[87] The history that Mr. Reeve provided to all of the expert witnesses was remarkably consistent. He testified that he made a point of sharing his complete medical history with every doctor he saw. That was evident in Dr. Caillier's report. He told her about a WorkSafe injury he suffered when he was 17 or 18 years old. He had no need to raise it as it was years before the Accident, but he wanted to be

accurate. His desire to be accurate was also apparent in his call to Ms. Hull following the FCE. He frankly reported that he experienced shoulder pain on both sides and pains all over his body, including in his elbow and lower back. He was being entirely frank about how he felt.

[88] Mr. Reeve's lay witnesses supported his evidence, and the witnesses were credible.

[89] Although the defendants submit that there were problems with Mr. Reeve's reliability, I do not agree. I found him to be a credible, reliable, and careful witness. He did not exaggerate his evidence or his symptoms. He frankly acknowledged that he knew very little about Laxmoon's finances and could not explain the fluctuations in his income. He presented as a thoughtful and dedicated family man who was doing his best to cope with the loss of a trade that he loved and was proud of. He is doing the best he can to earn a living to support his family, a role he takes seriously.

[90] Some of the examples the defendants relied on to demonstrate Mr. Reeve's lack of reliability were misunderstandings. When he was shown his earlier examination for discovery evidence, he readily adopted it.

[91] Mr. and Ms. Reeve were cross-examined at length about their tax and income reporting and business record keeping. They did not avoid answering those questions. While their record keeping makes it difficult to calculate Mr. Reeve's wage loss claims, there is no basis in the evidence on which I could find that the Reeves' lack of financial knowledge and organization was nefarious. The Reeves made use of write-offs and tax deductions that were legally available to them and acted on their accountant's advice about how to best present their income to secure a mortgage. As small business owners, they are entitled to take deductions in the year in which they were incurred, or defer them to subsequent years.

[92] There was also nothing wrong with using Ms. Reeve's Indigenous status to qualify Laxmoon as a First Nations business to take advantage of available government grants and to bid on contracts.

[93] The Reeves will not recover some damages as a result of their financial disorganization. For example, the Reeves have not put in evidence invoices for the workers they hired to assist Mr. Reeve with their home renovations, or for paying someone to mow the lawn when Mr. Reeve could not, or for the purchase of a new, lighter, lawn mower for Ms. Reeve to use to mow the lawn in Half Moon Bay. Despite the lack of invoices, their evidence in that regard was credible.

[94] I find that, when considered as a whole, and together with the other evidence, Mr. Reeve's evidence was both credible and reliable. It was confirmed by the credible and reliable evidence of his lay witnesses.

[95] Although in their closing submissions, the defendants suggested that Mr. Grainger, who gave video evidence, appeared to be referring to a document or documents, Mr. Grainger was not cross-examined about it. To suggest it in closing submissions, without giving Mr. Grainger an opportunity to respond, is unfair to Mr. Grainger. If he was referring to a document, which was not apparent to me, and if he was asked, he could have addressed what it was. Counsel's belief that he was doing so is not evidence.

**The Expert Medical and FCE Evidence**

[96] Mr. Reeve, and both of the physiatrists, agree that he suffered the following injuries in the Accident:

- a) Ongoing pain in the muscles of his left neck and upper back;
- b) TMJ disorder;
- c) Post-traumatic headaches secondary to neck pain; and
- d) Frustration and irritability.

[97] Initially, post-Accident, he suffered sleep disruption from his accident-related pain, but that has since resolved.

**Dr. Caillier*****Accident-Related Injuries and Recommendations***

[98] Dr. Caillier opines that Mr. Reeve suffered the following injuries and issues as a result of the Accident. I have not dealt with the injuries that have resolved. She also broke down her prognosis, treatment recommendations, and opinions regarding his abilities and limitations based on each diagnosis.

***Left-Sided Soft Tissue Injury to the Left-Sided Neck, Upper Back, and Shoulder Girdle Regions***

[99] Dr. Caillier opines that Mr. Reeve likely sustained a soft tissue musculoligamentous injury involving the left sided neck, upper back, and shoulder girdle regions, resulting in left-sided chronic soft tissue pain. She opines that, but for the Accident, Mr. Reeve would likely not have his current and ongoing level of pain complaints or difficulties in engaging in activities.

[100] While Mr. Reeve described some improvement in his physical symptoms, the symptoms have not resolved, and he described daily pain and muscle tension when he engaged in sustained, heavier-based, repetitive activities in awkward positions.

[101] As to prognosis, Dr. Caillier opines that, given the chronicity of Mr. Reeve's physical symptoms post-Accident, there is a poor likelihood of him becoming symptom-free and he will likely continue to suffer ongoing symptoms into the future. However, she opines that following her recommendations would likely result in his symptoms becoming less intense on a daily basis, or more intermittent daily, and a reduction in the frequency with which he experiences symptomatic flares when engaged in sustained, awkward positioning, repetitive, and heavier-based activities.

[102] Even if Mr. Reeve benefits from her recommendations, Dr. Caillier opines that he is unlikely to become pain-free and would continue to have pain into the future, flaring depending on his activities, particularly work related. He also has an increased susceptibility and vulnerability to worsening pain if he experienced future trauma to these areas. In that event, there would be a negative impact on his ability to engage in home, work, or recreational activities.

[103] Dr. Caillier opines that Mr. Reeve is capable of doing the work he does with Sunshine Bins, with an ergonomic desk and breaks as needed. He was also doing some timber sales and looking at expanding his business activities into purchasing bouncy castles for children's events. She also opines that he could go back to doing construction management or general contracting but that he would have difficulty with sustained, repetitive, or heavier-based activities at or above shoulder level. If he had to do that kind of work, he would benefit from assistance. As a business owner, he would have to manage or modify his activities and be more hands off the tools.

[104] Dr. Caillier said that Mr. Reeve could engage in home activities if he paced himself and prioritized tasks when required and modified his activities.

### ***Recommendations***

[105] Dr. Caillier recommends that Mr. Reeve engage in 22 to 24 sessions with a kinesiologist or personal trainer in a gym setting with progressive exercises to increase his strength and endurance through his neck, upper back, shoulders, lower back, core, and pelvis regions. She also recommends an additional four to six sessions a year with a kinesiologist or personal trainer, for the next three years, to progress exercises and troubleshoot as required. She opines that improving Mr. Reeve's overall physical conditioning would help him to better manage his pain and increase his endurance and tolerance for activities. A lifelong exercise program, three to four times a week, including at home in a gym and a pool, would manage his pain into the future.

[106] Dr. Caillier recommends acupuncture and massage therapy, at least once or twice a month, to allow for long-term pain management so that Mr. Reeve can continue working either as a carpenter or in waste management.

[107] Dr. Caillier recommends an ergonomic setup of his desk and breaks throughout his workday as required. She recommends that Mr. Reeve be as ergonomic as possible during the day, taking breaks when engaged in awkward, heavier-based, repetitive, and sustained positioning.

[108] As to medications, Dr. Caillier recommends Tylenol or Advil, as needed, when experiencing a pain flair, and a topical anti-inflammatory, like diclofenac 20%, applied to pain sites. Baclofen could be considered in a topical compounded preparation of 6–12% for muscle spasm and tightness. She recommends considering a trial of myofascial trigger-point injections into the left-sided neck and shoulder, using a local anesthetic, such as 1% lidocaine. She opines that these injections might add to his improvement and the improved management of his pain, but are not a cure.

[109] As to home supports, Dr. Caillier recommends that Mr. Reeve have extension poles for cleaning and a lighter-weight vacuum to assist with activities around the home. He should pace and prioritize his home activities. She also recommends that Mr. Reeve have assistance with heavier-based seasonal outside cleaning or yard work to allow him to better manage his symptoms, engage in activities to manage his physical symptoms, and continue working.

[110] In cross-examination, Dr. Caillier was asked if Mr. Reeve would continue to see progress if he followed her recommendations. She said that she is hopeful that he could better manage his pain and that his pain could become less significant or frequent, but that he will not become pain-free. She also said that chronic pain is “notoriously” known to “wax and wane” without “rhyme or reason”. She agreed that Mr. Reeve’s improvement from swimming was a positive indicator.

[111] Dr. Caillier opines that Mr. Reeve’s history “possibly increases his susceptibility and vulnerability to developing pain with a traumatic event such as the [Accident]”. However, she opines that, but for the Accident, Mr. Reeve “would likely not have his current and ongoing level of pain involving the left-sided neck and shoulder regions with the associated difficulties engaging in repetitive, sustained and heavier-based activities.”

#### ***Left Jaw and Facial Pain - Temporomandibular Joint Disorder***

[112] Dr. Caillier notes that Mr. Reeve was seen by an oral medicine specialist for TMJ disorder. He began an oral appliance therapy or treatment which initially



resulted in an improvement of his symptoms. More recently, the symptoms had flared up, and she deferred to dental experts with respect to further treatment.

***Sleep Disruption Secondary to Pain Issues***

[113] Dr. Caillier opines that Mr. Reeve had sleep difficulties following the Accident, secondary to pain. He also had issues as a result of anxiety and left-hand numbness. She concluded that these issues had resolved as a result of Mr. Reeve's use of CBD/THC. Mr. Reeve also reported that CBD oil lowered his pain in his left-sided neck and shoulder.

[114] Dr. Caillier says that Mr. Reeve requires ongoing monitoring of his sleep as lack of restorative sleep can have a negative impact upon his ability to function.

***Emotional and Psychological Symptoms***

[115] Dr. Caillier opines on Mr. Reeve's increased anxiety, irritability, shorter temper, reduced patience, and anxiety in vehicles. Although he had a history of pre-Accident anxiety, it increased after the Accident due to his pain and dealing with aspects of this litigation. She notes that this improved with his use of CBD oil. His anxiety was reduced by 75 percent.

[116] She opines that Mr. Reeve needs ongoing mental health monitoring to ensure that anxiety did not become problematic, thereby impacting his function and pain.

***Chronic Post-Traumatic Headaches***

[117] Dr. Caillier opines that Mr. Reeve's headaches are associated with his neck and shoulder symptoms and that he would likely not be experiencing them but for the Accident. She opines that the prognosis for Mr. Reeve becoming headache-free is poor. Though he may benefit from treatment, he is unlikely to become headache-free because he is unlikely to become pain-free. Headache frequency and intensity will depend on the level of neck pain he experiences.

### ***Non-Accident-Related Injuries***

#### ***Ulnar Nerve***

[118] Mr. Reeve reported to Dr. Caillier that he began experiencing numbness, tingling, and pain involving his left elbow in January 2019, which Dr. Caillier found to be supported by clinical records. Mr. Reeve told Dr. Caillier that when he was building Mr. Pierce's fence, apparently in 2021, he experienced numbness and tingling in his fingers. Dr. Caillier opines that Mr. Reeve experiences left ulnar nerve irritability with subluxation, which caused the symptoms beginning in 2019 and at the time of her assessment. She found that his ulnar nerve difficulties are not Accident-related. Dr. Caillier opines that he will need to monitor these symptoms and avoid sustained flexion of his elbow and leaning on it. She suggested that he try padding his elbow at night.

[119] In cross-examination, Dr. Caillier said that ulnar nerve symptoms that are occasional, intermittent, or non-limiting are not necessarily cause for concern. A patient's history is instructive in this regard. In her opinion, an ulnar nerve issue would not necessarily be a problem for someone employed in the trades; it depends on the person. She has clinical patients with ulnar nerve issues who continue to work heavy jobs, and she opines that ulnar nerve issues may be the most irritating for people sitting at desks.

[120] Dr. Caillier did not recommend any treatment for Mr. Reeve's ulnar nerve pain.

#### ***History of Aches, Pains, and Low Back Issues***

[121] Dr. Caillier notes that, pre-Accident, Mr. Reeve had "a history of various aches and pains for which he had seen a chiropractor" and that this history was consistent with working as a general contractor. She reports that Mr. Reeve did not describe limitations or restrictions as a result of these aches and pains. This was consistent with Mr. Reeve's evidence at trial and of the other lay witnesses, including his wife. It was also consistent with the fact that there are no clinical records showing

that Mr. Reeve sought treatment for low back issues in the years immediately pre-Accident.

[122] Mr. Reeve described that he has infrequent low back pain; it is not a constant injury. He feels pain when doing heavy work or when sitting for prolonged periods, such as on a plane on a recent trip to Italy.

[123] Both Mr. Reeve and his wife testified about a disk herniation in 2013 or 2014. Dr. Caillier notes the herniation in 2015, and her review of Mr. Reeve's clinical records refers to imaging in 2015; however, that imaging appears to have related to a 2014 injury.

[124] Dr. Caillier opines that Mr. Reeve continues to have residual effects with weakness of the S1 innervated muscles as well as loss of the Achilles tendon reflex, that he is aware of this weakness, and that he should use caution with climbing stairs or ladders, and when on uneven ground. She opines that his ongoing right-sided plantarflexion weakness is unlikely to result in Mr. Reeve being unable to pursue working within waste management or as a general contractor. This accords with Mr. Reeve's evidence that his low back did not create limitations or restrictions for him in his work as a carpenter or a contractor.

[125] In cross-examination, Dr. Caillier was asked about the impact of Mr. Reeve's low back pain on his ability to perform job duties, such as carrying, during his FCE. Dr. Caillier said that at time of the FCE, Mr. Reeve was not working full time as a carpenter or contractor. He had started Sunshine Bins. She explained that, when someone is no longer in a physical line of work, they become deconditioned, which could cause his low back pain to play a role that it might not continue to do if Mr. Reeve becomes more conditioned and improves his strength.

[126] In support of this, Dr. Caillier noted that Mr. Reeve had reported to Ms. Hull that both of his shoulders were sore after the FCE. She opined that deconditioning can lead to "more pain where it doesn't normally bother you" and that when someone becomes more sedentary, as opposed to their normal level of activity, this

needs to be considered. This accords with Mr. Reeve's evidence that, pre-Accident, when working full time as a contractor and carpenter, his low back was not causing him any great difficulty and required only intermittent maintenance.

[127] Dr. Caillier remained firm in her evidence that, regardless of any low back or ulnar nerve issues, it is Mr. Reeve's chronic neck and shoulder pain that is currently limiting him.

**Ms. Natalie Hull**

[128] Ms. Hull says that Mr. Reeve participated in her FCE testing with high levels of effort and opines that his self-reported functional abilities and limitations were consistent with his demonstrated functioning.

[129] During the testing, Ms. Hull concluded that Mr. Reeve demonstrated average grip strength and that he is capable of jobs involving dexterous hand use. Based on her testing and observations, she described that Mr. Reeve is limited for job tasks that require:

- a) reaching out from his body and requiring more than approximately 45 degrees of flexion at the shoulder with his left arm. He also required task setup to allow for close-range reaching to support his durability for job tasks requiring repetitive or sustained reaching below shoulder height with his left arm;
- b) reaching above shoulder height with his left arm, particularly involving weight above his shoulder level. He could do that for short periods, but only rarely;
- c) sustained or repetitive above-shoulder level reaching with his left arm;
- d) static positioning. He could tolerate sitting for about 30–60 minutes with frequent postural readjustments and required regular and consistent breaks from static position of his neck and shoulders. He was not suited for jobs requiring rigid or extensive prolonged sitting;

- e) sustained or repetitive, moderate to extreme, stooping demands on more than an occasional basis;
- f) simultaneous demands for loading through his left shoulder (crawling for example), bending of his trunk, or end range reaching with his left shoulder.

[130] Ms. Hull conducted simulations of Mr. Reeve using a nail gun and of doing overhead work. She identified both of these tasks as being part of the occupational functions of a carpenter.

[131] In the simulated use of a nail gun, Ms. Hull described:

During the second circuit, [Mr. Reeve] reduced the weight of the planks (2 instead of 3), and found this weight to be more manageable. Left side shoulder hiking was observed throughout. He reported the onset of left elbow pain up to 7/10 and left shoulder pain up to 5/10 while bracing the planks against the wall. His elbow pain settled to 1/10 at rest. His left shoulder pain stayed elevated.

[132] In the simulated overhead reaching test, Ms. Hull described:

[Mr. Reeve] was initially observed to use both hands to attach weights and bands. After 2 minutes and 5 seconds, reduced use of his left arm was observed. Reduced use of his left arm was initially observed with weighted overhead reaching. By the third round of the circuit, he relied exclusively on his right arm for weighted overhead reaching and while attaching the negligible weight bands. He reported a significant increase in left elbow pain (6/10+), increased left shoulder pain (5.5/10+) and mid back pain (3.5/10+).

[133] Ms. Hull also opines that Mr. Reeve could perform up to limited, light, select medium, and select heavy strength demands, including lifting different weights from the floor to waist height on a variable basis. Not surprisingly, the heavier the weight, the less frequently he was able to lift it. This also applied to lifting lighter weights to shoulder height and carrying weight.

[134] Ms. Hull summarized the reported physical demands of Mr. Reeve's work. They included forward reaching, sitting, overhead reaching, and neck extension (tilting his head backwards and looking up), and sustained work at flooring level.

[135] Carrying aggravated Mr. Reeve's low back, but lifting aggravated his left shoulder and mid-back.

[136] Based on Mr. Reeve's physical limitations, Ms. Hull opines that he did not meet the essential physical job demands for durable work as a carpenter, even on a part-time basis, or to offer the full range of services offered by Sunshine Bins without assistance.

[137] During cross-examination, Ms. Hull was pressed on whether she could determine the extent to which Mr. Reeve's difficulties with weighted overhead reaching were due to his shoulder and neck issues as opposed to his ulnar nerve issues. She said she was testing Mr. Reeve's upper quadrant function, including the shoulder, wrist, arm, and hand. She said that she had no tests that could isolate loss of elbow function or use from shoulder loss of function or use.

[138] The fact is that Dr. Caillier's concern with Mr. Reeve's ulnar nerve was with respect to elbow flexion, not extension. It was not at all clear on the evidence that it was Mr. Reeve's ulnar nerve that led to his reported pain during the work simulation exercises he did with Ms. Hull.

[139] In a message left for Ms. Hull following the FCE, Mr. Reeve said that both his shoulders were very sore on the day of and the day following the FCE. He put his level of pain at 5/10. Both of his elbows had very sharp pains; 5/10 on the left and 4/10 on the right. He was experiencing very sharp jolts of pain (6/10) in his right shoulder with restricted mobility. He felt general fatigue in both of his arms. His neck was still sore on both sides and he was experiencing restricted mobility on both sides. He felt like he had done a very hard days work or a long workout. His lower back was also sore, likely from the repeated lifts he did.

[140] Ms. Hull did not assess Mr. Reeve's lower back function as he did not identify it as a limiting factor.

[141] I conclude that Ms. Hull was a fair and frank witness. She was steadfast in her opinions despite being pressed on cross-examination.

[142] When considered as a whole, I conclude that Ms. Hull's FCE supported Mr. Reeve's position and evidence that his Accident-related injuries are the largest contributor to his physical limitations and his inability to perform work as a journeyman carpenter or as contractor.

**Dr. Jonathan Hawkeswood**

[143] As set out, Mr. Reeve was seen by Dr. Hawkeswood at the request of the defence. He provided an IME report and a rebuttal report to Dr. Caillier's report.

[144] In the IME report, Dr. Hawkeswood summarized his opinion that Mr. Reeve's work history and decisions are complex, with multiple factors likely contributing to his work transition post-Accident. The Accident injuries "probably" detracted from his employability in the physical roles of contracting, "although [Mr. Reeve] was vague with his history at times and [Dr. Hawkeswood] had a hard time fully clarifying things in clearer detail". Dr. Hawkeswood did not explain what Mr. Reeve was vague about or why he had difficulty clarifying things. Nevertheless, he opines that Mr. Reeve could probably work in a moderate-duty contractor role, or perhaps even return to a heavy-duty role with some modest accommodations. Dr. Hawkeswood did not explain what he meant by a "moderate-duty contractor role" or what modest accommodations would be required.

[145] Absent the Accident, Dr. Hawkeswood questioned the sustainability and durability of Mr. Reeve doing physical work on a long-term basis.

[146] Dr. Hawkeswood diagnosed Mr. Reeve with neck pain, predominantly myofascial in nature, affecting the left trapezial area, and thoracic pain, with a prominent myofascial component. Dr. Hawkeswood also noted "long-standing" mechanical low back pain.

[147] In terms of causation, Dr. Hawkeswood opines that the Accident caused Mr. Reeve's neck, upper back, and jaw pains and that his headaches are an indirect complication of those issues.

[148] He agreed that Mr. Reeve is physically capable of continuing in the waste management business.

[149] The defence does not dispute that Mr. Reeve's injuries, either causally related to the Accident or independent of it, would impact his ability to do overhead work and the more physically challenging aspects of carpentry in the construction industry.

[150] The physiatrists disagree about the role of Mr. Reeve's ulnar subluxation and back pain play in his reduction of function. Dr. Caillier opines that the ulnar subluxation and back pain play a marginal role. Dr. Hawkeswood opines that they play a more significant role. They also disagree about the chronicity of Mr. Reeve's pain. Dr. Hawkeswood opines that, in the absence of evidence of failure of conditioning therapies, such as active rehabilitation, the pain should be treated as persistent. Dr. Caillier concludes that Mr. Reeve's pain is chronic.

[151] For the reasons that follow, I conclude that Dr. Hawkeswood's reports and evidence demonstrated a lack of objectivity and inappropriate advocacy. A few examples will suffice.

[152] In Dr. Hawkeswood's addendum report, he acknowledged Dr. Caillier's opinion that Mr. Reeve's pre-Accident "aches and pains" were not causing him any degree of disability. At the same time, he described Mr. Reeve as having a "mild degree of disability" with respect to his ulnar nerve symptoms. When cross-examined, Dr. Hawkeswood said that in describing Mr. Reeve's ulnar nerve symptoms as causing a mild degree of disability, he was using a "general" term rather than making a clinical finding. He also acknowledged that he had no clear scoring system for determining level of disability. This indicated a certain casualness in his use of language that was problematic throughout his evidence. As a result, I give no weight to his opinion that Mr. Reeve's pre-Accident aches and pains, anxiety, and ulnar nerve symptoms made it "probable" that Mr. Reeve would have left construction work absent the Accident. His evidence in that regard was contradicted by his own notes in which he wrote that Mr. Reeve's pre-Accident pain



was “very rare” and his anxiety was well managed. It is not disputed that Mr. Reeve’s ulnar nerve symptoms arose post-Accident.

[153] Dr. Hawkeswood agreed that Mr. Reeve was working pre-Accident without difficulty. However, he opines that Mr. Reeve would have needed to reduce his physical involvement in construction, despite the Accident. He said that as the work gets more difficult, it is harder to work beyond the retirement age. He said the “harder the job, the harder it is to keep going” and that there was a risk of aches and pains absent the Accident. These comments were, in my view, no more than broad generalizations and not specific to Mr. Reeve’s circumstances.

[154] It was also concerning that Dr. Hawkeswood substituted his own colourful terms for the language Mr. Reeve used in giving his history to Dr. Hawkeswood. In his notes, he recorded Mr. Reeve’s description of his “hyperfocus” on his jaw pain. In his report, Dr. Hawkeswood referred to this as being “OCD-like”. There is no suggestion that Mr. Reeve was ever diagnosed with obsessive-compulsive disorder or having OCD tendencies. Dr. Hawkeswood’s description was unscientific and not based on what he was told by Mr. Reeve.

[155] In his IME report, Dr. Hawkeswood wrote that he was “unclear” about the extent to which Mr. Reeve was experiencing anxiety. He wrote that, despite Mr. Reeve describing “intensely” focusing on his pain symptoms, worrying, and experiencing stress in relation to “multiple MVA-related appointments and meetings”, and also alluding to having been “burdened” with multiple life changes, he denied having recurrent anxiety symptoms. He acknowledged that Mr. Reeve had not used the words “intensely” or “burdened”. Those words were Dr. Hawkeswood’s. In the next paragraph of his IME report, Dr. Hawkeswood wrote that Mr. Reeve “demonstrated” a number of negative psychological factors that have probably impeded rehabilitation. In his evidence, Dr. Hawkeswood acknowledged that “demonstrated” was not a good word to have used.

[156] Dr. Hawkeswood testified in cross-examination that Mr. Reeve had a risk factor of “alcoholism in the family”. There was no evidence to support that comment,

and it was directly contradicted by Mr. Reeve's history and what Dr. Hawkeswood set out in his report. Although this may have been an error, it was a careless one. Careless errors detract from an expert's credibility and reliability.

[157] It was not clear whether Dr. Hawkeswood tested Mr. Reeve's grip strength during his examination. Dr. Hawkeswood did not keep notes of the tests he performed or of any specific tests results. He agreed in cross-examination that whatever was involved in his testing, it was less than a comprehensive assessment of Mr. Reeve's ulnar nerve difficulties. In any event, Dr. Hawkeswood agreed that an electrophysiologist would be better suited to comment on ulnar nerve pain. It is of note that Dr. Caillier, who did have that expertise, did not recommend any treatment for Mr. Reeve's ulnar nerve pain.

[158] Finally, I am most concerned by Dr. Hawkeswood's reliance on personal anecdotes about his family's experience with those who work in labour intensive professions, specifically auto body shops, to base his evidence and opinion that Mr. Reeve was unlikely to have continued to work in carpentry despite the Accident. Dr. Hawkeswood, referred to low back problems for "a bigger guy" pumping shingles up on roofs and other heavy work, likely resulting in an interrupted work history. He testified that the "idea of him working as a general contractor with no interruptions" was unlikely and it was unlikely that Mr. Reeve would have worked beyond age 60. When he was asked what he relied on to support his opinion, he said that he had not done vocational research into the work trajectory of general labourers but that he knew that, with time, heavy physical jobs caused more aches and pains and that pathology can be seen on scans. He gave as an example his father who owned a body shop and told him that he had never seen a "body man" work a day over 60. Despite this evidence, he said it had not influenced his opinion with respect to Mr. Reeve.

[159] Dr. Hawkeswood's evidence was not scientific, and it did not relate directly to Mr. Reeve's circumstances. Mr. Reeve was neither a "body man" nor a "general labourer". He was a skilled journeyman carpenter and a contractor. Anecdotal

evidence is not helpful to determining a diagnosis or prognosis for Mr. Reeve. Dr. Hawkeswood's evidence was also arguably inconsistent with his opinion that Mr. Reeve could probably work in a moderate-duty contractor role, or perhaps ever return to a heavy-duty role with some modest accommodations.

[160] In his report, Dr. Hawkeswood said that Mr. Reeve described a pattern of radiating arm pain, both upwards along the back of his left arm and down into the ulnar aspect of the left forearm and hand. This pattern was not noted in his expert file. His notes referred to Mr. Reeve describing "numbness and tingling". In cross-examination, Dr. Hawkeswood agreed that there was a difference between numbness and tingling, and a pattern of radiating pain. He was unable to satisfactorily explain the content of his report, but in cross-examination he acknowledged the discrepancy between what he recorded in the history and what he dictated in his opinion that he was unable to reconcile. He acknowledged "loose" or sub-optimal documentation but said he tended to fall back on what he said in his opinion.

[161] In his IME report, Dr. Hawkeswood described Mr. Reeve's low back pain as "long-standing" while, at the same time, declining to comment on whether he considered Mr. Reeve's neck and upper back pain as chronic. When asked in cross-examination, at first, Dr. Hawkeswood described Mr. Reeve's pain as persistent but not chronic. He said that Mr. Reeve had "risk factors for chronic pain", but he was not entirely certain that he has chronic pain because Mr. Reeve had not given active rehabilitation a chance and there were periods when Mr. Reeve felt relatively well. He did not agree that chronic pain waxes and wanes. Nor did he agree that waxing and waning pain is a classic descriptor of chronic pain, responding that there is no universal definite of chronic pain. Some describe it as continuous, long standing pain that does not go away. When pressed during cross-examination, for the first time, he eventually conceded that Mr. Reeve experiences chronic pain.

[162] I also note that there is a difference between Mr. Reeve's response to Dr. Hawkeswood's question about exercise and what Dr. Hawkeswood reported.

Dr. Hawkeswood wrote that Mr. Reeve “was quite clear that he did not want to exercise after the accident, but rather have passive treatments”. In cross-examination, he accepted that what Mr. Reeve told him was that work was his exercise. Dr. Hawkeswood said that he got the impression that there was “some pushback” there.

[163] In light of these difficulties with Dr. Hawkeswood’s reports and evidence, I conclude that I cannot rely on his opinions, and wherever he disagreed with Dr. Caillier, I preferred her opinions and evidence. Her report was thorough and balanced. As a result, I accept Dr. Caillier’s diagnosis and conclusions.

[164] While both Dr. Caillier and Dr. Hawkeswood acknowledge that Accident and non-Accident injuries impacted on Mr. Reeve’s functional ability in employment, Dr. Caillier qualifies her evidence in that regard. She acknowledges that Mr. Reeve’s ulnar nerve and low back issues contribute to his current condition but said that his ulnar nerve difficulties could not be viewed in isolation and that, absent the ulnar nerve and low back issues, Mr. Reeve would still have chronic issues with his left shoulder and neck and would not be less impaired in the overhead work required of a carpenter. She opines that while Mr. Reeve’s low back pain currently impedes his ability to carry, that was likely a result of his deconditioning since the Accident. Finally, she concludes that absent the Accident, Mr. Reeve would not have his current and ongoing symptoms nor his difficulties in work activities.

### **Conclusion on the Expert Evidence**

[165] On the whole of the expert evidence that I accepted, I find that Mr. Reeve’s Accident injuries are the primary cause of his current physical limitations. The defence has not established that he would be unable to perform as a journeyman carpenter or contractor despite the Accident.

## Damages

### **Non-Pecuniary Damages**

[166] It is well-settled that non-pecuniary damages compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation should be fair and reasonable to both parties. Fairness is, in part, measured against comparable awards in similar cases, but each case will depend on its own facts.

[167] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court identified a non-exhaustive list of the factors to be considered when assessing non-pecuniary damages. They include the: plaintiff's age; nature of the injuries; 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; and loss of lifestyle.

[168] Mr. Reeve has shown stoicism in the face of his injuries for which he should not be penalized: *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 at paras. 54–55. He continued to work through his pain, and he has taken a problem-solving and entrepreneurial approach to his career that enabled him to see an opportunity to start Sunshine Bins, which he hopes to be able to take a draw from soon.

[169] Mr. Reeve proposed an award for non-pecuniary damages in the range of \$135,000–\$165,000 relying on the following cases:

- a) *Flores v. Burrows*, 2018 BCSC 334: Four years after the 31-year-old plaintiff was injured in an accident, he continued to suffer from neck, back, and hip pain which prevented him from enjoying his pre-accident activities. He did not miss time from work but had difficulty sitting for long periods and spent more time completing tasks than he did pre-accident. He had difficulty lifting and performing heavier household tasks and yard work. He had a poor prognosis for improvement. He was awarded the 2023-equivalent of \$136,000 in non-pecuniary damages.

- b) *Tolea v. Huang*, 2021 BCSC 260: The plaintiff was 31 years old on the date of the accident and 37 at trial. Pre-accident, he was in good health without chronic physical or emotional issues. He was physically active; cycling to work three days a week. He injured his back and neck and had constant headaches for two months post-accident. He agreed that he had “some good days” but said he generally experienced pain three to four times a week. He remained a labourer and, despite switching occupations several times, his work remained physically demanding and caused constant pain. He also developed psychological symptoms, including low mood, anxiety, sadness, frustration, and difficulty with concentration. The Court found that the fact the plaintiff had managed to improve certain aspects of his life, while pushing through the pain, did not disentitle him to compensation. He was awarded the 2023-equivalent of \$167,000 in non-pecuniary damages.
- c) *Johnstone v. Rogic*, 2018 BCSC 988: The plaintiff was 38 years old on the date of the accident and 42 at trial. She injured her back and exacerbated her previously-existing fibromyalgia symptoms. Pre-accident, she enjoyed an active recreational lifestyle, including cycling and hiking, which she could no longer do without aggravating her symptoms. The Court found that she had approached her injuries in a stoic manner and worked hard to get better and maintain her job and family duties. The Court noted that she was relatively young, with an unfortunately guarded prognosis, and that she was a highly driven individual who, pre-accident, was effectively managing her pre-existing conditions. The Court awarded the 2023-equivalent of \$171,500 in non-pecuniary damages.
- d) *Bidulka v. Haugen*, 2020 BCSC 1065: The 40-year-old plaintiff was involved in two accidents approximately a year apart. From a young age, she helped on a family farm, performing physically demanding tasks. Prior to the two accidents, she suffered occasional dizziness; low back pain; right upper back pain; frequent shoulder, neck, and hip pain; and headaches. She was diagnosed with cervical cancer at 16 and required three surgeries. Following

the accidents, she continued to experience pain in her neck, shoulders, upper back, and lower back. She became depressed and frustrated with her physical condition. She was an engaged and physically active mother, but, following the accidents, she could no longer participate in activities with her daughters. The Court found that the plaintiff would likely suffer lifelong neck, shoulder, and back pain; headaches; and some numbness in her hand. The Court further found the plaintiff was able to complete most housekeeping tasks with proper pacing. The Court awarded the 2023-equivalent of \$191,000 in non-pecuniary damages

[170] In contrast, the defendants submit that the appropriate range for Mr. Reeve's non-pecuniary damages is between \$80,000–\$100,000, relying on the following cases:

- a) *Juelfs v. McCue*, 2019 BCSC 1195: Pre-accident, the 36-year-old plaintiff was healthy and lived a relatively active lifestyle. Post-accident, she developed TMJ dysfunction and suffered soft-tissue injuries to her neck, and upper and lower back. The soft-tissue injuries caused chronic intermittent neck and back pain that was exacerbated by prolonged sitting, sustained neck postures, and sustained vigorous physical activity like lifting heavy weights, running, or carry a backpack for extended periods. She tried to return to field work as a wildlife biologist, and continued to be as active as she could in fitness activities and recreational pursuits. The Court accepted her evidence, and that of her lay witnesses, that her soft-tissue injury and resulting pain limited her ability to do field work in her chosen occupation, and imposed moderate limitations on her lifestyle. The Court accepted her evidence that her decision to change jobs was “multi-factorial”, including her belief that changing employers would be beneficial to her career and a desire for a better work-life balance. The Court determined that one, but not the predominant, reason for her job change related to her accident-related injuries. The Court awarded the 2023-equivalent of \$75,400 in non-pecuniary damages.

- b) *Purewal v. Uriarte*, 2020 BCSC 1798: Post-accident, the 32-year-old plaintiff suffered from chronic pain in her shoulders, back, neck, and head; and serious and ongoing headaches. The persistence of her injuries over the past four years had created anxiety, stress, and depression. Her relationships with her husband and children were seriously affected. She could not be physically affectionate with them, she was short tempered with her children, and she was restricted in what she could do. Her sleep was seriously impacted. She used to gain considerable pleasure from her work in retail, and that was lost to her. She used to enjoy social gatherings and entertaining people; these activities were also severely impacted by her injuries. However, the medical opinions suggested that there was room for optimism as her pain may become more manageable and her psychological problems may improve with treatment. The Court awarded the 2023-equivalent of \$92,700 in non-pecuniary damages.
- c) *Peter v. Beveridge*, 2020 BCSC 750: The 33-year-old plaintiff was injured in a significant car accident about three-and-a-half years prior to trial. As a result of the accident, she sustained soft tissue injuries to her neck and back, headaches, and sleep impairment. Despite the passage of time, and undertaking various forms of treatment, she continued to suffer from ongoing chronic back pain, intermittent and ongoing headaches, and sporadic neck pain. Though the Court found a potential for her condition to improve with appropriate treatment, the medical evidence supported a finding that she would never fully recover and would be left with residual chronic pain. There were some issues about the plaintiff's credibility. She worked various jobs after dropping out of school and later worked for several years as a flagger and traffic controller. She was able to continue in her pre-accident employment but could not perform the duties of a certified dental assistant for which she was training at the time of the Accident. The Court awarded the 2023-equivalent of \$92,700 in non-pecuniary damages.



d) *Bal v. Makichuk*, 2022 BCSC 1695: The plaintiff was 31 years old at trial. He was a delivery driver who, pre-accident, carried packages weighing from 20 to 50 pounds. He had planned to start a Certified Professional Accountant program but withdrew for reasons not attributable to the accident. At trial, he continued to suffer from daily back and neck pain, aggravated by sitting, standing, etc. He also had daily headaches, along with depression and anxiety. The Court did not conclude that the plaintiff would improve with further treatment, but confirmed there was no real risk of deterioration. The plaintiff was open to working in construction but was precluded from doing so because of his injuries. He no longer pursued his interest in martial arts. He continued as a delivery driver and general labourer after the accident. By the time of trial, he was working as a sales and installation technician for a cleaning company. The Court awarded the 2023-equivalent of \$100,000 in non-pecuniary damages.

[171] Having considered all of the cases relied on by the parties, and their submissions, I conclude that a fair award for compensation for Mr. Reeve's non-pecuniary damages is \$150,000. In arriving at this award, I have considered the *Stapley* factors and, in particular, Mr. Reeve's age, stage of life, established chosen career, and the fact that five years post-Accident, Mr. Reeve is still experiencing pain that is chronic.

[172] An award at the level proposed by the defendants is too low and would fail to fully account for the impact of the injuries on Mr. Reeve's quality of life. The defence cases do not reflect Mr. Reeve's inability to continue in a skilled profession he worked in for years and which was a significant part of his personal identity. He took pride in his work and was a perfectionist. According to his wife, he was a strong man who could do anything she asked of him; she no longer sees him that way.

[173] Both Mr. and Ms. Reeve testified that, post-Accident, Mr. Reeve is not able to interact with, or be as engaged with, his children as he had been. This was a significant focus of Mr. Reeve's life and activity pre-Accident.

[174] Mr. Reeve was established in his chosen profession, and the impact of being physically unable to continue as a trained, skilled, and qualified journeyman carpenter is profound. Without a post-secondary education, Mr. Reeve struggled in his early working life to find a job in which he could perform at a high level and, eventually, support a family. His change of career and transition to Sunshine Bins was forced on him by the Accident. It reflects his continuing desire to support his family; however, the loss of his trade and the fact that he hired others to complete the renovation work in Prince Rupert and at the family's Half Moon Bay home is significant. He hoped to be able to contribute to the current renovations, and negotiated a discount for doing so, but was unable to contribute at the level he or his contractor expected.

### **Past and Future Income Loss**

#### ***Mr. Reeve's Income***

[175] There are significant challenges in determining Mr. Reeve's pre-Accident income. From 2013 or 2014 onward, he earned his income through Laxmoon, a company owned by his wife and who was the sole shareholder. As a non-shareholder, he was not entitled to draws. He testified that he rarely drew a salary from Laxmoon. The Reeves merged their finances and took funds out of Laxmoon as they needed them. Neither Mr. Reeve nor his wife provided details of their income except to say that it was sometimes paid by cheque and sometimes by draws. I was not provided with Ms. Reeve's income tax information or Laxmoon's financial statements.

[176] Apart from indicating that cedar sales represented about five percent of Laxmoon's business income, I was not given any indication of the amount of those sales.

[177] Further complicating an assessment of Laxmoon's construction income was the fact that Mr. and Ms. Reeve structured their income and expenses to provide a favourable income profile for borrowing purposes. They obtained initial financing from a private lender, and their construction loan was from an institutional lender. In

2015/2016, they needed a mortgage, and on their accountant's advice, they retained earnings in the business. Once they qualified for the mortgage, they did not need to declare income, so Mr. Reeve believed that they wrote off as many expenses as they could to minimize taxes. In his evidence, Mr. Benning agreed that such adjustments to income and expenses made the corporate and personal income returns less reliable.

[178] During their house renovations in Prince Rupert, Mr. Reeve was working full time, doing work on the house, and pouring money into the renovations. He held off on taking a draw. Mr. Reeve could not explain how he had no personal earnings in 2018. He believed that, perhaps, the company earnings were going to his wife and she declared income, but said that he could not speak to that. He was not sure about his income. He also could not explain why he received a T-4 in 2021 but declared no income.

[179] As a result, the calculation of any loss of income has to be based on Mr. Reeve's income potential.

[180] In the Agreed Statement of Facts, the following tables summarizes Mr. Reeve's personal income reported to Canada Revenue Agency from all sources in the years specified:

Year	T4 Earnings	Gross Business Income	Net Business Income	CCERB	Total (Net)
2013	-	\$69,465	\$35,304	-	\$35,304
2014	-	\$119,352	\$69,323	-	\$69,323
2015	\$17,994	\$136,729	\$63,337	-	\$81,661
2016	-	\$128,041	\$96,030	-	\$96,030
2017	\$3,189.22	-	-	-	\$3,189.22
2018	-	-	-	-	\$0.00
2019	-	\$25,200	\$13,826	-	\$13,826
2020	-	\$35,000	\$18,950	\$2,000	\$20,950
2021	\$13,104	\$3,500	\$3,500	-	\$16,604.00
2022	-	-	-	-	\$0.00

[181] The following table summarizes the corporate income of Laxmoon Builders Inc. and 1026853 BC Ltd. in the years specified:

Year	Company	Revenue	Business Costs	Net Revenue
2017	Laxmoon	\$208,479	\$231,962	-\$23,483
2018	Laxmoon	\$184,917	\$139,697	\$45,220
2019	1026853	\$283,811	\$224,137	\$59,674
2020	1026853	\$138,004	\$126,809	\$11,195
2021	1026853	\$102,334	\$178,834	-\$76,500
2022	1026853	\$386,679	\$492,783	\$106,104
2023	1026853	\$500,940	\$557,872	-\$56,897

### **General Principles**

[182] Claims for both past and future income loss are assessed under the same legal test. Mr. Reeve must demonstrate that his Accident-related injuries, and the resulting symptoms and limitations, have impaired his ability to earn income, and that there is a real and substantial possibility that his diminished capacity has resulted, or will result, in a pecuniary loss.

[183] Loss of earning capacity is quantified using either an earnings approach or a capital asset approach. In this case, both parties submit, and I agree, that the uncertainty of Mr. Reeve's past and future income makes the capital asset approach appropriate: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[184] Regardless of the approach adopted, an assessment of past and future earning capacity involves a consideration of hypothetical events. The general principles are well-settled. In summary, they are:

- a) A plaintiff is not required to prove hypothetical events on a balance of probabilities. A hypothetical possibility will be considered as long as it is a real and substantial possibility and not mere speculation.

- b) An award for loss of future earning capacity is not calculated solely on a mathematical basis. It is a fair and reasonable assessment based on all of the circumstances of the case.
- c) Using statistical and economic evidence does not turn the assessment into a calculation but may be helpful in determining what is fair and reasonable.
- d) If a plaintiff establishes a real and substantial possibility, the court must then determine the measure of damages by assessing the likelihood of the event.
- e) The principles in *Brown v. Golajiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.); and *Kwei v. Boisclair*, 60 B.C.L.R. (2d) 393, 1991 CanLII 645 (C.A.), accurately set out the factors to be accounted for when considering the extent of future loss of earnings.

[185] The *Brown* and *Kwei* factors are:

- a) Has Mr. Reeve been rendered less capable overall from earning income from all types of employment?
- b) Is Mr. Reeve less marketable or attractive as an employee to potential employers?
- c) Has Mr. Reeve lost the ability to take advantage of all job opportunities which might otherwise have been open to him had he not be injured?
- d) Is Mr. Reeve less valuable to himself as a person capable of earning income in a competitive labour market?

[186] These factors are not a means for assessing the dollar value of a future loss. Instead, they provide a means for assessing whether there has been an impairment of a capital asset, which will then be helpful in assessing the value of that capital asset: *Rab v. Prescott*, 2021 BCCA 345 at para. 36.

[187] Finally, the assessment for loss of earning capacity must account for both positive and negative contingencies to recognize the possibility that assumptions on which the award is based may prove inaccurate: *Ziauddin v. Kuang*, 2022 BCSC 386 at para. 256.

### ***Past Loss of Earning Capacity***

[188] There are some well-settled principles for assessing past losses. Those principles include:

- The standard of proof for past facts is a balance of probabilities, but when dealing with hypothetical events, both past and future, the standard of proof is a “real and substantial possibility”.
- The standard of a “real and substantial probability” is lower than a balance of probabilities but higher than that of something that is only possible and speculative.
- While a hypothetical or future event will be considered so long “as it is a real and substantial possibility and not mere speculation”, past events must be proved on a balance of probabilities, and once past events are proved, they are treated as certainties: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183.
- The rationale for distinct standards of proof for past actual events and past hypothetical events was explained in *Smith v. Knudsen*, 2004 BCCA 613 at para. 29:

[29] ... What would have happened in the past but for the injury is no more “knowable” than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[189] In this case, Mr. Reeve demonstrated that his Accident-related injuries impaired his ability to earn an income before trial. Although there is little documentary evidence confirming Mr. Reeve’s actual earnings pre-Accident, or the

increased business expenses he incurred as a result of his injuries post-Accident, the evidence of Mr. Reeve, Mr. Grainger, and Mr. Lupini demonstrates that Mr. Reeve hired additional skilled labour on construction projects and unskilled labour with respect to Sunshine Bins to perform tasks that, but for the Accident, he would have performed himself.

[190] Mr. Reeve testified that, as a result of his injury-related limitations, he hired additional journeymen carpenters, including Mr. Grainger, to perform the physically demanding aspects of his construction projects. Mr. Grainger testified that Mr. Reeve hired him for four weeks in April and May 2021 for a large home renovation in Saanich. Mr. Grainger said he was paid \$80 an hour and worked eight-10 hours a day, five-six days a week.

[191] Mr. Reeve also testified that after the family moved to Half Moon Bay, he hired, "Ritchie", a third-year carpenter's apprentice, to assist him with physical tasks on his own construction projects. These were tasks he would have done but for his Accident-related injuries and limitations. Ritchie's employment records were not in evidence, but Mr. Reeve testified that he was paid \$45 an hour. Mr. Grainger confirmed that Ritchie worked for Mr. Reeve on the Saanich project during Mr. Grainger's four weeks on that project.

[192] Lastly, Mr. Reeve and Mr. Lupini testified that Mr. Reeve hired "Tory" as additional unskilled labour to assist Mr. Reeve in Sunshine Bins while Mr. Lupini was on vacation and to assist in the estate clear-out aspects of the business. Tory was paid \$30 an hour. There was no evidence contradicting Mr. Reeve's evidence about hiring Ritchie or Tory or how much they were paid.

[193] Based on Mr. Grainger working between 20 and 24 days, eight to 10 hours a day, at \$80 an hour, that amounts to a loss of between \$12,800 and \$19,200. Based on Ritchie working 20 to 24 days, eight to 10 hours a day, at \$45 an hour, that amounts to a loss of between \$7,200 to \$10,800. Finally, based on Tory working eight days, for eight to 10 hours a day, at \$30 an hour, that amounts to a loss of

\$1,920 to \$2,400. As a result, the range of past wage loss is between \$21,920–\$34,400. Mr. Reeve claims the sum of \$34,400.

[194] I accept that Mr. Reeve has demonstrated that his Accident-related injuries impaired his ability to earn an income before trial and that there was a real and substantial possibility that this impairment resulted in pecuniary loss. I also accept that the *viva voce* evidence, which was not seriously challenged on cross-examination, shows that there has been a measurable and calculable loss.

[195] I am not, however, satisfied that Mr. Reeve has established a loss at the high end of the range. Doing the best I can with the evidence, and in the absence of explicit documentation, I award Mr. Reeve the sum of \$28,000 as a fair assessment of his past wage loss.

#### ***Future Loss of Earning Capacity***

[196] A claim for future loss of earning capacity is compensation for a pecuniary loss. It requires the court to compare the likely future of Mr. Reeve's working life without the Accident with his likely future working life with the Accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32. It is an assessment, not a mathematical calculation.

[197] In a number of recent Court of Appeal decisions, the Court confirmed that a three-part test is to be applied when considering claims for loss of future earning capacity. In the first two stages, I must determine whether the evidence discloses a potential future event that could lead to a loss of capacity and whether, on that evidence, there is a real and substantial possibility of that future event causing a pecuniary loss.

[198] The burden is always on a plaintiff to prove a real and substantial possibility of a future event leading to an income loss. If a plaintiff discharges that burden, then, depending on the facts, the plaintiff may prove the quantification of that loss of earning capacity, considering the relative likelihood of the possibility occurring, either on an earnings approach or, as agreed in this case, a capital asset approach:



*Dornan v. Silva*, 2021 BCCA 228; *Rab; Lo v. Vos*, 2021 BCCA 421; and *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217.

[199] The defendants do not challenge that Mr. Reeve provided evidence of a potential future event that could lead to a loss of capacity. That evidence comes from Dr. Caillier and from Mr. Reeve himself. There is no doubt that Mr. Reeve has pain in his neck and shoulder that persist five years post-Accident, and I have accepted that his pain is chronic. Dr. Caillier and Ms. Hull both opine that, due to the Accident, he is not capable of being a full-time journeyman carpenter unless he is assisted with the work activities that he is no longer able to do competitively.

[200] I accept on the evidence, and applying the *Brown* factors set out earlier in these reasons, that Mr. Reeve has been rendered less capable overall of earning an income as a journeyman carpenter and general contractor in any capacity and has been rendered less capable in all types of employment as a result of his Accident-related injuries. I am not satisfied on the evidence that non-Accident factors would impair Mr. Reeve's ability to function.

[201] Mr. Reeve is intelligent, but not educated. His struggles in high school and during his attempt at post secondary education limited his work options, and he always worked in physical jobs. He has no marketable skills for administrative work or other jobs that would require him to work in an office environment and, based on his unrefuted evidence, is unlikely to work well in that environment. He preferred working for himself with only a few employees as needed.

[202] As a young man, he carefully considered his interests and skills and selected the job he thought he was ideally suited to. He combined his interest in building things with his perfectionism and attention to detail and set his sights on becoming a journeyman carpenter. By all accounts, he was successful in that role, and, using his entrepreneurial skills, he began working as a general contractor. Despite the lack of evidence about his financial earnings from general contracting, the *viva voce* evidence establishes that he was able to support his family as a general contractor.

The Reeve's were able to afford renovations to their Prince Rupert home before moving to Half Moon Bay.

[203] Mr. Reeve remains highly symptomatic five years post-Accident. He lives with chronic pain in his neck and left shoulder, which is aggravated by his work as a journeyman carpenter, particularly overhead tasks. His new employment at Sunshine Bins, although physically easier for him, still involves tasks that he is unable to do; he hired others to assist him and modified the equipment he uses to make the job easier. His employability continues to be vulnerable as a direct result of the Accident.

[204] This is particularly the case because Mr. Reeve has always worked in a physical capacity. Ms. Reeve performs some of the administrative work for Sunshine Bins, and those administrative responsibilities cause him anxiety. He has always made a living working with his hands, his arms, and his body, setting an example for those he worked with on sites, and this is reflected in the quality of the finished carpentry work that he most enjoyed.

[205] The evidence establishes that Mr. Reeve has suffered a loss of capacity due to his Accident-related injuries and symptoms, thereby making him less valuable to himself as a self-employed person capable of earning income in a competitive labour market. He has met the first aspect of the test.

[206] Turning to whether, on the evidence, there is a real and substantial possibility that the future event will cause pecuniary loss, I accept that evidence of ongoing pain can ground a substantial possibility that Mr. Reeve's pain will adversely affect his future ability to work. In this regard, Mr. Reeve's stoicism should not be held against him. The adverse effect on his future ability to work holds true even when, as in this case, Mr. Reeve did not miss significant work due to his injuries: *Clark v. Kouba*, 2014 BCCA 50 at para. 33.

[207] When taken as a whole, the lay and expert evidence demonstrates a real and substantial possibility that Mr. Reeve will be unable to maintain his career as a

journeyman carpenter and contractor as a direct result of his Accident-related injuries, symptoms, and limitations.

[208] Mr. Reeve testified about his significant limitations in performing the physical aspects of his job as a journeyman carpenter and contractor, particularly his ability to perform tasks which required sustained overhead reaching, which comprised roughly 50 percent of his work. Post-Accident, anything that required work at shoulder level or above had to be “avoided at all costs”. His evidence was confirmed by Ms. Hull’s FCE results. As a result, he was unable to maintain his pre-Accident working capacity and hired additional skilled and unskilled labourers to perform the heavier and overhead tasks that he could no longer perform. His evidence was supported by the testimony of Mr. Grainger and Mr. Pierce and by the expert evidence.

[209] Mr. Reeve said that, in the past two years, he has done roughly 10 days of carpentry work. He has attempted to limit himself to less strenuous interior finishing work but even installing flooring, cabinetry or trim, aggravates his Accident-related symptoms. He has turned down construction jobs as a result, and delayed completing other jobs when he did not have available assistance for the more physical tasks such as concrete pouring. His reduction in physical capacity and his need to support his family were pivotal in his decision to redirect his vocational focus to Sunshine Bins. Although less strenuous, his Accident-related injuries are aggravated by some of the physical aspects of his new work such as securing and removing the tarp on the bin truck and reversing the truck.

[210] I also accept that Sunshine Bins is a start-up business that is not yet sufficiently profitable for Mr. Reeve to draw from. If he is unable to continue in that business, or it does not succeed, his vocational options are limited. He has shown that he is adaptable, but his adaptability does not alter the fact that his career trajectory and future earnings were altered by the Accident.

[211] Although the defendants argue that Mr. Reeve did not present evidence of what he did to try to adapt his work environment to accommodate his loss of

function, I do not accept that in running a small construction company, bidding on jobs based on an hourly rate plus an administration fee, workplace accommodations were possible. Mr. Reeve primarily worked in residential construction. Mr. Reeve did not perform carpentry or general contracting at one location. He often worked alone or with one other labourer. It is difficult to conceive of an accommodation, apart from the assistance of someone else to do the heavier and overhead work, that could have been implemented. The added cost and time that would be borne by Mr. Reeve, or his clients, in erecting and dismantling a platform, if Mr. Reeve was physically able to do so, would not be sustainable in the long run, and the time required to set up, move, and then break down a platform is impractical.

[212] I note that the viability of the defendants' accommodation proposal was not put to Ms. Hull or Dr. Caillier in cross-examination.

[213] Both Dr. Caillier and Ms. Hull, although pressed in cross-examination, were steadfast that, even without his ulnar nerve pain, Mr. Reeve's neck and shoulder pain would be causing him pain and functional limitations in his work as a journeyman carpenter and for Sunshine Bins. Neither of them could opine with certainty how much his ulnar nerve issues may be adding to that, but I accept that on the preponderance of the evidence, taking Mr. Reeve as a whole, he is limited by his neck and shoulder injuries. When pressed in cross-examination, Dr. Hawkeswood acknowledged that Mr. Reeve's Accident-related chronic injuries impacted his ability to do overhead work and the more physically challenging aspects of carpentry in the construction industry.

[214] I conclude that the evidence shows that there is a real and substantial possibility that Mr. Reeve will be unable to return to his chosen profession as a skilled and certified journeyman carpenter or as a general contractor as a result of his Accident-related injuries, symptoms, and limitations.

[215] Despite this future outlook, Mr. Reeve has maintained his entrepreneurial spirit and worked to create a working life that accommodates his physical limitations. Nevertheless, the evidence establishes that there is a real and substantial possibility

that Mr. Reeve's loss of capacity and inability to continue in his trained profession, and difficulties in maintaining his current position, will result in a future pecuniary loss.

[216] I turn now to the issue of quantification. An assessment of future income loss is an exercise in judgement and assessment, and not a mathematically precise calculation; however, if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them: *Jurczak v. Mauro*, 2013 BCCA 507 at para. 37.

[217] As set out, I agreed that the capital asset approach should be applied in this case in light of:

- a) the limited documentary evidence relating to Mr. Reeve's actual pre- and post-Accident earnings;
- b) the fact that his earnings were manipulated for legitimate purposes, on the advice of an accountant; and
- c) the ultimate uncertainties associated with embarking on a new business venture.

[218] The assessment of loss must be based on the evidence but does not involve a purely mathematical calculation. The means of assessment will vary depending on the circumstances of the case: *Pett v. Pett*, 2009 BCCA 232.

[219] In *Pallos v. Insurance Corp. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), the Court wrote:

[43] The cases ... suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It

has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. ...

[220] Cases since *Pallos* have not limited loss of annual income to one or more years. For example, in *Miller v. Lawlor*, 2012 BCSC 387, Justice MacKenzie awarded three years of lost earnings. Three years of lost earnings was also awarded in *Flores* and in *Aylen v. Mellin*, 2022 BCSC 223. Three and a half years was 2021 BCSC 360 awarded in *Craig v. Martin*, 2021 BCSC 785, and four years was awarded in *Tolea*.

[221] Like Mr. Reeve, the plaintiffs in these cases were relatively young and had a significant amount of work-life remaining.

[222] I accept that it is possible that Mr. Reeve will not suffer a future income loss at all, either because his condition will improve as a result of treatment options, or because Sunshine Bins will become profitable and he will be able continue to do that work until he retires. I also accept that it is possible that Mr. Reeve may experience a greater loss of income in the future if he is required to change careers again or faces unemployment due to his physical limitations and perhaps more limited options. In all the circumstances, I conclude that an award of damages that is roughly equal to three years of Mr. Reeve's pre-Accident income is an appropriate benchmark for Mr. Reeve's loss of future earning capacity.

[223] Perhaps, one of the more difficult challenges in this case is determining an appropriate pre-Accident income on which to properly assess this aspect of his claim.

[224] One approach is to assess Mr. Reeve's loss based on earnings of between \$65 and \$80 an hour as a journeyman carpenter, working eight hours a day, five days a week, for 50 weeks a year. Mr. Reeve testified that as a journeyman carpenter, his hourly rate was \$75 an hour. Before the Accident, he was working full time in his field. Mr. Grainger testified that, over time, he worked for hourly rates ranging from \$65 to \$80 an hour.

[225] Another approach is to assess Mr. Reeve's loss relying on the average earnings of third quartile (top quartile) and first quartile (bottom quartile) male journeymen carpenters in BC, as set out in Mr. Benning's report at Ex. 3, Tab A at p. 20–21. I will refer to this approach as the projected earnings approach.

[226] A third approach is to assess his loss based on his actual pre-Accident earnings for three years pre-Accident: the 2015, 2015, and 2016 tax years. I will refer to this as the pre-Accident earnings approach. These are the years preceding the available information about Laxmoon's business income and years in which the income was not manipulated for mortgage reasons.

[227] Under the first approach, based on Mr. Reeve earning \$75 an hour, working eight hours a day, five days a week, for 50 weeks a year, over three years, Mr. Reeve's loss of future earning capacity would amount to \$450,000. Adjusting this figure for the labour market contingencies set out in Mr. Benning's report (participation, unemployment, part-time and part-year work), and using the multipliers for 2027, three years into the future, results in a loss of future earning capacity of \$390,150.

[228] Under the projected earnings approach, Mr. Benning estimates Mr. Reeve's past and future employment income assuming Mr. Reeve earned income commensurate with a BC male journeyman carpenter earning top quartile income from the date of the Accident, to the date of his retirement, either at age 65 or 75. Mr. Benning's calculations are set out at Table 2 of Ex. 3, Tab A, at p. 17.

[229] Mr. Benning presents a similar calculation at Table 4 of Ex. 3, Tab A, at p. 20, assuming Mr. Reeve earned income commensurate with a BC male journeyman carpenter earning bottom quartile income from the date of the Accident, to the date of his retirement no later than age 60.

[230] Tables 2 and 4 both apply various labour market contingencies, including voluntarily lack of participation in the workforce, unemployment, part-time and part-year work, as well as a survival contingency.

[231] Despite determining that Mr. Reeve's future loss of income capacity should be assessed using the capital asset report, Tables 2 and 4 are useful in determining Mr. Reeve's potential annual income by relying on the average earnings in both tables for the years 2023–2026. Mr. Benning's report shows that three years of Mr. Reeve's annual earnings would range between \$153,558 (three years' earnings, first quartile income) and \$344,692 (four years' earnings, fourth quartile income).

[232] Turning to Mr. Reeve's pre-Accident earnings, his net reported earnings on his personal income tax returns for 2014–2016, as set out in Ex. 1, p. 2, at para. 16, were \$69,323, \$81,661, and \$96,030. Averaging those years results in an annual income of \$82,338. Accordingly, three years of Mr. Reeve's average annual earnings results in \$247,014. Adjusting this for labour market contingencies, using the multipliers set out at Table 5 for 2027 results in \$214,149.

[233] I accept that there is evidence in the record that might support each of the approaches. As I have said, they are all helpful in assessing an appropriate award. I have concluded that, in the circumstances of this case, a fair award for this head of damages is \$235,000, an approximate average of the figures produced from the three approaches. It is an assessment higher than Mr. Reeve's income tax documents would produce, but I accept that the income tax documents are unreliable and the earnings fluctuated and were unclear.

[234] It is a figure lower than the averages produced using Mr. Benning's quartile earnings calculations, but those percentile figures were not directly applicable to Mr. Reeve's circumstances. For example, there was no evidence on which I could find that, pre-Accident, Mr. Reeve was a top quartile earner, and I think it unlikely that he was a bottom quartile earner.

[235] The rate of \$75 an hour is what Mr. Reeve earned at one time and is between Mr. Grainger's lowest and highest rates. It is appropriately higher than what Ritchie and Tory were paid for much less-skilled work.



### **Cost of Future Care**

[236] To receive an award for future care costs, Mr. Reeve must establish that the treatments or care items are reasonable and medically justified in the sense that they are intended to ameliorate the impacts of his injuries and to promote his physical and/or mental health: *Alagar v. Mackay*, 2023 BCSC 209 at para. 180.

[237] In this case, Drs. Caillier and Hawkeswood and Ms. Hull each evaluated Mr. Reeve and made several recommendations as to his future care requirements.

[238] In her report, Ms. Hull made the following treatment recommendations intended to help Mr. Reeve maintain his level of functioning and to support his durability at work, and the cost for each.

### ***Mental Health Support***

[239] Dr. Caillier recommended “several sessions with a psychologist or counsellor regarding strategies and techniques ... to manage emotional and psychological symptoms in vehicles, as well as dealing with flares of pain”, noting that mental health issues “can not only have an impact on [Mr. Reeve’s] ability to function but can also have a negative impact on his pain”.

[240] Based on Dr. Caillier’s recommendation, and her own clinical practice as an occupational therapist making referrals for patients with chronic pain, Ms. Hull recommended 10–16 sessions at \$135–\$225 per session for a range of \$1,350–\$3,600. Mr. Reeve acknowledged that he had pre-Accident anxiety when attending to the administrative responsibilities of his work, but he did not miss work or require treatment as a result. Ms. Reeve testified that her husband had seen a counsellor due to a relationship breakup prior to them meeting. The evidence does not suggest that Mr. Reeve’s anxiety was a limiting factor for him pre-Accident or that he required medical support for his anxiety. Nonetheless, I accept that Mr. Reeve’s pre-Accident anxiety is a negative contingency that should be considered. I allow 16 sessions at \$200 per session, reduced by 10 percent for the negative contingency, and award \$2,880.

### ***Occupational Therapy***

[241] All three experts supported this recommendation. Dr. Caillier recommended an ergonomic setup of Mr. Reeve's work station and work breaks throughout his workday in relation to his chronic neck, upper back, and shoulder girdle pain. Ms. Hull expanded on this based on her clinical practice as an occupational therapist. It was not at all clear to me in Mr. Reeve's evidence how much time he spends at a work station. He testified that most of his administrative work took place in the front of his truck, and Ms. Reeve testified about her role in administration with respect to Sunshine Bins. I accept that work breaks are going to be necessary as a result of Mr. Reeve's chronic pain. I award \$2,500 for occupational therapy.

### ***Active Rehabilitation***

[242] This recommendation was also supported by all three experts. Dr. Caillier recommended active rehabilitation to improve on Mr. Reeve's strength through his neck, upper back, shoulders, lower back, core, and pelvis regions. In cross-examination, Dr. Caillier testified that Mr. Reeve's more recent low back issues could be attributed to deconditioning because he no longer worked in a full laborious position. Dr. Caillier did not recommend active rehabilitation for his ulnar nerve condition.

[243] Dr. Caillier explained that for patients with chronic pain, exercise is not a choice. Provided the exercise is beneficial, chronic pain patients have to engage in an exercise routine on a lifelong basis as a pain management strategy.

[244] I conclude that the evidence supports an award of \$5,040, the top of the range set out by Ms. Hull.

### ***Symptom Management Treatment and Aids***

[245] Dr. Caillier recommended acupuncture and massage therapy at least once or twice monthly to help Mr. Reeve with pain management. Ms. Hull agreed that such treatment will support Mr. Reeve's durability at work.

[246] At the current cost of Mr. Reeve's treatment, the range of cost supported by Dr. Caillier's and Ms. Hull's evidence is \$1,380–\$3,000 per year during Mr. Reeve's working years. Assuming that Mr. Reeve works to age 60, the correct multiplier, as set out in Ex. 3, Tab A at p. 22 of Mr. Benning's Table 6, is 17,310, which sets a range of \$23,887.80–\$51,930 in lump sum present value.

[247] Mr. Reeve testified that prior to the Accident, he attended for chiropractic treatment for his low back approximately once every six months. On the records before me, out of the records for 30 acupuncture treatments, low back pain is referred to in five of them, and elbow and arm symptoms (presumably ulnar nerve related) appears in three records. However, the records do not indicate that the sole reason for the treatment was Mr. Reeve's low back or ulnar nerve pain. Rather, these conditions are mentioned in conjunction with neck, shoulder, upper back pain, or headaches. Considering that non-Accident related issues formed part of Mr. Reeve's need for treatment and the evidence that Mr. Reeve's pain is likely to wax and wane, and that he may experience overall improvement, I award a lump sum of \$35,000 for this cost of future care.

[248] As to symptom management aids, these relate to the Theragun that Mr. Reeve currently uses and replacements over his lifetime. The witnesses support Mr. Reeve's use of a Theragun and that it provides him with relief. The lump sum present value for this item is \$1,040, and I award that lump sum as being reasonable in the circumstances.

### ***Home Exercise Equipment***

[249] Dr. Hawkeswood and Ms. Hull recommended a number of pieces of home exercise equipment for Mr. Reeve, including an exercise bike, a yoga mat, a foam roller, a stepbox, and a lacrosse ball. The present value of these items, including their replacements over the years, calculated pursuant to Mr. Benning's report is \$2,402. I conclude that this cost is reasonable and make the award accordingly.

### **Medication**

[250] Both Dr. Caillier and Ms. Hull support Mr. Reeve's continued use of CBD oil, which has been effective in managing his anxiety and pain. Ms. Hull says that cost is \$219 annually, which amounts to \$8,760 over the course of an 80-year lifespan. Applying Mr. Benning's future care cost multiplier in Table 7, the lump-sum present value of this medication is \$6,816 (Ex. 3, Tab A at p. 24).

[251] There is nothing in the evidence to support that Mr. Reeve would have used CBD in any event due to pre-existing anxiety. He had not required any earlier anxiety treatment as an adult, and the CBD was not required to manage his aches and pains pre-Accident.

[252] I find that the plaintiff is entitled to the full cost of this future care item. The evidence does not support a claim for other headache management supplements because Mr. Reeve is managing these through over-the-counter medications.

### **Yard Work and Home Maintenance Support**

[253] Dr. Caillier opines, and Ms. Hull agrees, that seasonal yard clearing assistance is appropriate for Mr. Reeve. Mr. and Ms. Reeve both testified that they paid people to mow the lawn in the years since the Accident and that they purchased a lighter lawn mower so that Ms. Reeve could mow the lawn.

[254] Mr. Benning valued the lump sum present value of this assistance to age 70 at \$10,894. I conclude that the appropriate age should be 65. Mr. and Ms. Reeve would likely have required assistance, absent the Accident, at age 65.

[255] As to home maintenance support, Dr. Caillier opines that Mr. Reeve can engage in household maintenance activities but will need to pace, prioritize, and modify activities to account for his chronic physical symptoms. She recommended assistance with heavier-based seasonal cleaning outside the home or yard work. Dr. Caillier's recommendations were not in relation to his ulnar nerve or his low back pain.

[256] Ms. Hull noted that Mr. Reeve's Accident-related functional limitations would cause him difficulty with outdoor and household chores, and that exposure to such tasks will likely result in symptom aggravation that could compromise his work capacity.

[257] I have determined that this claim is more appropriately dealt with as a loss of capacity claim.

[258] Based on my findings, I order the following costs of future care:

Mental Health Support	\$3,880
Occupational Therapy	\$2,500
Active Rehabilitation	\$5,040
Symptom Management Treatments	\$35,000
Home Exercise Equipment	\$2,402
Medication (CBD Oil)	\$6,816
Symptom Management Aid (Thera Gun)	\$1,040
TOTAL:	\$56,678

### Loss of Housekeeping Capacity

[259] Mr. Reeve seeks compensation for his loss of housekeeping or domestic capacity as a result of the Accident and its impact on his ability to continue with yard work, home maintenance and repair, and renovation work that he would have done himself prior to the Accident.

[260] The claim is for a loss of personal capacity, an asset, and the cost of replacement services if used does not inform the analysis.

[261] Such an award should be arrived at after accounting for all of the relevant contingencies. Just because an injured plaintiff has the support of family to perform household tasks does not mean that this loss of capacity is not compensable: *Gleason v. Yoon*, 2015 BCSC 586; *Munoz v. Singh*, 2014 BCSC 567; and *Kim v. Lin*, 2018 BCCA 77 at para. 52.

[262] In this case, Dr. Caillier opined that as a result of Mr. Reeve's chronic neck, upper back, and shoulder girdle pain, he will have difficulties with sustained,

repetitive or heavier based activities at or above shoulder level and that he will benefit from assistance with those tasks. She recommended that he be as ergonomic as he can during the day and take breaks when engaged in these types of activities.

[263] I accept that the evidence supports that Mr. Reeve's capacity to undertake pre-Accident household chores, primarily outside, has been functionally limited due to the Accident. The Reeves both testified about hiring help to cut the lawn and the need to purchase a light-weight lawn mower so that Ms. Reeve can now do it. Mr. Reeve also testified about buying a lighter electronic chainsaw for limbing trees in his yard. He also testified that he expected to be able to work on the renovations for the family home in Half Moon Bay, and negotiated a discounted administrative fee from his contractor as a result. The contractor's administrative fee has since been increased because of Mr. Reeve's lack of capacity.

[264] Mr. Reeve relies on two cases: *Hastings v. Mathew*, 2020 BCSC 1418 at paras. 52–54; and *Chappell v. Loyie*, 2016 BCSC 1722 at paras. 256–267. In both cases, the plaintiffs were unable to perform home maintenance, repairs, and renovations after an accident. Mr. Hastings was awarded the 2023 equivalent of \$40,500, and Mr. Chappell was awarded the 2023 equivalent of \$61,655 for the loss of capacity.

[265] Mr. Reeve seeks an award of \$50,000. I am satisfied that such an award is warranted in this case.

### **Special Damages**

[266] To be compensated, Mr. Reeve's special damages must be reasonable.

[267] In closing submissions, the defendants said that Mr. Reeve's special damages were not contested. I am satisfied that Mr. Reeve sought medically recommended treatment primarily for his neck, shoulder, and jaw pain; although, as noted, on occasion, he also mentioned arm and lower back issues to his treaters. Arm and lower back issues were never the primary basis for treatment.

[268] I conclude that Mr. Reeve is entitled to \$19,069.54 in special damages.

### **Failure to Mitigate**

[269] The defendants pled and argued at trial that Mr. Reeve failed to mitigate his injuries by not undertaking the cardiovascular exercises recommended by his physiotherapist.

[270] In *Yeomans v. Buttar*, 2021 BCSC 343 at para. 143, relying on a number of earlier decisions, the Court summarized the relevant principles in respect of the defence of failure to mitigate.

[271] Failure to mitigate is a defence that must be alleged and then particularized in the pleadings. If pled and particularized, the defendant has the burden of proving on a balance of probabilities that: 1) there were steps the plaintiff could have taken to mitigate their damages; 2) the plaintiff acted unreasonably in failing to take those steps; and 3) the extent to which the loss would have been avoided or mitigated by taking those steps: *Yeomans* at para. 144.

[272] What is reasonable has both subjective and objective components. Subjectively, the court must examine the plaintiff's personal circumstances and constraints on their ability to mitigate. Objectively, the court must assess what a reasonable person in the plaintiff's circumstances would have done. The determination is a question of fact: *Yeomans* at para. 145.

[273] Determining what would have happened had the plaintiff taken the recommended steps is a hypothetical exercise in which the court examines the possible outcomes according to their relative likelihood.

[274] In this case, the defendants merely pled a failure to mitigate in what can only be described as a boilerplate pleading. The pleading was never amended and it is not particularized.

[275] Although the analysis could end here, I will go on to consider the defence as if it had been particularized and as argued by the defendants.

[276] Mr. Reeve testified that he was not receptive to the exercises recommended by his physiotherapist because he believed that the physical nature of his work gave him sufficient exercise and he was looking for treatment of his pain. It was not at all clear on the evidence what specific exercises were recommended by Mr. Reeve's physiotherapist as neither Mr. Reeve's treating doctor or his physiotherapist testified. There is also no reliable expert evidence confirming that, had Mr. Reeve followed through with the exercise recommendations, his injuries would have been alleviated or his condition improved. Dr. Caillier is hopeful but not certain.

[277] I accept that Mr. Reeve testified that the swimming he started in the few months before trial resulted in some improvement to his shoulder but not his neck. Dr. Caillier agreed that swimming was beneficial.

[278] However, on the evidence, I conclude that the defendants have not met their burden of establishing failure to mitigate. They have not proven, as they set out in their submissions, that had Mr. Reeve started swimming years before, he would likely be "far more capable of engaging in the rigours of his trade" and "would be able to tolerate more overhead work, with less breaks" translating into "his being able to maintain his carpentry profession".

[279] I accept that Mr. Reeve's recent improvement of function, and his evidence that he is "definitely on the mend" and "feeling pretty good", should be considered as a positive contingency in assessing his claim for compensation for loss of economic capacity and for general damages. Dr. Caillier agreed that Mr. Reeve's feelings of improvement are a positive indicator.

[280] As Dr. Caillier made clear in her evidence, the patients who suffer from chronic pain "notoriously" experience waxing and waning in their condition and may improve and then decline for "no rhyme or reason". She testified, and I accept, that chronic pain necessitates a lifelong exercise routine as a long-term pain management strategy. Mr. Reeve only began swimming in June 2023. The Accident was in August 2018. Mr. Reeve described how he experienced improvements and declines in his condition over the years. There is no evidence to suggest that swimming will result in a long-lasting improvement in his overall condition. It may



only reflect a period of the waning of his symptoms. Dr. Caillier's opinion is that Mr. Reeve will never be pain-free.

[281] Nevertheless, there are other positive indicators for an improvement in Mr. Reeve's condition or his ability to manage it. According to his wife, his involvement in jiu jitsu has benefitted him. It is good exercise and has given him a focus. He has purchased an off-road but street legal motorcycle, and has enjoyed using it with Mr. Lupini when the terrain is not too rough. These indicators, and the possibility that following an exercise program and using the exercise equipment provided for in the award for cost of future care, create a real and substantial possibility of improvement in Mr. Reeve's pain management and in his capacity.

[282] Assessing the appropriate quantification of that positive contingency must also consider the waxing and waning nature of Mr. Reeve's chronic pain condition. I conclude that the contingency should be set at 10 percent.

### **Summary and Conclusion**

[283] For the foregoing reasons, I have awarded the following damages to Mr. Reeve:

- a) Non-pecuniary damages: \$150,000 (reduced by 10 percent to \$135,000)
- b) Past loss of earning capacity: \$28,000
- c) Future loss of earning capacity: \$235,000 (reduced by 10 percent to \$211,500)
- d) Cost of future care without including yard work and home maintenance support: \$56,678
- e) Loss of housekeeping capacity: \$50,000 (reduced by 10 percent to \$45,000)
- f) Special damages: \$19,069.54

[284] Remaining to be determined is the amount of interest payable under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, on Mr. Reeve's past loss of earning

capacity, special damages, and costs and disbursements. These issues should be agreed upon between the parties, and if no agreement is reached on costs, they should be assessed by the Registrar.

“MacNaughton J.”