IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Moen v. Grantham,*
2024 BCSC 937

Date: 20240530
Docket: M182157
Registry: Victoria

Between:

Cody Grant Moen

Plaintiff

And

Kaytlyn Grantham and James Westwood

Defendants

- and -

Docket: M181761
Registry: Victoria

Between:

Cody Grant Moen

Plaintiff

And

Robert Blackburn and Anita Blackburn

Defendants

- and -

Docket: M204075
Registry: Victoria

Between:

Cody Grant Moen

Plaintiff

And

Thomas Kevin Grace

Defendant

Before: The Honourable Justice Kent

Reasons for Judgment

Counsel for the Plaintiff:	M. Kazimirski, KC H. Chiong
Counsel for the Defendants Kaytlyn Grantham, James Westwood, Anita Blackburn, Robert Blackburn and Thomas Grace:	E. Wagner C. York B. Chadha
Place and Dates of Trial:	Victoria, B.C. January 29 - February 2, and February 5-9, 2024
Place and Date of Judgment:	Victoria, B.C. May 30, 2024

Table of Contents

INTRODUCTION AND OVERVIEW

[1] These are Reasons for Judgment in three personal injury actions that were tried together pursuant to an order granted by this court on July 22, 2022.

[2] Each action relates to a separate motor vehicle accident involving the plaintiff and each of the three groups of defendants occurring on May 5, 2016 (“MVA#1”), May 7, 2016 (“MVA#2”) and December 18, 2018 (“MVA#3”) respectively.

[3] The defendants are all BC residents and are all insured by motor vehicle liability policies issued by the Insurance Corporation of British Columbia (“ICBC”) who has appointed a single law firm to act on behalf of all defendants at trial.

[4] In their respective defence pleadings, each group of defendants denied liability for their respective accident, denied that the plaintiff had sustained any injuries as a result of the accident, and, in the alternative, alleged contributory fault on the part of the plaintiff. As well, they each alleged in the further alternative that, if the plaintiff suffered any injury or loss as a result of their respective accident, he failed to reasonably mitigate any such loss and any award of damages should be reduced accordingly.

[5] None of the defendants made any claims against the other defendants for contribution or indemnity, whether under the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333 or on any other basis.

[6] At the commencement of trial counsel for the defendants informed the court that his clients were formally admitting:

- 100% fault for each of the accidents;
- the plaintiff had sustained “indivisible injury” as the cumulative result of the accidents (as described later in these reasons);
- the plaintiff was not contributorily negligent in respect of the accidents, nor had he failed to reasonably mitigate any loss arising from those accidents; and,

- the defendants were jointly and severally liable to the plaintiff for the aggregate amount of damages that the court might award in this matter and it was not necessary for the court to allocate any portion of the damages to any particular accident.

[7] While liability may now be admitted, quantum of damages is very much in issue between the parties. Counsel for the plaintiff submits that damages should be assessed in the aggregate amount of approximately $5 million. On behalf of the defendants, counsel submits that damages should only be assessed in the range of approximately $385,000 to $475,000.

[8] The court was concerned about possible conflicts of interest between the different groups of defendants insofar as joint and several liability for sums in excess of respective policy limits might be concerned. While ICBC's right to retain and instruct one counsel to defend multiple defendants has in some circumstances been endorsed by the Court of Appeal in *Mara (Guardian of) v. Blake*, (1996) 23 BCLR (3d) 225, different considerations can apply if the claim has realistic potential to exceed any defendant's policy limits.

[9] The court also raised with counsel for the defendants the propriety of dispensing with allocation of damages to each accident. For example, the defendants in MVA#3 cannot possibly be liable for any loss sustained by the plaintiff before that particular accident occurred: see the discussion in *Kallstrom v Yip*, 2016 BCSC 829 at paras. 385-387.

[10] In response to these concerns, counsel for the defendants assured the court both that (1) allocation of damages as between each accident is not required and (2) there was sufficient insurance money available under the defendants' policies in the aggregate to satisfy payment of any judgment even in the higher amounts sought on behalf of the plaintiff. I will therefore say no more about these matters.

[11] For the reasons that follow, the court generally finds in favour of the plaintiff with respect to most of the issues in dispute and damages are assessed accordingly.

CONDUCT OF TRIAL

[12] The trial occurred in the Victoria Courthouse over a two-week period commencing January 29, 2024.

[13] The plaintiff testified over the course of four days and called a further 11 witnesses as part of his case. These included two family members (his wife and his father), three consulting medical experts (a neurosurgeon, a psychiatrist and a work capacity assessor), a treating chiropractor (as a fact as opposed to an expert opinion witness), an expert economist, the plaintiff's accountant, and two witnesses who testified about their successful respective ventures in the heavy equipment field in which the plaintiff was employed.

[14] Only two witnesses were called on behalf of the defendants. Their primary witness was a physiatrist who, at their request, had undertaken an independent examination of the plaintiff. The other witness was an expert economist who briefly testified regarding economic multipliers and contingencies applicable to the present value of future economic loss for damages assessment purposes.

[15] This is a case about chronic pain caused by mechanical back and neck injury sustained in the three accidents all of which has combined to cause significant functional and occupational impairment, major depression and severe emotional distress to such an extent that the plaintiff was contemplating suicide in 2020 and again as recently as two weeks before the commencement of trial.

[16] In a case such as this, the credibility of the plaintiff can be a critical issue. Throughout his testimony at trial, Mr. Moen displayed visible pain behaviours, constantly moving around and standing up, and frequently losing concentration and focus. He admitted to taking up to six tablets of Tylenol 3 pain medication on each day of his testimony and, perhaps not surprisingly, his memory was at times poor and his testimony vague.

[17] Matters are further complicated because the plaintiff has a learning disability that impacts his ability to read and write. He had difficulties in school and dropped

out in grade 9. He has always worked in physically demanding jobs such as handyman work, landscaping, residential construction and renovations, and in recent years heavy equipment excavation and snow-removal.

[18] Of course, Mr. Moen's physical injuries and chronic pain also contribute to his poor memory and concentration. While I have reservations regarding the reliability (accuracy) of certain aspects of Mr. Moen's evidence, I nevertheless have no doubts about his truthfullness. His evidence on factual matters was largely corroborated by the lay witnesses who testified. His ongoing injuries and disability were confirmed by all of the medical experts. The medical witnesses, including the physiatrist who testified as an expert for the defence, found the plaintiff to be truthful and forthright without exaggeration of his symptomology. Those that conducted “Waddell Testing” confirmed there was no reason to question the veracity of his subjective complaints.

[19] Plaintiff's counsel submits,

> Any inconsistency or lack of detail in his evidence was not to Mr. Moen's advantage. Mr. Moen has a tendency to understate his limitations. This is evidenced by the fact that the full extent of Mr. Moen's mental health was not self-reported to any witnesses including family, to the detriment of his case. Additionally, Mr. Moen continues to soldier on at work through debilitating pain and increasing doses of painkillers. This is not the behaviour of a malingerer or litigation-conscious plaintiff.

[20] I agree.

[21] I should note here that the defendants applied for an adjournment of the trial following the testimony of the plaintiff and two of his expert medical witnesses. The request was based on a hospital visit by the plaintiff on January 20, 2024 following a panic attack and an episode of suicidal ideation. The hospital records regarding that attendance were not available before the commencement of trial but were produced by Island Health on the fourth day of trial. I allowed counsel for the plaintiff to question his client and defence counsel to cross-examine him on both the attendance and the hospital records. The latter were also marked as an exhibit.

[22] Reference was also made to the recent hospital attendance and the related medical records during the testimony of the plaintiffs' medical expert witnesses. It turns out that the expert psychiatrist, Dr. Lu, had received a telephone call from the plaintiff when the panic attack first occurred and it was in fact Dr. Lu who told him to go to the hospital right away. Of course, none of this was addressed in the expert medical reports which had been generated several months earlier and, not surprisingly, defence counsel objected to any additional testimony by the experts regarding the January 20, 2024 hospital events. The court overruled that objection. As it turned out, Dr. Lu simply testified that the events did not change his diagnosis but merely "solidified his concern" regarding the plaintiff's reduced capacity.

[23] Once the testimony of the plaintiffs two expert medical witnesses was completed, counsel for the defendants requested an adjournment of the trial. They argued that the recent episode of suicidal ideation was "new evidence" that changed the "complexion of the case" to the prejudice of the defendants. They informed the court they wished to consider obtaining expert evidence from a psychiatrist. They also informed the court that the defendants were prepared to make an advance payment of damages as a condition of my adjournment being granted.

[24] Plaintiff's counsel objected to the adjournment. He argued that the plaintiff's severe psychiatric problems, including his suicidal ideation, was not a new issue in the case and indeed had already been addressed by Dr. Lu in his expert report. He noted the defendants did not obtain any rebuttal report respecting Dr. Lu's opinions, opinions which had not changed and which were merely confirmed by the recent events. He emphasized that the eighth anniversary of the first two accidents is upcoming and an adjournment of the trial would result in yet another lengthy delay that would be hugely prejudicial to the plaintiff.

[25] Ultimately the court was persuaded by the plaintiff submissions, declined the adjournment, and directed that the trial continue.

THE PLAINTIFF'S BACKGROUND AND TESTIMONY

[26] The plaintiff was born on September 20, 1990 and was 33 years old at the time of trial. He was 25 years old when MVA#1 and MVA#2 occurred.

[27] The plaintiff comes from a close family. He has a younger brother, now age 28, and a younger sister who is 14 or 15 along with another brother who was adopted. The latter two children still live with their parents.

[28] The plaintiff describes his childhood as happy, one without significant health issues. However, like his father, he did not do well at school. For him, "everything was going too fast", he did not really understand, could not follow and was easily distracted. To this day, reading, writing and comprehension of the written word are "still ongoing issues for me".

[29] The plaintiff dropped out of school in grade 9 and went to work. He always enjoyed working with his hands and had a natural aptitude for all things mechanical. He said he could take his bike apart and rebuild it by the age of seven. Later, when he started working for himself, he rebuilt the transmission on his parents' truck and got it on the road. He built a cabin on his parents' property so he could live independently.

[30] The plaintiff went to work with his father at an early age, mostly in the area of landscaping and building repairs and maintenance. The necessary skills came easily to him.

[31] The plaintiff did not obtain his driver's license until he was 18 years of age. His reading challenges proved to be a major obstacle to getting his license earlier. He took over some of his father's customers and started working for himself. He was adept at roof repairs, renovating kitchens, concrete work and fencing. Along the way he collected a variety of tools along with additional customers and "it all just took off".

[32] Before the accidents, the plaintiff enjoyed a wide variety of physical activities: working out at the gym, running, wakeboarding, swimming and hiking to name a few.

Photographs taken in 2014 and 2015 were put into evidence and depict a muscular and physically fit individual. He say's he was very strong at the time, bench pressing some 350 pounds in the gym while working full-time and long days on his renovation business.

[33] The plaintiff met his wife, Tanis Jackson, in 2015, the year before the first and second motor vehicle accidents. They soon moved in together, living in the cabin that the plaintiff built on his parents' property. She works in the insurance industry. She currently has a managerial position with an insurance agency.

[34] MVA#1 occurred on May 5, 2016. He was driving his 2009 Dodge Ram pickup truck along Sooke Rd. in Langford when he stopped to let a transit bus pull out in front of him. While stopped, he was rear-ended by a vehicle driven by the defendant Anita Blackburn. He described it as a "fairly big impact", one which caved in the bumper on his truck.

[35] The plaintiff, who was accompanied by Tanis Jackson at the time, noticed soreness in his neck and leg but says "he did not think it was a big deal" at the time. The truck was still drivable and he did not go to the hospital.

[36] MVA#2 occurred two days later on May 7, 2016. He was second in line waiting to exit a parking lot. The vehicle in front of him was driven by the defendant Kaytlyn Grantham who, it turns out, was a learner driver. She started to pull out then suddenly stopped and, seemingly startled by approaching vehicles, rapidly reversed and collided with the front of the plaintiff's truck.

[37] The plaintiff says he was wearing his seatbelt at the time. Again, he felt sore following the impact but "did not think anything of it".

[38] The plaintiff say he went to a health clinic a few days after the second accident where he was told that he had suffered a whiplash injury. He was suffering pain on both sides of his neck but primarily on the left and likewise with his lower back. He does not recall the treatment he was prescribed and he carried on with his

then current renovation project and, indeed, the other jobs that continued to come his way.

[39] The plaintiff says that immediately before these accidents he was working 60 to 70 hours per week. While he did post some online advertising for his business, the majority of the work that came his way was the result of “word-of-mouth” referrals.

[40] As time went by, the plaintiff says he noticed that his neck and back injuries were simply not getting any better. He struggled with the heavy physical tasks such as jack or sledgehammering, digging holes, and carrying materials… none of which was a problem for him before the accident. He received some chiropractic adjustments which “helped him carry on" but did not actually result in any healing or improvement. Physiotherapy treatment did not help and indeed some sessions made him feel worse. Projects started taking longer time to complete, clients were sometimes unhappy with his absences from their project, and he started making some mistakes, such as forgetting to order the appropriate colour countertop on one project resulting in a loss which “came out of my pocket”.

[41] The plaintiff says he “was struggling” and the persistent pain in his neck and back was “definitely limiting me”. He started wondering whether it was feasible for him to continue in this type of work when in late 2016, at the request and with the assistance of a friend who had an excavation company, he learned how to operate a bobcat and an excavator. No formal licensing was required to operate this equipment and the plaintiff quickly became a competent operator on projects requiring trench digging, excavation or placement of earth material, and the like.

[42] The plaintiff says he thought excavation work would turn out to be both more lucrative than his previous construction/renovation undertakings and might be physically less demanding (“a wheelchair for my tasks”). He acquired his own small excavator (a lease to own contract) and became a self-employed excavation contractor, initially working for the friend who had introduced him to the excavation business and then on a wide variety of other projects. He found there was a high

demand in the market and that “there was more work than I could do”. Unfortunately, however, the excavation business did not see any improvement or amelioration of the plaintiff's back pain. The cab was a very cramped space and running the equipment involved lots of jostling and abrupt movements which “inflamed the injuries”.

[43] The plaintiff says that he would look for projects that were “easier jobs”. He was turning down available work because of his pain condition and even when he was working, he would take breaks to lay down in the hopes that the “swelling would recede”.

[44] The plaintiff testified that he did not let other people know of his injuries as he did not want to get a reputation as someone who could not perform the work. He would not generally articulate his reasons when he turned work down or passed jobs by.

[45] In 2017 the plaintiff's family doctor retired but his wife's family doctor agreed to take the plaintiff on as a patient. He referred the plaintiff to a physiatrist, Dr. Galimova, for an assessment of his ongoing back pain problems but, according to the plaintiff, she provided no specific recommendations for treatment other than stretching exercises which did not have much beneficial effect.

[46] In 2018, the plaintiff acquired another slightly larger John Deere excavator. It not only allowed the plaintiff to accept larger projects involving longer reach and more volume, but also raised the prospect of the plaintiff hiring an operator so that both machines might be employed, whether on the same or different worksites. The charge out rates for this type of equipment are generally set by the Island Equipment Owners Association (the “IEOA”) and the hourly pay for equipment operators are fairly standard in the industry. The plaintiff says, that if he had not been injured, he would have been able to work 60 to 70 hours a week and could have generated substantial income, particularly if he was able to have both machines working at the same time with the assistance of an operator-helper.

[47] The plaintiff has in fact tried to hire a “crew” but finding willing and capable employees has proved challenging. At one point he hired an individual on what was supposed to be a two-year contract under which the plaintiff agreed to provide assistance and training on the excavator(s). The plaintiff hoped this would allow him to reduce the physical work himself, to attend to project management and billing, and to become less reliant on his father for assistance. However, after completing his training on the excavator, the trainee quit his employment within a matter of months to start up his own excavation business.

[48] MVA#3 occurred on December 18, 2018. At that time the plaintiff was driving his truck with a trailer attached and was stopped for a red light at an intersection when he was again directly rear-ended by a vehicle driven by the defendant Thomas Grace. The plaintiff had no warning before the impact occurred. He says he immediately felt a sharp pain down his left leg. When he got out of the vehicle, his legs were shaking and his left knee was painful. He says he thought to himself “no way this is happening again!”.

[49] This third accident severely aggravated both his physical symptomology and also his mental health. He says all of this has caused “bigger, ongoing problems”. The pain now radiates down from the left butt, down the side and back of the leg into the knee and down the calf to his foot. Physiotherapy, chiropractic treatments, and acupuncture have not resulted in any improvements. He cannot sleep properly. He takes medication which “dulls the pain and helps me cope” but it also affects his memory, focus and concentration. He has become deeply depressed.

[50] A psychologist from whom he sought counsel told him that the excavation work is not allowing his body to heal but he simply cannot afford to stop work. He says he is “running scared” because of his big financial commitments.

[51] The plaintiffs relationship with his wife now has serious problems and he is deeply worried she will not stay with him if they do not have a child soon, something he would very much like to occur if he were healthy but which he does not think he

can now afford: “I am so lost, I do not know what is in my future or how I can afford to keep my house”.

[52] In 2019, the plaintiff was still engaged in the excavation business, depending a great deal upon the assistance offered by his father. He made a decision to focus on snow removal as a supplementary and then alternative line of business because it offered the prospect of hefty returns over a short seasonal timeframe. That year he incorporated his business (mostly because of the liability risks and insurance requirements related to snow removal) and at one point had secured approximately 25 contracts with different customers in the Victoria area.

[53] Snow removal is demanding work which involves plowing and salting of parking lots and sidewalks at both early and late hours whenever the weather dictates. Again, he has had to rely on support of family and friends, particularly his father, and he simply forces himself to work through the pain as best he can. As before, the hiring of reliable crew members has proven to be extremely difficult. This regime has not been sustainable, however, and the number of contracts he has is now reduced to 12.

[54] In August 2021 the plaintiff acquired a John Deere 85 excavator by way of the assignment of a lease purchase agreement. He thought he would be able to make more money running this much larger machine than the smaller JD 35 excavator. He says that, as it turns out he “just could not handle it” and he ultimately sold the JD 85 in January 2023. He has since also sold his bobcat in June 2023 and has done little or no excavation work since that time. This, he says, is mostly because of his mental health.

[55] In 2021 the plaintiff and his wife bought a house a short distance away from his parents property. He says it was a “rushed decision” and it turns out it required substantial repairs. It took about a year or so for the plaintiff and his father to fix the place up, although it was his father who did most of the work. The house has a $790,000 mortgage on it. The financial stress is further straining the marital relationship.

[56] The plaintiff acknowledges that he is capable of doing some work-related activities, including driving a snowplow or operating in excavator for short periods of time on good days. It is helpful if the tasks can be broken down into smaller pieces. He says he is “not reliable” but he is “trying to hold it together” and “do things in shorter chunks”. He says, however, he has “episodes of his brain going blank”, he is “struggling”, and he needs help because “I’m falling off the deep end”.

[57] The plaintiff had not told his wife about having suicidal thoughts until just before the trial. He says this has happened “several times” but that “I do not [currently] have a plan, all I know is I would not do it in my own home”.

[58] Two episodes have been particularly serious.

[59] The first occurred in 2020 after his family doctor made a referral to a neurosurgeon and he was sent for an MRI. He was very optimistic that some sort of resolution would be found for his pain and mental suffering which to him would be “life-changing”. Unfortunately, the neurosurgeon told him that surgery was not recommended because it was very high risk and might not help in any event.

[60] As a result of this, the plaintiff had what he described as “a pretty serious breakdown” in the parking lot. He was overpowered by the guilt from relying on and “taking advantage of” his father to keep his business running. He was angry and frustrated because he was not winning the fight. He felt the walls closing in and for a couple of hours found himself standing on a bridge contemplating killing himself. Ultimately he held off and ended up going home.

[61] The second incident occurred shortly before trial during the afternoon of January 20, 2024. The plaintiff was doing snow removal work at the time but he had not taken any medication because he knew he was operating machinery. After giving “everything in the tank” to do the work, he found himself “just crying” and in pain that was “off the scale”. Again he felt the walls coming in on him and felt trapped. He called his father to come and get the dog and then drove himself to the Victoria General Hospital where he told them he had a “mental breakdown” and was

having more suicidal thoughts. According to the plaintiff, he was assured by the attending medical practitioners that things could be done to help him, however at the end of the day all they did was “give him more medication and a hug”.

[62] The plaintiff's description of this attendance is, perhaps not surprisingly, not entirely accurate and reference will be made later in these Reasons for Judgment to the clinical records produced by the Victoria General Hospital.

[63] I conclude this summary of the plaintiff's evidence with perhaps the most important point for the purposes of assessing damages in this case. The plaintiff firmly believes, and stated at various different places in his testimony, that if these car accidents and resultant injuries had not occurred, he would have been fully able, both mentally and physically, to establish a successful excavation and snowplowing business at which he would have worked at least 60 to 70 hours a week and derived a substantial income as a consequence. He is convinced that he would not have had to rely upon his father as extensively as he did, or perhaps at all, not only for assistance in his business undertakings but also for repairing and maintaining the house he purchased with his wife.

NOTABLE COLLATERAL LAY WITNESSES

Tanis Jackson

[64] Ms. Jackson is the plaintiff's 28-year-old spouse. She has been working in the insurance business since 2017 and is currently an assistant manager with a firm of insurance brokers.

[65] Ms. Jackson started dating the plaintiff in the summer of 2015 and the couple started living together in December of that year. They were formally married in October 2021.

[66] In the first year of their relationship, Ms. Jackson described the plaintiff as being a motivated and driven individual. At the time they met, he was self-employed on landscaping and home renovation projects. She estimates he was working up to 70 hours a week. He was the sort of person who always wanted to be active. He

fixed cars, repaired and maintained the cabin in which they were living on his parent's property, and went to the gym regularly. She described him as a "fit, strong guy who took pride in his appearance".

[67] Ms. Jackson says the plaintiff had no health concerns before the accidents. He had no mood issues but instead was upbeat, outgoing and extroverted. They would regularly go hiking and camping and the plaintiff would be the one to "push [her] into doing stuff" instead of just relaxing at home.

[68] From a housekeeping perspective, she described the plaintiff as being very "neat and clean". Housekeeping tasks were "pretty evenly split".

[69] Ms. Jackson was a passenger in her husband's vehicle at the time of MVA#1. They were both hurt in the accident and he was involved in another accident a couple days later. She understood the plaintiff's injuries as mostly back pain which later developed into pain shooting down his leg. He continued working, although he reduced his hours to more of a nine to five schedule and he started spending more time inside resting. The plaintiff's father also started helping him at work.

[70] Ms. Jackson described the plaintiff as someone who "does not like to talk about his issues". He tends to be "pretty closed", someone who did not want to show weakness because he had a "strong guy vision" of himself.

[71] Over the next couple years the plaintiff further reduced his hours at work. He was still using his father to assist him with his work but he cut back on his social activities. He was too sore to go to the gym and wanted to stay in more.

[72] Ms. Jackson says the plaintiff was very shocked and emotional when MVA#3 occurred in December 2018. He could not believe yet another accident had occurred. She said his pain got worse and he would come home drained of energy. He pushed himself but his workdays became shorter and he became even more reliant on his father for help. The type of projects he took on for work shifted to smaller jobs but even then he would take more time to complete them.

[73] Just before the third accident, the plaintiff had became involved in snow removal work and quickly realized it's money-making potential. Even though Ms. Jackson was herself working full-time, she started helping with the management of the snow removal work. This included paperwork, invoicing, setting rates, as well as arranging and coordinating assistance with the snow removal work that came in. She called upon her sisters, a cousin, her husband's friend Cory Zander, and of course the plaintiff's father. She also does some of the salting and snow shoveling herself.

[74] In 2020 both Ms. Jackson and the plaintiff decided to take some time off work. She had also been involved in a second accident and suffered from severe headaches. She took a month off work and the plaintiff was off for three to four months in the summer. They had no money coming in, although the plaintiff's father continued doing most of the work during this time. They were working on improving their "mental health" and their relationship. When the plaintiff returned to work, it was basically three to four hours a day for three days a week. His father was pretty much holding things together.

[75] The couple got married in October 2021. The plaintiff did not want a big wedding and did not want to be the centre of attention, so they just "eloped".

[76] In December 2021 the couple bought a house but it required significant repairs. This was the type of work that the plaintiff used to do himself but, because of his injuries, the work was mostly done by his father. They moved into the house in December 2022. The plaintiff helped "as much as he could" with the move but did not do much.

[77] The 2021-2022 snow removal season was lucrative. The business had 27 contracts at its height, although that later dwindled to 12 or 13 because, with the plaintiff's injuries, they just could not keep up to the level of work required. Even keeping up with the 12 contracts would not be possible without the involvement of Ms. Jackson working herself, along with her family and friends and the plaintiff's father. She says that the average working season is perhaps 20 to 25 days of work

but in the 2023-2024 season, gross earnings have only been $72,000 to the date of trial. Even with a recent snow event before trial, the plaintiff was only able to clear three of the properties and the work on the other nine was performed by others (herself, her family and the plaintiff's father).

[78] Ms. Jackson testified that the plaintiff has turned down work because of his injuries. She referred to a very lucrative contract available at Victoria Airport which they had to decline because they would not have been able to do all the work without the plaintiff being fully healthy. They also declined a full year contract for two Lowes stores (landscaping and snow removal) as well as at least one other contract for a major property management company.

[79] Ms. Jackson says she is very worried about the future. There is strain on the marriage. She had wanted children but is no longer sure this will be possible. Her intimate relationship with the plaintiff is almost nonexistent.

[80] In the past year Ms. Jackson says the plaintiff seems to have been in a “downward spiral”. He “does not like to talk about his issues or his emotional problems”. He “shuts me down" with silence and does not want to talk. It was only the previous week that he told her for the first time about his suicidal thoughts because he is “not where he wants to be in life”.

Gary Canfield

[81] Mr. Canfield is the plaintiff's father. He is 57 years of age. The plaintiff is his eldest son and he has three other children, a 28-year-old son, a 15-year-old daughter and a 11-year-old adopted son who suffers from autism. The latter two children live with Mr. Canfield and his wife on their two-acre property along with his mother. His brother lives in a trailer on the same property.

[82] Mr. Canfield says that he did not finish school and that he dropped out at the age of 16. He has been self-employed since, working mostly in the area of home improvements (carpentry, construction, landscaping etc.).

[83] Mr. Canfield describes the plaintiff as a “healthy normal kid” who always wanted to get involved in whatever his father was working on. Early on, however, they became aware of the plaintiff's learning disability. He was in a special education class but Mr. Canfield said he “knew he could not learn on paper” and that he “wanted to be out doing things”. At 15 or 16 years of age the plaintiff started working with Mr. Canfield and they were working full-time together by the time he was 16.

[84] Eventually, the plaintiff created his own business. He had his own customers and became independent doing the same type of work as his father. He built and moved into his own house (a cabin) on Mr. Canfield's property by the time he was 17 or 18. Mr. Canfield help them with that project. He described his son as “very fit”, “very strong” and “always active” with no significant health complaints.

[85] After the 2016 motor vehicle accidents, Mr. Canfield said he could tell something was wrong with the plaintiff. He was unhappy, uncomfortable and unfocused. Eventually, he told Mr. Canfield that he needed help because he could not keep up with the work.

[86] From 2016 onward, Mr. Canfield says he has been helping his son with most of his work. He says he would be charging $100 per hour on his own projects but he did not charge the plaintiff that because he was “just trying to help”. He essentially got paid the “bare minimum I needed” which was in the range of $3,000-$3500 a month, not as an employee but as an independent contractor. This continued to be the case as the plaintiff transitioned into the excavation business and later into snow removal work. All of the equipment was kept on Mr. Canfield's property.

[87] Mr. Canfield plainly stated more than once in his testimony that the plaintiff would not be able to sustain any excavation or snow removal business without Mr. Canfield's help. He simply cannot work that much and he has been “getting worse” and is so depressed. Mr. Canfield is worried that his son is considering suicide (he broke into tears while giving this testimony).

[88] Mr. Canfield describe the work required to repair the plaintiff's house after it was purchased in late 2021. He described it as a “big project” including replacement of flooring, roofing, kitchen, bathrooms. 80% of the drywall was replaced. Work was also required on the driveway and septic tanks. Mr. Canfield say he would have charged $100,000 for all of this work if he had done this for some other customer. As it was, Mr. Canfield was unpaid for the work.

[89] It is interesting to note there are many similarities between Mr. Canfield and the plaintiff. Both struggled with schooling and dropped out of school at an early age. While neither have any formal qualifications, they have both developed marketable skills in construction and heavy equipment operation. Both have a very strong work ethic.

Cory Zander

[90] Mr. Zander was presumably called as a witness for the following reasons:

- he has known the plaintiff since grade 3 (he went to school with the plaintiff's younger brother). They are fast friends who have spent a lot of time together and he is in a unique position to testify respecting the plaintiff's pre- and post-accident recreational and work activities;

- he, along with a partner, operates a successful marine construction business (projects over or on the water's edge) which owns and operates numerous pieces of heavy equipment including forklifts, cranes, excavators and the like… like the plaintiff, Mr. Zander has no formal ticket and is essentially self-taught in that regard; and,

- his business has used the plaintiff as a subcontractor on some of the projects and he has himself been helping the plaintiff with some of his snow removal work.

[91] After graduating high school, Mr. Zander started working in the field of residential construction. He started with small jobs but as he got more equipment

and a reputation in the area, bigger work started coming his way. One of his opportunities was a project involving the construction of some docks and this is how his business eventually became focused on marine construction over the last six years (he is 28).

[92] Mr. Zander says he is currently working 50 to 60 hours a week year round. There is a lot of work available and he could be working a lot more if he so wished. He is present on the site every day and is involved in all aspects of each project.

[93] Mr. Zander describes operating an excavator as a “tough physical job”. It involves working on uneven ground, always moving angles, and lots of jostling. He uses the excavator for lifting heavy objects, a task where focus is very important and which requires great skill.

[94] Mr. Zander described the plaintiff before the accident as a “very fit guy”, one of the stronger individuals at the gym… they went to the gym together four to five times a week. The plaintiff had always been a “pretty happy guy”, with lots of friends and the two of them had a big group of people they used to hang around with.

[95] Mr. Zander described the plaintiff as always being very mechanically inclined… he spent a lot of time rebuilding cars for example. They helped each other out all the time in their respective businesses. Mr. Zander said the plaintiff always paid a lot of attention to detail and was a skilled worker with a good work ethic. He was not the type of person who sits idle but rather one who always wants to get on with things.

[96] After the accidents Mr. Zander noticed change in the plaintiff. His attendance at the gym dropped off. He did not get involved in as many recreational activities and when he did, he tended to stay back and watch rather than joining in.

[97] In 2022 Mr. Zander retained the plaintiff to help him on a months long project rebuilding a pavilion in Burnaby. He says he needed a skilled equipment operator, “somebody I could trust”, noting that you have to be very careful when working on water and having your wits about you was important.

[98] That particular project was a very physically demanding job. The work involved lifting concrete panels and wood beams, among other things. Mr. Zander said that he himself was going home sore after a day's work because he was constantly moving back and forth in the equipment as it was “rocking around” the site.

[99] The plaintiff “did the best he could” on that project but did have difficulty. The plaintiff informed Mr. Zander he would not be able to do any work other than operating the equipment (excavator) but even with that limitation he still needed breaks, something Mr. Zander would not normally give his employees but which he granted to the plaintiff.

[100] According to Mr. Zander, the plaintiff was sore and displaying pain. At least three to four times a day he would lay down on the ground doing stretches, taking a break, and walking around.

[101] Mr. Zander stated that for the last couple years he has helped the plaintiff with his snow removal contracts by operating equipment. He does not do snow removal himself as part of his own business. After helping the plaintiff, he goes on to his own projects.

[102] Mr. Zander does a lot of work for municipalities. Once you get on their list it can be quite lucrative because it often involves emergency work that does not require any bidding process. He also has opportunity to refer projects or other subcontracts to others in the business, including excavator operations. At the time of trial, he was currently working on a job with the city of Colwood. It is a large project worth $2.5-$4 million that involves a lot of excavation work which he would have referred to the plaintiff but did not do so because “he cannot do the work” and he “has to show up” i.e. be ready and available at the times required.

[103] Mr. Zander has worked for Burnaby for over four years and knows that they are currently looking for an excavator contractor for a particular parking lot project. The work is probably worth $35,000 but again he has not referred it to the plaintiff.

[104] Mr. Zander implied that his business was very successful and that he and his partner were doing well. He was not asked the specifics of his income but did confirm that the average profit margin for most jobs was in the vicinity of 30%.

Ryan Rae

[105] 43-year-old Ryan Rae owns and operates an excavating company which was incorporated in 2016. He has been a heavy equipment operator since 2014. He got into the business when he bought an acreage that needed clearing and he learned how to use the heavy equipment on his own property, quickly realizing there was good money to be made in the industry.

[106] Mr. Rae's business currently has two employees who, along with himself, operate excavators. The corporation currently owns five excavators ranging from 1.7 tons to 15 tons. In addition to running the machines, there is a fair bit of labouring involved in the job, compacting, hand-digging and the like. He describes it as a “very physical job”, one he could not imagine doing with an injury.

[107] He observed that one “gets bucked around pretty good” when operating an excavator.

[108] Mr. Rae obtains his work mostly through word-of-mouth although he also bids on projects as well. There is a standard rate (“billing hour”) used in the industry, but bid jobs can be more lucrative than hourly work depending on how fast and efficiently the work can be done.

[109] Mr. Rae has never developed a business plan or any formal approach to growing the business. He simply expanded the business as more work became available, saying that there is “more work than I can handle” out there.

[110] Mr. Rae testified that it was very hard to find equipment operators. There is currently a construction boom underway and anybody with skills is readily hired if they are looking for work. Employees are something of a “trial and error” process and one can lose them as they move away or get hired by someone else.

[111] Mr. Rae says he would not hire anybody who needed frequent breaks because of a medical condition or who was unable to do physical work such as digging. Nor would he hire anyone whose medical condition involved good days and bad days where the employee might not show up for work…"We are there to get a job done".

[112] Mr. Rae pays his employees $40-$41 an hour with an overtime rate of time and a half. Working hours are usually 7:30 a.m. to 3:30 p.m. but can be longer on some projects depending on scheduling and deadline issues. He estimates his employees make approximately $85,000 a year including some overtime and holiday pay.

[113] Most equipment in the business is typically obtained on a five year "lease to own" contract with a one dollar buyout at the end of the term. If the excavator is being charged at $150 per billing hour, he estimates his operating profit to be 50% per hour for each employee after deducting $40 per hour for the employees pay, $20 an hour for fuel and $10-$20 an hour for maintenance and insurance costs. He estimates his gross earnings per annum is in the range of $500,000-$800,000. As the sole shareholder of his company, he does not pay himself a salary but simply withdraws money by way of dividends. He was not asked and did not volunteer his annual income.

[114] Mr. Rae stated that he personally operates the equipment alongside his employees. He works a full week in the field and also spends additional time on computer work such as invoicing. He does use a bookkeeper and also has an accountant who attends to accounting and year-end tax reporting. He was not asked about any other operating expenses incurred by the corporation.

EXPERT MEDICAL EVIDENCE

[115] The plaintiff served two expert reports prepared by Dr. Tamir Ailon, a neurosurgeon, and Dr. Shao-hua Lu, a psychiatrist. Both of these experts also testified at trial and were cross-examined by counsel for the defendants.

[116] For their part, the defendants adduced the expert report of Dr. Julian de Ciutiis, a specialist in physical medicine and rehabilitation (physiatry). He too testified at trial and was cross-examined by counsel for the plaintiff.

[117] While, as here, it is standard practice for defendants in personal injury cases to adduce medical evidence from one or more experts who are retained by counsel to conduct an independent medical examination (“IME”) of the plaintiff, the court usually expects evidence to be adduced by the plaintiff from family physicians and the other medical professionals (e.g. physiotherapists, massage therapists etc.) who have actually treated the plaintiff as a patient over several years. These witnesses often provide useful information respecting pre- and post-accident medical conditions and the triaging of treatment over time. In many cases, the clinical records of such treating medical professionals are adduced into evidence, usually by consent, so that the plaintiff's full medical history might be better understood by the court.

[118] In this case, as in several other personal injury cases which have come before me in the past few years, the plaintiff’s expert medical opinion was provided by physicians selected by and retained by plaintiff's counsel to undertake an IME. In both cases, the selected expert was provided with MSP and Pharmanet printouts, hospital records from any hospital attended by the plaintiff, and clinical records from family doctors/medical clinics, physiotherapists, massage therapists acupuncturists, and the like. Some of these records contain consulting reports from other medical experts.

[119] All three IME witnesses relied, at least in part, upon the plaintiffs background medical records in formulating and expressing opinions regarding the plaintiff's pre- and post-accident medical complaints. Most of this background material was not put into evidence at trial.

[120] The parties executed a “Document Agreement” which was marked as Exhibit 1 at the trial. The terms of that agreement applied only to a certain attached “index”

of documents, which included tax returns, accounting and equipment records, and the like but which did not include any of the plaintiff's clinical records.

[121] The court therefore has no admissible evidence before it from any of the plaintiff's treating medical professionals with the sole exception of a chiropractor, Dr. Wayne Walker, who treated the plaintiff both before and after the first accident. Dr. Walker was called as a “fact” witness (as opposed to an expert opinion witness) to explain various handwriting and hieroglyphic entries in his medical records which were also marked as an exhibit.

[122] Another exception relates to the records of Victoria General Hospital respecting the plaintiff's attendance on January 20, 2024 for “nervous breakdown” and suicidal ideation. As noted earlier, these records were obtained during the course of the trial and, over the objection of the defendants, questions regarding that attendance were also put to the three IME witnesses who testified at trial.

Dr. Shao-hua Lu (Psychiatrist)

[123] Dr. Lu, whose specialty is in psychiatry, has been licensed by the College of Physicians and Surgeons of British Columbia since 1999. He is a Clinical Associate Professor at the Department of Psychiatry at the University of British Columbia and is on the clinical staff at Vancouver General Hospital.

[124] Dr. Lu's expert report is dated November 3, 2023 and was marked as an exhibit at trial. He was qualified to express opinion evidence respecting forensic psychiatry with a particular expertise in his subspecialty of complex pain cases.

[125] Dr. Lu's opinion was based on a clinical semi-structured psychiatric interview of the plaintiff, a mental status examination, and a review of provided medical documentation. He concludes that as a result of the three motor vehicle accidents, the plaintiff has a combination of physical, cognitive and psychiatric symptoms, including chronic pain which has diminished his physical capacity and which is a major factor in his psychological distress.

[126] Dr. Lu expresses the opinion that the plaintiff meets the diagnostic criteria for major depression. He has persistent sadness and feelings of helplessness. He has loss of joy and interest. He exhibits emotional withdrawal and social anxiety. This depression is due to the multiple impacts of his chronic pain and particularly its effect on his working capacity. His physical, functional and occupational disability are also perpetuating factors for his psychiatric symptoms.

[127] According to Dr. Lu, the plaintiff's suicidal ideation (which the plaintiff finds embarrassing and stigmatizing) illustrates the severity of his depression. He opines that even with some stabilization, the plaintiff remains “at very high risk of a precipitous deterioration”. He urges that the plaintiff “must have continuing monitoring and support for his mood”

[128] Dr. Lu notes that “there is a self-reinforcing cycle of anxiety, pain and isolation”. The classic “clinical markers” of his combined depression and pain symptoms include anxiety, persistent frustration and feelings of demoralization. He also displays the clinical features of somatic symptom disorder with pain as his major focus. He has long-term fear about the seriousness of his current symptoms and about his future work capacity, all of which is leading to intense subjective distress.

[129] Because the plaintiff has had chronic pain for more than five years, Dr. Lu states it is unlikely to remit. And because his chronic pain is unlikely to be resolved, the plaintiff's long-term psychiatric risk is “highly guarded”. The most recent events leading to the Victoria General Hospital attendance illustrate the high risk of rapid deterioration.

[130] Due to the complexity of the plaintiff's symptomology, Dr. Lu says he “must have more intensive treatments”. At a minimum, the plaintiff needs to have a trial of psychological treatment with a specific focus on depression and chronic pain. He needs to develop better coping skills for his chronic pain. He needs vocational assessment for work options in light of his reading limitations.

[131] Dr. Lu says that the plaintiff's chronic sleep changes are exacerbated by his chronic pain. He believes the plaintiff “should be maintained on sleep aids long-term” and recommended the sleep medication Lemborexant because it has a favourable side effect profile. If he can tolerate medications well, Dr. Lu says the plaintiff should be maintained on an antidepressant medication for at least five years. He emphasizes the addiction risk of opioid treatment and strongly recommends non-opioid pain treatment options.

[132] Dr. Lu expects that the plaintiff will have fluctuating psychiatric symptoms which will wax and wane with the severity of his pain and physical symptoms. “The chronic pain will have a long-term negative impact on his future psychiatric trajectory”. Even if he responds well to treatment, there would be at least a 30% chance of relapse, and “it is unlikely that he will be free of mental health symptoms or chronic pain”. Indeed, if the plaintiff is not able to return to work, “he is likely to have indefinite symptoms” and chronic monitoring of his mood will be required.

[133] Dr. Lu suggests that, with the significant risks that he is facing, the plaintiff should have a period of part time work so he can have time to address his combination of physical and psychological symptoms. Because the plaintiff places high value on his work and productivity, it is recommended that the plaintiff does not completely stop work, however “he must have a better handle on his mental health as soon as possible”.

[134] In cross-examination, Dr. Lu conceded that his assessment was essentially a “snapshot” of the plaintiff based on relatively short contact. He pointed out, however, that after 25 years of doing IMEs, the plaintiff is the first person he has examined who later directly contacted him seeking further help. This was in reference to the email received from the plaintiff shortly before trial indicating that he was not doing well, whereupon Dr. Lu called the plaintiff and told him to go to immediately go to the hospital.

[135] Dr. Lu agreed with counsel for the defence that “active rehabilitation” might be helpful, indeed he stated that his “number one recommendation” for his chronic pain

patients to is “get active”, although they must take care to avoid aggravation or re-injury.

[136] Dr. Lu was asked by the court whether he could provide any estimates, expressed as percentages, of improvement or deterioration in the plaintiff's condition in the event the plaintiff received some of the treatments Dr. Lu was recommending. When pressed on his statement that there is a “low probability of full remission of his chronic pain”, Dr. Lu stated that this occurred only in a very small minority of patients and the chances of this occurring would be in the 2%-5% range. He also stated that the chances were very high that the plaintiff's condition will get worse, his “educated guess” in that regard being in the range of 66%.

Dr. Tamir Ailon (Neurosurgeon)

[137] Dr. Ailon completed medical school in 2007 and his neurosurgical residency in 2013 at the University of British Columbia. Thereafter he obtained a Masters of Public Health from Harvard University in 2014 and completed a Complex Spine and Spinal Deformity Fellowship in 2015 at the University of Virginia.

[138] Since 2015, Dr. Ailon has been working as a spinal neurosurgeon at the Vancouver General Hospital and since 2017 has been a clinical assistant professor at the University of British Columbia. By consent, Dr. Ailon was qualified as an expert witness in the field of neurosurgery with particular expertise respecting clinical management of the spine.

[139] At the request of plaintiff's counsel, Dr. Ailon performed an independent medical examination of Mr. Moen on August 4, 2023 and thereafter prepared a detailed report respecting his findings dated September 25, 2023 which was marked as an exhibit at trial.

[140] In the Facts and Assumptions portion of his report, Dr. Ailon sets out the information provided to him by the plaintiff regarding the accidents and his medical history, refers to various events documented in the plaintiff's MSP and Pharmanet records, Dr. Walker's chiropractic clinical records, Dr. Pereira’s family doctor clinical

records, including two MRI reports (lumbar spine and cervical spine), neurosurgical consultations (Dr. Frangou) in 2020 and 2022, and Dr. Galimova's physiatry consultation in June 2017.

[141] Dr. Ailon performed a physical and neurological examination of the plaintiff during the latter's office attendance on August 4, 2023. He noted the plaintiff was fully cooperative and demonstrated no "non-organic" pain behaviours.

[142] Dr. Ailon made the following "accident-related diagnoses":

1. aggravation ("permanent worsening") of pre-existing mechanical ("dependent on motion or activity") low back pain, possible discogenic component;

2. aggravation of intermittent left L5 (lumbar root) radiculopathy ("pain with numbness/weakness");

3. mechanical neck pain; and,

4. cervicogenic headaches.

[143] In terms of "causation" Dr. Ailon noted that the plaintiff reportedly had mild, intermittent low back pain and left leg pain but no neck pain or headaches before the accidents. He opines that low back pain was "significantly aggravated" by the accidents resulting in a "gradual worsening of pre-existing lower left lower extremity radicular pain". The neck pain and cervicogenic headaches were "more likely than not" caused by the motor vehicle accidents.

[144] Dr. Ailon notes that traumatic disc herniation are rare occurrences and because there was no "acute worsening" of the lumbar pain following any of the three accidents, "it is more likely that the L4-L5 disc protrusion noted on the MRI of November 28, 2019 was a pre-existing condition that was aggravated by each successive motor vehicle accident leading to a gradual worsening of left leg radicular pain".

[145] Dr. Ailon notes that the main ongoing source of the plaintiff's disability is his persistent low back pain which is exacerbated by most of his activities. This pain has “significantly reduced his work capacity” as well as caused limitations in his recreational and domestic activities. He concludes that the plaintiff's “current level of disability will persist indefinitely” and that the plaintiff “will likely continue to experience the symptoms [low left back/neck pain and headaches] at their current intensity “indefinitely” along with “exacerbations triggered by activities”.

[146] In terms of treatment recommendations, Dr. Ailon agrees with Dr. Frangou's earlier recommendation against surgical intervention because it is “unlikely to relieve the plaintiff's radicular symptoms” and the outcome of such surgery is “highly variable” and generally “confer(s) greater risk than potential benefit”.

[147] Dr. Ailon also observed:

- regular self-directed exercise focused on core strengthening, flexibility and general conditioning is the mainstay of managing chronic mechanical low back and neck pain;
- occasional (say, twice a month) physiotherapy or kinesiology sessions to ensure appropriate technique and regimen adjustments would be helpful;
- pool-based therapies can often be helpful;
- “comprehensive assessment and management in a pain clinic may benefit patients by employing multi-modal strategies to address the physical and mental aspects of chronic pain in an evidence-based manner”;
- the plaintiff is at risk of further deterioration and a “lack of cohesion/coordination” and patient management is problematic, hence a “comprehensive approach” is recommended because even “maintenance of the status quo is a benefit”.

[148] Dr. Ailon was cross-examined on the prospect of the plaintiff's pre-accident incidents of back pain and the likelihood of increased deterioration even if the accidents had not occurred. He agreed with the proposition that the “best predictor of the future is the past history up to that point” but stated that, while the percentage chance of without-accident deterioration could not be said to be zero, the “most likely scenario” is that the plaintiff would have continued to have episodic, transient and fairly mild back pain from time to time which would have resolved with treatment.

[149] Dr. Ailon was reluctant to express any conclusive opinions regarding the psychiatric aspects of chronic pain but did comment that patients such as the plaintiff who have a “clear emotional component” to their condition are “less likely to be well”. He stated that unless there is improvement in the emotional component of the plaintiff's symptoms, there was a “very low chance” of overall improvement to his chronic pain. He noted that participation in a publicly funded pain clinic could be a “reasonable start” but observed that these programs tend to have big waiting lists.

Dr. Julian de Ciutiis (Physiatrist)

[150] Dr. de Ciutiis conducted an IME of the plaintiff on June 26, 2023 and his report dated July 26, 2023 was marked as an exhibit at trial. It will be noted that this report was prepared before either of the two medical expert reports tendered by the plaintiff at trial. It appears pre-trial mutual objections were made by the parties to any form of rebuttal testimony and hence no such evidence was presented to the court.

[151] Dr. de Ciutiis obtained his medical degree from the University of Saskatchewan in 2016. He completed his residency in the specialty of physical medicine and rehabilitation (physiatry) in 2021. He has been practising physiatry with the Vancouver Island Health Authority since January 2022 and has been working at the Nanaimo Regional General Hospital’s pain clinic since January 2023.

[152] Dr. de Ciutiis stated that multi-disciplinary pain clinics have a “relatively standardized” structure usually including a physiatry list such as himself, a neurologist, an anaesthesiologist, nurses, occupational therapists, social workers and a psychologist. However, psychological services have only recently been added

to the Nanaimo clinic (approximately one month before trial). This is the sort of clinic which would be beneficial for the plaintiff, however there is currently a long wait list of 10 months-one year for new patients. There is a “fast-track option" available but only for epidural steroid injection candidates. Dr. de Ciutiis does not do these injections himself.

[153] Dr. de Ciutiis says he would likely defer to a psychiatrist regarding any mental health issues affecting the plaintiff and also likely to an expert functional capacity assessor with respect to that particular field as well. However, he did agree on cross-examination to various propositions put to him by counsel for the plaintiff including the following:

- chronic pain can impact mood and cognition;
- indeed pain and mood are mutually perpetuating and exacerbating;
- the longer a patient experiences pain, the more entrenched it becomes, indeed, repetitive exposure effects the central nervous system; and,
- it is “not at all surprising that the plaintiff is suffering badly” and there is “no reason to doubt” the plaintiff's reporting of his pain experiences.

[154] In his report, Dr. de Ciutiis commented on the plaintiff's behaviour, gait, neurological and orthopedic presentations. He noted that the plaintiff did not display any “overt pain behaviours” and that there was no embellishment or exaggeration in his reporting. He agreed on cross-examination that Mr. Moen appears to be a stoic individual who is inclined more to understatement than histrionics.

[155] In his report, Dr. de Ciutiis lists his diagnoses as follows:

- chronic nonspecific lumbar back pain;
- Grade 2 whiplash-associated disorder with resultant pain in the cervical parascapular musculature bilaterally, with the left side being affected to a greater extent than the right;

- cervicogenic headaches;
- mood disruption with depressive and anxiety components as well as driving-related anxiety;
- sleep disruption;
- left greater trochanteric pain syndrome (GTS) … pain radiating along the iliotibial band between the buttock and the knee.

[156] With respect to causation, Dr. de Ciutiis stated any determination was “difficult” because of the “vagueness” of the plaintiff's reporting and the “paucity of clinical documentation”. He does state, however, that both the low back pain and the cervical/parascapular pain is causally related to the first accident with subsequent aggravation/worsening as a result of the second and third accidents.

[157] Dr. de Ciutiis commented that the plaintiff had experienced pre-accident low back pain and he opined that, although the plaintiff said this had resolved before the first accident, it nevertheless “probably rendered him more susceptible to experiencing pain in the context of trauma”.

[158] With regard to the plaintiff’s headaches and sleep disruption, Dr. de Ciutiis again attributed causation to the first accident with subsequent aggravation by the second and third accidents, noting that in each case the plaintiff “would probably not be experiencing [the symptoms] to the degree that he is currently absent the subject accidents”.

[159] With respect to the plaintiff's anxiety and depression, Dr. de Ciutiis noted that because pain and mood are mutually perpetuating and exacerbating, the plaintiff's “mood disruption is probably attributable to the third accident”. He says he would defer to any expert in the fields of psychiatry or psychology with respect to causation.

[160] With respect to the GTS, given the absence of supportive clinical documentation and the high incidence of this condition in the general population, Dr. de Ciutiis concludes that “the motor vehicle accidents are not contributory to the plaintiff's left knee pain”.

[161] On cross-examination, Dr. de Ciutiis was forced to agree that GTS does not typically explain numbness and pain radiating below the knee to the foot. He also agreed that the MRI results in this case (L4-L5 disc protrusion) “could explain left leg symptoms” and ultimately conceded the likelihood of L-5 radiculopathy.

[162] Ultimately, Dr. de Ciutiis opined that, if his treatment recommendations were followed, the plaintiff “will experience a degree of improvement of his symptoms which will translate into increased tolerability of the demands of his [employment]”, although “he will probably continue to experience a significant degree of discomfort and possible intolerance of full-time work involving heavier lifting”. He recommended that a functional capacity assessment be completed to “further explore” this issue.

[163] Dr. de Ciutiis therefore recommends:

- the plaintiff should enroll in a multidisciplinary pain clinic that includes psychology specializing in chronic pain as well as a robust pain education component;
- ongoing regular moderate to vigorous aerobic activity with the goal of achieving 150 minutes/week;
- follow-up with the plaintiff's family physician regarding mood; and,
- while physiotherapy, kinesiology, chiropractic therapies will not likely lead to complete symptomatic improvement, they are reasonable options for chronic pain relief on at least an intermittent basis (he would not place a number on such sessions but stressed it was important not to “over engage”).

[164] On cross-examination Dr. De Ciutiis conceded that the plaintiff is going to have ongoing pain for the rest of his life, however he maintained that the exact degree of that pain is unclear. He noted that the plaintiff has not had any pain-centred interventions such as a multidisciplinary pain clinic or any epidural steroid injections, each of which can “typically” lead to improvement. He was reluctant to assign any percentage of improvement that might arise from such treatments because there are no direct studies on the matter which he can use for reference. However if he was required to opine, any such improvement would be less than 50% and more probably in the range of 10% to 20% improvement of his current levels of symptomology.

Dr. Wayne Walker (Chiropractor)

[165] Dr. Walker was not called as an expert witness but rather as a fact witness to present and explain his handwritten clinical records of the chiropractic treatments he provided to the plaintiff during the period August 14, 2015 to October 17, 2020. The latter was the month that Dr. Walker retired from his practice.

[166] It appears the primary purpose for calling Dr. Walker was to deflect any adverse inference that the court might otherwise be asked/inclined to draw and, in particular, to address the nature and extent of the plaintiff's orthopedic complaints in the year preceding MVA#1.

[167] Dr. Walker met the plaintiff on August 14, 2015. At that time the plaintiff was complaining of left rib pain sustained when working out at the gym. Dr. Walker took a history from the plaintiff and also conducted a physical examination, each of which was noted in his clinical records. The diagnosis was “rib subluxation”. Dr. Walker applied some rib “adjustments and releases” and made some recommendations for certain stretches/exercises to improve mobilization.

[168] The history was recorded as “L2” disc “about eight months ago, x-rays ordered, no residuals”.

[169] On August 28, 2015, Dr. Walker's records referred to left lower back pain caused by shoveling gravel. Treatment included rotation and adjustment/release of the left sacroiliac joint. Treatment was also given for the ongoing chronic rib problem which was the “primary reason” Dr. Walker was seeing the plaintiff.

[170] On the plaintiff's attendance on February 5, 2016, Dr. Walker's notes record some lower back pain experienced by the plaintiff while performing five repetition sets of 260-pound bench presses in the gym. This is the last reference to lower back pain in Dr. Walker's notes before MVA#1. Dr. Walker stated he “had no concerns regarding the plaintiff's lower back” and he noted that the plaintiff's ribs had also become “much more stable” by that time.

[171] The plaintiff attended upon Dr. Walker on May 10, 2016 after both MVA#1 and MVA#2 had occurred. At that time Dr. Walker recorded acute pain in the plaintiff's lower back as well as neck pain for the first time.

[172] Dr. Walker's notes thereafter record various further attendances by the plaintiff in the ensuing three years. His last entry on October 17, 2020 reads:

- left side sciatica to left knee and left groin;
- needs T3's daily for chronic pain;
- has lost 50 pounds but still less muscular than pre-MVA;
- “Cody is improving in his general fitness but is far from the extraordinarily muscled build and strength that he had prior to the MVAs”.

Victoria General Hospital January 20, 2024 Notes

[173] As noted above, the plaintiff contacted Dr. Lu on this date who in turn directed to go to the hospital. These notes, which were obtained during the course of the trial and marked as an exhibit, record the attendance and the treatment he received at the hospital.

[174] The first entry is made by the triaging nurse at approximately 3:15 PM on January 20, 2024 and reads as follows:

> Patient reports thoughts of self-harm/suicidal ideation, living with chronic pain. Does physical labour for work. Describes overwhelming waves of depression. Agreeable to contract of safety. Hesitant to disclose plan/access to plan at triage.

[175] The plaintiff was also ultimately seen by an emergency physician, Dr. Morrow.

[176] Dr. Morrow recorded the history recited by the plaintiff as follows:

> This patient presents complaining of having a nervous breakdown.
>
> He is quite a gracious historian which makes getting the story a little bit difficult.
>
> But essentially since 2016 when he had a motor vehicle crash he has had ongoing chronic pain. His most significant pain is in the L5 nerve root.
>
> In addition he gets neck pain headaches and chronic abdominal pelvic pain.
>
> This is interfering in his life and his business significantly. He has seen multiple specialists to multiple therapists. Has been told that his back injury is not surgical.
>
> He usually works as an excavator and is having to pare down his business. He is also having to rely on his father a lot for help. His other job is snow removal and he has been doing a lot the last few days.
>
> He is having difficulty sleeping. He is feeling anxious and tearful. Today he had an episode when he was feeling extremely unhappy and he felt the walls closing in.
>
> He does discuss having suicidal thoughts on and off. He tells me that he knows he would do something quick that would end him but he does not have a specific plan and he could promise me he would not do it. He does not think he actually would go through that without it or do that to his wife.
>
> The thoughts come when he thinks about lost business opportunities and that he is so young and he is not functioning in the way he wants to.
>
> He is not currently seeing a counsellor and has not seen a psychiatrist.
>
> He has not had a facet or nerve block. He has not been seen in the chronic pain clinic.
>
> He is taking the Tylenol 3 and an anti-inflammatory as needed for pain. He tells me he does not tolerate Gabapentin and the like. He is very ambivalent about taking medication.

[177] The “Impressions/Plan” noted by Dr. Morrow on the emergency records include the following:

> Suspect depression with anxiety.
>
> Panic attack today.
>
> Suicide ideation, passive at this time.
>
> Patient is able to contract against self-harm. He knows the crisis line number. I referred him through CARES for a one-time assessment. I sent a referral for the pain clinic.
>
> He does not want the radicular injection at this time.
>
> He would like to see the pain clinic first so I will not order a block.
>
> Lorazepam 1 mg tablets to use sparingly for anxiety and panic.
>
> Warned against addictive properties etc.
>
> Supportive counsel given.
>
> He understands he can follow-up immediately with his progressive or new symptoms or concerns.

Dominic Shew (Occupational Therapist/Work-Functional Evaluator)

[178] Mr. Shew has been a registered occupational therapist since 2003 and a certified work/functional capacity evaluator since 2005. He has been accepted on numerous occasions as an expert witness in the Supreme Court of British Columbia regarding occupational therapy, work capacity evaluations, and life care planning/cost of future care assessments and reporting.

[179] The plaintiff was referred to Mr. Shew by counsel for a physical functional/work capacity evaluation. He was provided by counsel with various medical documents, including the expert reports of Dr. Lu and Dr. Ailon, as well as consultation reports from the family doctor's medical files from Dr. Frangou (neurosurgeon) and Dr. Galimova (physiatry).

[180] Mr. Shew conducted a detailed clinical interview of the plaintiff along with a series of physical and functional testing protocols over the course of eight and a half hours on September 14, 2023. The testing included sitting, standing, walking, climbing, lifting, crouching/squatting, bending/stooping, hand dexterity, grasping, overhead and forward reaching, and functional strength testing.

[181] In Mr. Shew's assessment, the plaintiff provided a high and consistent level of physical effort during the testing and Mr. Shew believed the testing results are an

accurate representation of the plaintiff's physical and functional residual capacity (i.e. abilities and limitations). He also notes that the plaintiff passed all placebo/distraction and non-organic Waddell tests and he has no doubts about the genuineness of the plaintiff's performance during testing.

[182] Mr. Shew emphasized that his report primarily addresses physical and functional capacity and does not take into significant consideration potential factors such as emotional or cognitive concerns which may further limit the plaintiff's abilities to complete and sustain work. It was apparent to Mr. Shew that the plaintiff does in fact experience psychological and/or emotional difficulties.

[183] It took the plaintiff a very long time (over an hour) for him to complete Mr. Shew's standard form questionnaires and, indeed, the plaintiff had to take a break during that process. As well, the clinical interview took much longer than usual and Mr. Shew had to “redirect” the plaintiff several times during that process. He needed three separate sets of directions to find the washroom.

[184] Mr. Shew understands that the plaintiff was previously working as a self-employed contractor renovating residential properties but his current line of work has been the operation of excavation and snow removal equipment. Based on his testing, Mr. Shew opines that the plaintiff demonstrated limitations with tasks that applied stress to his neck/upper back, lower back and lower leg extremity and he concludes that the plaintiff does not have the capacity to perform and sustain the full demands of these positions at a competitive level on a part-time or full-time, durable basis in an unlimited manner.

[185] It is Mr. Shew's conclusion that, while the plaintiff demonstrated adequate basic strength necessary for any occupation requiring him to remain seated while operating machinery, his physical and functional capacity would decline as his workday and work week progressed. It is, in his opinion, unlikely that the plaintiff would be able to tolerate higher-level physical demands on a continuous, daily basis. The plaintiff is likely physically capable of operating machinery but, given his limitations, he will likely require breaks to rest, stretch and change positions which in

turn will negatively impact his overall speed and productivity. Any work that requires higher-level physical demands would not be sustainable by the plaintiff at a competitive level on a part-time or full-time basis.

[186] The overall results of the plaintiff's physical and functional limitations as identified in Mr. Shew's functional capacity testing mean “he is likely at a competitive disadvantage compared to his cohorts”.

GENERAL PRINCIPLES ON CAUSATION OF LOSS AND PRE-EXISTING INJURY

[187] In recent years I have been called upon to decide a series of cases involving plaintiffs injured in motor vehicle accidents and who have been left with life long chronic pain. Recent examples include:

- *Kallstrom v. Yip*, 2016 BCSC 829;
- *Meckic v. Chan*, 2022 BCSC 182;
- *MacKinnon v. Swanson*, 2022 BCSC 1821, affirmed on appeal 2024 BCCA 95; and,
- *Thiessen v. Kepfer*, 2023 BCSC 1593.

[188] In all these cases (and others) I generally follow the same format for the reasons for judgment and have adopted the same approach in this case. It is also my practice to expressly refer counsel to these cases at trial, not only so they may have an understanding of the methodology employed but also so they may correct “errors” and/or otherwise “update” those principles to reflect the most recent case law from the Court of Appeal on matters such as pre-existing injury, hypotheticals and contingencies, loss of earning capacity, and the like.

[189] In this case, perhaps not surprisingly, counsel for the defendants quotes extensively in his final submissions from the *Thiessen* reasons for judgment on most of the legal issues. I will do likewise in these reasons.

[190] I recognize that there is only limited dispute between the parties regarding causation of injuries in this particular case. The only meaningful issue in dispute in that regard is the nature and extent of the plaintiff's pre-existing low back pain and, in particular, the extent to which that condition might have worsened in any event had the three motor vehicle accidents not occurred.

[191] Paragraph 86 of *Thiessen*, as repeated in the defendant's submissions, reads as follows:

> 86 I summarized the law on these matters in *Kallstorm v. Yip*, 2016 BCSC 829 as follows:
>
> > [318] The basic legal principles respecting causation are found in the seminal case of *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, repeated many times since, and which include:
> >
> > > 1.the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
> > >
> > > 2.this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
> > >
> > > 3.it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is it is part of the cause of an injury, the defendant is liable; and
> > >
> > > 4.apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.
> >
> > [319] The above paradigm addresses principles of liability. It does not address principles related to the assessment of damages in tort. The latter requires consideration of conditions or events unrelated to the tort(s) which occurred either before or after the plaintiff's injury and which impact the nature or extent of the compensation that should be awarded for the tort. In such situations, Athey reminds us to consider first principles:

> [32] ... The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence ("the original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position" which is the plaintiff's loss. ... [Emphasis in original.]

[320] In *Blackwater v. Plint*, 2005 SCC 58, the Court put it this way:

> [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway. ...

[321] It is in the above context that the so-called doctrines of "thin skull" and "crumbling skull" come into play. In that regard Athey held:

> [34] The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's

> losses are more dramatic than they would be for the average person.
>
> [35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's" original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, supra, at pp. 779-780 and John Munkman, Damages for Personal Injuries and Death (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: Graham v. Rourke, supra; Malec v. J.C. Hutton Proprietary Ltd., supra; Cooper-Stephenson, supra, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.
>
> [Emphasis added in these reasons for judgment]

[192] In their written submissions, the defendants state: that they do not dispute that the MVA's, or some of them, are causative of some injuries and symptoms, but the MVA's are not causative of all of the injuries and symptoms of which the plaintiff complains. Similarly, they are not causative of all of the changes in the plaintiff's function, either at home, recreationally, or at work.

[193] The defendants cite *Bradley v. Groves,* 2010 BCCA 361, leave to appeal dismissed 2011 CanLII 20960 (SCC) and agree that both the physical and psychological injuries suffered by the plaintiff as a result of the three accidents are "indivisible" in nature and that the defendants are therefore jointly and severally liable for the totality of the damages assessed by the court with respect to those injuries. However, the defendants submit that “had the accidents not occurred… the

plaintiff would have continued to have mechanical low back pain and intermittent left-sided L5 radiculopathy and esophagitis as he did prior to the accidents."

[194] Counsel for the plaintiff correctly points out that the plaintiff's esophagitis was a long-standing relatively minor health condition (occasional choking and difficulty swallowing food) which was discovered at the age of 16 and which has since been successfully managed by medication. I agree with this characterization and find that this condition does not factor into the assessment of damages in this case.

[195] I agree with Dr. Ailon that the plaintiff did have pre-existing intermittent low back pain although I note, and find as a fact, that the last episode of such back pain before the accidents had resolved a few months before MVA#1. I accept Dr. Ailon's assessment, and I find as a fact, that the most likely "without accident" scenario for the plaintiff was that he would have continued to have episodic and transient back pain from time to time which would have resolved with treatment.

[196] While the motor vehicle accidents have aggravated (i.e. permanently worsened) the plaintiff's pre-existing back pain condition, I find that this pre-accident condition would not have had any significant impact on the plaintiff's ability to work and would not have caused any significant financial losses in that regard.

[197] It follows from the above that no reduction in damages to reflect any contingency respecting the plaintiff's pre-existing back condition or esophagitis is warranted. It also follows that the defendants are jointly and severally liable for all of the damages which are hereinafter assessed, which assessment will of course include recognition of relevant contingencies other than the plaintiff's pre-existing low back condition and esophagitis.

FINDINGS RESPECTING THE PLAINTIFF'S INJURIES, FUNCTIONAL LIMITATIONS AND DISABILITY

[198] In this case, the evidence is overwhelming and I find as a fact that the accidents have combined to cause the plaintiff the following physical injuries:

- whiplash-associated disorder with resultant chronic pain in the cervical parascapular musculature which is aggravated by motion or activity affecting that part of the plaintiff's anatomy;

- chronic cervicogenic headaches triggered by the plaintiff's neck injury;

- chronic mechanical low back pain, likely associated with lumbar disc protrusion;

- chronic L-5 (lumbar root) radiculopathy (pain with associated numbness and weakness) extending from the buttocks down and around the left leg and progressing to the left foot;

- chronic sleep disruption triggered and exacerbated by the chronic pain.

[199] The evidence is likewise overwhelming, and I find as a fact, that:

- the accidents and the resulting physical injuries have also caused the plaintiff severe cognitive and psychiatric symptoms including major depression disorder with elements of somatic symptom disorder including persistent sadness, anxiety, demoralization and intense subjective distress which has on occasion triggered suicidal ideation; and,

- the chronic physical pain and the plaintiff's depressed mood and cognition are mutually perpetuating and exacerbating and unless there is significant improvement in the emotional component of the plaintiff's symptomology, there is little chance of overall improvement to the plaintiff's chronic pain condition.

[200] I also accept the expert opinions regarding recommended future treatment for the plaintiff's injuries which include,

- enrolment in a multidisciplinary chronic pain clinic;

- a trial of epidural steroid injections (blockers);

- medication for depression and anxiety for at least the next five years and beyond if necessary;
- medication for pain, headaches and sleep;
- other passive treatment modalities which the plaintiff finds helpful for even just temporary pain relief, such as massage therapy; and
- regular exercise with occasional kinesiology sessions to ensure appropriate technique and regimen adjustments.

[201] However, given the chronicity of the plaintiff's injuries, I find as fact it is extremely unlikely that treatment will result in full remission of the plaintiff's chronic pain. Even if he responds positively to treatment, the chances of relapse are in the range of 30%. Indeed, absent meaningful improvement, the chances are high (likely in the range of 66%) that the plaintiffs' condition will get worse. His condition also makes him more vulnerable to injury and distress should he be involved in any further accidental injury events.

[202] It follows from all of the above, and I find as a fact, that the plaintiff's injuries have had and continue to have a significant impact on his functional capacity. I accept Mr. Shew's findings regarding the extent of those limitations.

[203] I agree with Mr. Shew's conclusions, and find as a fact, that the plaintiff does not have the physical capacity to perform the full demands of occupations involving residential renovation, excavation or heavy equipment operation, and/or snow removal, whether on a full-time or even a part-time basis. When combined with the plaintiff's depression, severe emotional distress and ongoing cognitive difficulties, I have no hesitation in concluding that the plaintiff is not competitively employable in his chosen professions of construction, excavation and snow removal.

[204] It is only because the plaintiff is self-employed and has, despite his pain, forced himself to continue work, albeit at a reduced level and with the necessary assistance of family and friends, that he has been able to generate income. Without

some successful treatment and some improvement in his psychological and physical functioning, I find as a fact that even this reduced performance is likely to significantly decline.

[205] In short, as is often the case with these types of chronic pain injuries, the quality of the plaintiff's life has dramatically deteriorated. Before the accidents he was a high functioning, athletic individual, working long hours, determined to succeed in business, and enjoying a happy social life with a committed partner. As a result of the accidents, he has been converted into someone who suffers from chronic pain, unremitting depression, and emotional distress so severe he has contemplated suicide. The prospects for any significant improvement in his condition, even with the treatment recommended by medical experts, are poor and it is highly likely he will have to endure these medical conditions for the rest of his life.

HYPOTHETICALS, CONTINGENCIES, STANDARDS OF PROOF AND THE ASSESSMENT OF DAMAGES IN PERSONAL INJURY CASES

[206] The defendants repeat paragraphs 94 and 95 of the *Thiessen* case as a "thorough review of the relevant legal principles":

> [94] In *Meckic v. Chan*, 2022 BCSC 182, I recently provided a comprehensive review of the relevant legal principles governing the assessment of damages in personal injury cases, including the analytic framework endorsed by a trilogy of decisions decided by our Court of Appeal. I repeat here the relevant portion of that judgment.
>
> > **A. The "Simple Probability" Standard of Proof**
> >
> > [109] The assessment of damages in a personal injury case necessarily deals not only with past events but also with hypothetical and future events. The standard of proof for past events is, of course, the balance of probabilities and, once proven, such matters are treated as certainties. Hypothetical or future events, on the other hand, need not be proved on a balance of probabilities standard; instead, future or hypothetical possibilities are taken into account so long as they are "real and substantial possibilities and not mere speculation, and they are given weight according to their relative likelihood": *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 SCR 458, paras. 27-29; *Grewal v. Naumann*, 2017 BCCA 158, paras. 44-49.
> >
> > [110] The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she

would have been in absence of the defendant's negligence. This is the plaintiff's "original" or "without-accident" position. This is then compared with the plaintiff's "injured" or "with-accident" position and the difference between the two represents the plaintiff's loss: *Athey*, para. 32.

[111] There are thus four scenarios which the Court is required to assess:

> 1. What actually happened to the plaintiff in the past to the date of trial, a determination that includes life events between the accident and the trial, all of which, once proven on a balance of probabilities, is treated as a certainty;
>
> 2. What would have occurred to the plaintiff between the date of the accident and the trial, had the accident not occurred (a past hypothetical "without-accident" scenario);
>
> 3. How would the plaintiff's life have proceeded in the future if the accident had not occurred (a future hypothetical "without-accident" scenario); and,
>
> 4. How will the plaintiff's life proceed in the future now that the accident and resultant injury has occurred (the future hypothetical "injured" or "with-accident" scenario).

[112] Scenarios 2 to 4 above involve past or future hypothetical possibilities which, as noted, will be taken into consideration so long as they are "real and substantial possibilities" as opposed to "mere speculation". This of course begs the question: how does one determine the difference between the two and, once the former is established, how does it apply to the quantification of damages?

[113] The leading text on personal injury damages in Canada is Ken Cooper-Stephenson & Elizabeth Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed (Toronto: Carswell, 2018). Chapter 2 of that text addresses "Proof of Damages" and discusses the "simple probability" standard of proof and its application to the assessment of damages contingent upon chance. The word "probability" is used in its statistical sense, i.e. denoting <u>any</u> degree of chance.

[114] Some of the substantive principles set out in the text include the following (citations omitted):

> • The "simple probability" standard of proof evaluates the degree of probability that any sequence of events will occur or would have occurred, and therefore the degree of probability that the plaintiff will suffer or would

> have suffered the material loss. It then awards damages for the material loss proportionate to the established degree of probability;
>
> • The Court thus estimates what are the chances that a particular event will or would have happened, usually expressed as a percentage, and reflects those chances in the amount of damages which it awards;
>
> • All contingencies, positive or negative, that are established on the evidence as realistic as opposed to merely speculative possibilities must be given effect;
>
> • However, there comes a point when a chance or probability is so small that it might be characterized as "speculative", or "too remote" and thus excluded from consideration; and,
>
> • The plaintiff recovers damages in proportion to the likelihood that the event and its consequences might have or may occur; this is done by scaling the award downwards or upwards in accordance with the percentage likelihood.

[115] In [*Athey*,] the example of the simple probability standard being applied was:

> if there is a 30% chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30% of the anticipated extra damages to reflect that risk (para. 27).

[Emphasis all in original.]

B. The BCCA Trilogy

[116] In 2021, the BC Court of Appeal issued a trilogy of judgments clarifying the above principles and illustrating their application to the assessment of damages in personal injury cases. The cases include *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345 and *Lo v. Vos*, 2021 BCCA 421. They involved hypotheticals and contingencies related to pre-existing injuries, past and future loss of earning capacity, future care costs, as well as non-pecuniary general damages for past and future pain and suffering.

[117] In *Dornan*, the Court noted in para. 92 that contingencies fall into two categories namely,

> • "general contingencies" which simply as a matter of human experience are likely to be experienced by everyone and which are often "not readily susceptible to evidentiary proof" but

> which "may be considered in the absence of such evidence" nonetheless; and,
>
> • "specific contingencies", ones peculiar to the particular plaintiff which must be supported by evidence that their occurrence is actually realistic as opposed to simply a speculative possibility.

[118] Insofar as general contingencies are concerned, the Court must be mindful that they can be positive as well as negative[,] i.e. that everyone's life has "ups" as well as "downs" and that any allowance premised only on general contingencies "should be modest".

[119] Insofar as specific contingencies are concerned, however, whether positive or negative in nature, the Court must go beyond a determination of their existence to also analyze the evidence and decide the relative likelihood of their occurrence and their consequences.

[120] *Dornan* explains the difference between a contingency that is a real and substantial possibility as opposed to mere speculation:

> A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable (para. 63).
>
> [Emphasis added.]

[121] Elsewhere in the judgment, the Court stated that,

> the risks commonly encountered on this rather dangerous planet [e.g. car accidents, tripping and falling, etc.] will not suffice to establish a real and substantial possibility..... such events can happen to anyone but....are not predictable..... [and thus] would not give rise to a measurable risk (para. 77).
>
> [Emphasis added.]

[122] In *Dornan*, the trial Court applied a 30% reduction to the awards for non-pecuniary damages, past wage loss, loss of future earning capacity and future care costs to reflect the negative contingency that, given his lifestyle and history, the plaintiff was at risk of suffering a concussion with serious consequences in any event. The Court of Appeal upheld the finding that a further without-accident concussion was a real and substantial possibility for the plaintiff, however reduced the contingency deduction from 30% to 15% for future losses (and to only 10% for past losses) based on its own analysis of the second step in the process, namely determining the relative likelihood that the real and substantial possibility would actually materialize (an analysis that the Court of Appeal said the trial judge did not actually undertake: "in this case, the

judgment addresses the real and substantial possibility analysis only implicitly, and is silent on the relative likelihood", para. 135).

[123] The Court of Appeal acknowledged that the task confronting the trial judge was "not easy":

> By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence, not to averages and approximations based on imprecise evidence (para. 134).
>
> [Emphasis added.]

[124] The "right process" insofar as specific contingencies is concerned (in *Dornan*, the possibility of the plaintiff incurring a serious concussion injury regardless of the accident) is:

> • Step one: determine with reference to the evidence whether the hypothetical future event is a real and substantial possibility (i.e. a measurable or predictable risk as opposed to mere speculation), and if so,
>
> • Step two: determine, again with reference to the evidence, the relative likelihood [i.e. the chances] of that event actually occurring in order to arrive at an appropriate contingency deduction (*Dornan*, para. 113, emphasis added).

[125] *Lo v. Vos* is another case where the trial judge applied an "across-the-board" 20% contingency deduction to the awards for nonpecuniary damages, future care costs and loss of future earning capacity on account of the plaintiff's pre-existing back conditions. The trial judge found that the accident caused physical injuries that contributed to chronic pain, which in turn lead to depression, anxiety and post-traumatic stress disorders rendering her totally disabled from working. However, the trial judge also concluded there was a "measurable risk" the plaintiff would have developed a major depressive disorder consequent on pre-existing lower back pain and leading to a level of pain and disability similar to the sort experienced at trial. Hence the 20% contingency deduction.

[126] The Court of Appeal set aside the contingency deduction on the basis that the evidence at trial did not establish any contingent risk that was a real and substantial possibility, as opposed to simply an impermissible speculative possibility. There was no expert evidence that, absent the accident, the plaintiff had any inherent vulnerability to, or any risk of developing mental health problems because of her pre-

accident conditions. While it was essential for the trial judge to consider the plaintiff's pre-existing state in the assessment of damages, whether that original state gave rise to a measurable risk of her developing, mental health problems in any event (a future hypothetical event) was "a different question requiring additional evidence" (paras. 74-78, emphasis added).

[Emphasis all in original.]

C. Deductions for Failure to Mitigate

[95] There is another deduction which is often made with respect to personal injury damages and which involves the assessment of hypothetical outcomes, namely, situations where the plaintiff has "failed to mitigate" the loss. Relevant principles arising from the leading text and recent Court of Appeal decisions were summarized in *Yeomans v. Buttar*, 2021 BCSC 343 and repeated with one small modification in *Mackinnon v. Swanson*, 2022 BCSC 1821 at para. 65 as follows:

> [143] It is a fundamental principle of tort law that no damages will be recoverable for any loss which the plaintiff ought reasonably to have avoided. As a result, it is customary to speak of a plaintiff's "duty" to mitigate, an "obligation" to take all reasonable steps to avoid the negative consequences of their injuries and to prevent the accumulation of losses.
>
> [144] "Failure to mitigate loss" is a defence. It must first be alleged and particularized in the pleadings and then the defendant has the burden of proving on a balance of probabilities:
>
> > 1. there were steps the plaintiff could have taken to mitigate;
> >
> > 2. the plaintiff acted unreasonably in failing to take steps; and
> >
> > 3. the extent to which the loss would have been avoided by taking those steps.
>
> [145] The test for reasonableness in the context of mitigation has both subjective and objective components. The subjective aspect of the test requires the court to examine the plaintiff's personal circumstances and any constraints on her ability to mitigate. [For example, a Plaintiff will not be penalized for reluctance to take medication or lack of diligence in following

> treatment recommendations if such matters stem from the psychiatric or medical condition caused by the accident.] The objective component of the test requires the court to assess what a reasonable person *in that plaintiff's circumstances* would have done. The determination is a question of fact.
>
> [Sentence in brackets added]
>
> [146] Determining what would have happened if the plaintiff had taken the suggested steps to avert loss is an exercise in the hypothetical. The court will weigh the possible outcomes according to their relative likelihood. Mathematical certainties are possible, but unlikely. As well, the failure to mitigate can, and often does, affect one head of damages differently than another. While somewhat arbitrary, the chances of success expressed as a percentage will often result in a reduction of the appropriate damages by the same percentage.
>
> [147] A plaintiff is entitled to be compensated for any loss reasonably incurred in undertaking or attempting mitigation. This typically involves pecuniary expenses and is recovered as an aspect of the claim for special damages. In rare cases, it can also include non-pecuniary loss such as pain and suffering consequent of a course of medical treatment. Such loss is recoverable even if, in the result, the mitigation efforts do not succeed.
>
> [148] See generally, *Gill v. Lai*, 2019 BCCA 103, *Ueland v. Lynch*, 2019 BCCA 431, and K. Cooper-Stephenson, E. Adjin-Tettey, "*Personal Injury Damages in Canada*", (3rd edition, 2018, Thomson Reuters) chapter 15.
>
> [Emphasis in original.]

[207] Even though the defendants repeated the principles respecting mitigation in their submissions, they then advised that:

> The defendants are not alleging a failure to mitigate regarding medical treatment as such. However, the plaintiff has tried and continued several treatment modalities, choosing to remain with chiropractic, which he was having prior to the accidents. While this is not, strictly speaking, a failure to mitigate, it does indicate the extent to which the plaintiff believes he will benefit from treatment.

[208] In any event, with the above principles in mind, I now turn to the assessment of damages in this particular case.

NON-PECUNIARY GENERAL DAMAGES

General Principles

[209] With respect to the principles governing the assessment of non-pecuniary general damages in personal injury cases, the defendants repeated in their submissions paragraph 97 of the *Thiessen* case. They did not include paragraphs 98 and 99, which are also relevant. I repeat all three paragraphs here:

> [97] In *Sahota v. Slupskyy*, 2019 BCSC 2215, I summarized the law governing the assessment of non-pecuniary general damages:
>
> > [112] In a personal injury lawsuit, the Court may make an award for non-pecuniary damages to compensate a plaintiff's pain and suffering, loss of amenities, and loss of enjoyment of life. The Supreme Court of Canada has articulated a "functional approach" to the assessment of such damages. Following this approach, because non-pecuniary losses are intangible and not readily susceptible to evaluation, any such award should be designed to provide reasonable "solace" for a plaintiff's loss, where "solace" is viewed in the sense of funding things that might make life more bearable or enjoyable.
> >
> > [113] In 1978 the Supreme Court of Canada also limited these types of general awards to $100,000, a limit which is subject to upward adjustment to account for the effects of inflation since that date. At the present time, the upper limit is in the vicinity of $400,000, which is only awarded in cases involving extremely severe injury and disability and where maximum solace must be recognized.
> >
> > [114] A non-exhaustive list of factors taken into account in assessing any award for non-pecuniary general damages include the plaintiff's age, the nature of the injury, the severity and duration of the pain, disability, emotional suffering, impairment of life, family, marital and social relationships, impairment of physical and mental abilities, and loss of lifestyle. While there is no "tariff" on such awards, their fairness and reasonableness are measured with reference to awards made in other cases involving similar injuries and circumstances. In each case an appreciation of the plaintiff's specific circumstances is required as the need for solace does not necessarily correlate with the seriousness of the injury.
> >
> > See *Andrews v. Grand & Toy Alberta Ltd*., 1978 CanLII 1 (SCC), [1978] 2 S.C.R 229; *Thornton v. School Dist. No. 57 (Prince George) et al*., 1978 CanLII 12 (SCC), [1978] 2 S.C.R

> 267; *Arnold v. Teno*, 1978 CanLII 2 (SCC), [1978] 2 S.C.R 287; *Lindal v. Lindal*, 1981 CanLII 35 (SCC), [1981] 2 S.C.R. 629, at 638-648; *Stapley v. Hejslet*, 2006 BCCA 34, at paras. 45-46, leave to appeal ref'd [2006] S.C.C.A No. 100.
>
> [98] The upper limit of $400,000 referred to above would, if adjusted for inflation to the present date, now be in the amount of approximately $445,000. However, recent case law from our Court of Appeal has emphasized that it may not be appropriate to simply adjust older/dated cases for inflation to the date of award. Such an approach "ignores that awards for non-pecuniary damages have continued to increase over the years in addition to the inflationary component": *Valdez v. Neron*, 2022 BCCA 301 at para. 58, leave to appeal to SCC ref'd, 40442 (30 March 2023).
>
> [99] In *Callow v. Van Hoek-Patterson*, 2023 BCCA 92, the Court relied on *Valdez* to reject consideration of any case that was more than a decade old and emphasized that:
>
> > [18] … more recent decisions may be of more persuasive value in determining the present range.
> >
> > **The Appropriate Range**
> >
> > 19 It is important to keep in mind that determining the appropriate range entails ascertaining the "the upper and lower range for damage awards in the same class of case": *Cory* at para. 8 (emphasis added). Given no two cases are alike -- either the injuries are more or less severe, or have a greater or lesser impact on the plaintiff's quality of life -- defining the class is a generalized exercise that takes place at a high level of abstraction.

Plaintiff's Submissions

[210] The plaintiff emphasizes the *Stapley* factors and submits that the emotional testimony from Mr. Moen and his family members speaks volumes about the magnitude of pain and suffering brought on by the accidents. They submit that "for a young man whose physicality was his identity and livelihood, Mr. Moen's loss from the accident has been crushing". He has, they say, prioritized his work and ability to provide income for the household through his stoicism and funneling all of his energy into trying to keep his business afloat, even though the work causes him a great deal of pain.

[211] Counsel emphasizes Mr. Moen's mental suffering and internal turmoil. They say the plaintiff has an overwhelming sense of loss and guilt because he has become a burden upon his family.

[212] Counsel also emphasizes that the plaintiff is only 33 years old, but has a debilitating level of chronic pain that is not expected to improve. The injuries have resulted in a loss of the plaintiff's chosen vocation and affected his relationships with his father and his wife. He no longer has the previously active and social life he used to have. While he attempts to help with housekeeping, he is not able to do so in any meaningful way and, as Ms. Jackson testified, she is now the one who is shouldering the bulk of housekeeping activities and is worried about the pressure on their relationship:

> Right now, it's hard. I come home, make dinner. If he's sore, I will run a bath. He'll ask if I can massage his back. Adding a kid would put pressure in our relationship… It is hard to say what that is going to look like without support, when I am not home… That's a day I would be concerned, the need to care for another human being.

[213] Plaintiff's counsel places great emphasis on *Grabovac v. Fazio,* 2021 BCSC 2362. In that case, a 26-year-old dental hygienist was involved in two accidents that caused musculoskeletal injuries to the neck, shoulders and back, which over time progressed into a chronic pain condition, major depression, PTSD, and somatic symptom disorder, the ongoing cumulative effects of which rendered her competitively unemployable. In that case, counsel for the plaintiff sought $225,000 as non-pecuniary general damages, an amount that the Chief Justice found to be "insufficient to compensate" the plaintiff in the circumstances. An award was made in the global amount of $350,000 [$400,000 updated present value ("PV")], which included the (unquantified) factor of loss of housekeeping capacity and the loss of any "real prospect of having children".

[214] Plaintiff's counsel also cites:

- *Meckic v. Chan*, 2022 BCSC 182…$225,000 ($243,000 PV) for a 53-year-old female suffering chronic pain and depression and who was no longer competitively employable because of her injuries (thereafter reduced for the contingency of possible improvement in the future); and

- *Steinlauf v. Deol*, 2021 BCSC 1118, aff'd 2022 BCCA 96…$225,000 ($257,000 PV) for a well-regarded, hard-working and ambitious police officer who was permanently partially disabled by chronic pain and experienced serious psychological problems including depression, somatic symptom disorder, and disruptive sleep, and whose career was now limited to sedentary, administrative duties.

Defendants' Submissions

[215] The defendants submit that the plaintiff's injuries should be categorized as "moderate" in their severity, warranting an award of general damages in the range of $90,000 to $125,000. In the alternative, the defendants submit that "if the psychological injuries are found to be more significant, then the defendants urge the Court to find…an award of $180,000 is reasonable".

[216] When characterizing the injuries as "moderate", the defendants point out that the plaintiff's complaints are essentially persistent soft tissue complaints that are "worse with activity and impacting function, but not absolutely preventing any particular form of function", especially as it relates to the plaintiff running his business as opposed to being "on the tools" (i.e. doing the physical work himself). They point out that, while the plaintiff has had suicidal ideation, "he has no active plan" to take his own life.

[217] The defendants cite the following cases:

- *Fortin v. Bircham,* 2021 BCSC 1618…$125,000 ($143,000 PV) for a previously hard-working and enthusiastic 42-year-old with no physical limitations, who suffered post-accident right-side back pain, gluteal spasm and radiculopathy, triggering psychological issues and negative impacts on the marital relationship;

- *Klaver v. Grant*, 2023 BCSC 609…$110,000 ($113,000 PV) for a female plaintiff involved in three accidents resulting in chronic pain, somatic symptom disorder and depression;

- *Lewis v. Gibeau*, 2023 BCSC 784…$220,000 ($226,000 PV) for a previously healthy plaintiff suffering from persistent pain in the neck, shoulders and back, headaches, sleeping dysfunction and significant functional impairment;

- *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81…$180,000 ($225,000 PV) for a 41-year-old construction worker suffering from persistent soft tissue injury to the neck and back, ongoing pain, dizziness and nausea, sleep disturbance, anxiety and depression, with an exaggerated sense of his disability limiting activities and producing deteriorating relationships, anger and isolation; and

- *Kallstrom v. Yip,* 2016 BCSC 829…$180,000 ($225,000 PV) for a female plaintiff involved in multiple accidents cumulatively causing chronic pain and depression, which rendered her competitively unemployable, although she was employed in an accommodating environment in her brothers' business.

Determination

[218] In a trilogy of cases in 1978, (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 1978 CanLII 1; *Arnold v. Teno*, [1978] 2 S.C.R. 287, 1978 CanLII 2; and *Thornton v. School Dist. No. 57 (Prince George) et al.*, [1978] 2 S.C.R. 267, 1978 CanLII 12), the Supreme Court of Canada capped the recovery of non-pecuniary general damages in personal injury cases in Canada at $100,000. After accounting for inflation, that cap is now approximately $450,000.

[219] In *Thiessen*, I stated:

> [108] I was the judge who decided some of the chronic pain cases cited by the parties, including the most recent decisions of *Meckic* and *MacKinnon*. In those cases, it was and remains my opinion that permanently severe and chronic pain conditions that drastically reduce a person's enjoyment of life should today attract substantial non-pecuniary general damages in the range of $200,000–$225,000, if not more. Such cases are rightly described as catastrophic in their own way, particularly where the loss of dignity and functionality, and the concomitant need for solace, is profound.

[220] In *Thiessen*, *Meckic*, and *MacKinnon*, I assessed a contingency deduction for the relatively low possibility that there may be some improvement in the plaintiff's medical condition in the future.

[221] This case is another example of chronic pain that has drastically reduced the plaintiff's enjoyment of life, so much so that he has actually contemplated suicide on more than one occasion. The plaintiff is acutely aware of his learning disability, but he was rightly proud of his physical strength and his substantial skill set in the fields of construction and the operation of heavy mechanical equipment. His self-esteem was founded on his competencies in this regard, and it has been severely undermined, if not entirely destroyed, by the accidents. As in the other cases, his loss and continued need for solace is profound.

[222] It may be that the $350,000 non-pecuniary damages award made in *Grabovac* represents a new high watermark for cases involving chronic pain and loss of functional capacity. That case was not brought to my attention by counsel in any of the earlier cases that I decided. Had it been so, I likely would have pegged the upper end of the range in para. 108 of *Thiessen* at $250,000.

[223] As noted above, the award made by the Chief Justice in *Grabovac* included compensation for the plaintiff's loss of housekeeping capacity. The amount by which the award was increased on account of that factor is not articulated in the reasons nor, frankly, is it possible to infer what that value might have been.

[224] Perhaps not surprisingly, counsel for the plaintiff submits as follows: “while the evidence in this case supports an award for loss of housekeeping and childcare capacity, the plaintiff does not seek a segregated award but asks that his loss in this regard should be reflected in an augmentation of the award for loss of amenities under non-pecuniary damages.” He seeks an aggregate amount identical to the sum in *Grabovac* (i.e., $350,000).

[225] In *Thiessen*, I dealt with loss of housekeeping capacity as a separate head of damages and, indeed, awarded $145,000 in that regard. Defence counsel in this

case adopted in their submissions the summary of relevant legal principles set out in paras. 161–164 of *Thiessen*, principles which I need not set out again here, except perhaps for the following from *McKee v. Hicks*, 2023 BCCA 109:

> [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[226] In this case, there is no doubt that the plaintiff has suffered a loss of housekeeping capacity, one that is, much like his chronic pain, very likely to be a lifelong disability. It is amply illustrated by his inability to provide any meaningful assistance to his father during the one-year renovation of the new home purchased by the plaintiff and his wife. This is precisely the type of work at which the plaintiff had previously excelled. His distress and loss of self-esteem associated with that loss is a major contributor to his depression and emotional distress.

[227] In the result, I accept the plaintiff's submission and I exercise my discretion to address the plaintiff's loss of housekeeping capacity as a factor augmenting the award of non-pecuniary damages in this case instead of making a separate award of damages in that regard. I therefore assess the plaintiff's non-pecuniary damages the aggregate amount of $300,000. In doing so, I have offset the contingency of possible future improvement in the plaintiff's medical condition against the more substantial contingency of the plaintiff's condition worsening in the future. The amount also reflects a relatively modest sum in respect of loss of housekeeping capacity that is less than what it might otherwise have been had a separate assessment/award been made in that regard.

LOSS OF EARNING CAPACITY

General Principles

[228] In their submissions, counsel for the defendants repeated the summary set out in the following paragraph of *Thiessen*:

> 113 I repeat here the summary of general principles set out in Meckic:
>
> > [142] Most personal injury lawsuits include a claim for damages for loss of past and future income that the plaintiff would have earned if the defendant's negligence and the resulting injuries had not occurred. As noted in *Kallstrom v. Yip*, 2016 BCSC 829:
> >
> > > [388] ...Since *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229, it has been acknowledged that, technically speaking, it is not loss of earnings for which compensation is being made, but rather it is for loss or impairment of a capital asset, namely, the plaintiff's capacity to earn income.
> >
> > > [389] Valuation of the loss may be measured in different ways depending on the circumstances of each particular case. Generally speaking, the value of a particular plaintiff's capacity to earn is equivalent to the value of the earnings that he or she would have received, whether in the past or in the future, had the tort not been committed. The essential task of the court is to compare what would have been the plaintiff's past and future working life if the accident(s) had not happened with the plaintiff's actual past and likely future working life after the accident(s). The difference between the two scenarios represents the plaintiff's loss and the resulting monetary award is thus consistent with the basic principle of tort law compensation, which is to restore the injured plaintiff to the position he or she would have been in but for the defendant's negligence, at least insofar as a monetary award is capable of doing so.
>
> ....
>
> > [393] There is a discrete, two-step process that is required with respect to these past and future loss of earning capacity claims:
> >
> > > 1.the court must first determine whether, as a result of the injuries sustained in the

> accident(s), the plaintiff's past or future earning capacity has been or will likely be impaired, such that there has been an actual loss of income in the past and/or a real and substantial possibility of a loss of income in the future; and
>
> 2.if so, then the court must then determine the amount of past loss that has been incurred to the date of trial and, on a present value basis, assess the amount to be awarded for any possible future financial loss.

[394] The first question deals with entitlement and the second with quantum.

...

[144] *Rab* discussed the correct analytical framework as follows:

> [27] As this Court observed in *Dornan v Silva*, 2021 BCCA 228 at para 134, the process of determining whether a hypothetical future event is a real and substantial possibility can be a difficult task:
>
> By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence....
>
> [28] Difficult as it is, that task is a necessary first step in the analysis of whether a plaintiff has established a claim for loss of future earning capacity. This was explained by Mr. Justice Goepel, dissenting but not on this point, in *Grewal v Naumann*, 2017 BCCA 158:
>
> [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event.

> Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
>
> [29] Some claims for loss of future earning capacity are less challenging than others. In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous. Yet it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. *Dornan* was such a case.
>
> [30] But in other cases, assessing the possibility of a future income loss is less straightforward. Among these are cases involving plaintiffs whose injuries have led to continuing deficits, or have exposed them to future problems, yet whose income at the time of the trial is at or near the level of earnings they enjoyed before the accident. These tend to be cases that lend themselves to the capital asset approach to quantifying the loss. Grewal was such a case, as were *Pallos, Brown* and *Perren*. This one is also such a case. The respondent advanced no claim for past loss of income, and her income at the time of trial, all of which was passive, was greater than it had been at the time of the accident.
>
> [31] Accordingly, the process described in Grewal comes to the forefront: assessing whether there is a real and substantial possibility of an event leading to future loss, and assessing its likelihood, before turning to quantification on either an earnings or capital asset approach.

[145] After reviewing the case law dealing with the "capital asset" approach in cases where there has been no clear loss of income before trial, and which was said to have given rise to "some apparent confusion", the Court continued:

> [47] From these cases, a three-step process emerges for considering claims for loss of

> future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring -- see the discussion in *Dornan* at paras 93-95.
>
> [Emphasis added.]
>
> [Emphasis in original.]

[229] The claim for past and future loss of earning capacity is the most difficult and contentious issue in this case. The question is not so much one of entitlement but rather one of quantification. And here, the parties are millions of dollars apart.

[230] There is no question that the plaintiff's earning capacity has been substantially impaired as a result of the injuries sustained in these accidents. The plaintiff suffers from chronic pain and debilitating depression, a self-perpetuating disability that will in all probability persist for the remainder of his life. It is simply impossible for him to do the same physical work (i.e. construction, operating machinery, etc.) as effectively and for as long as he could before the accidents. This, without more, means that the plaintiff has established that he has suffered, and will continue to suffer, a loss of earning capacity. As noted above though, the much more difficult question is how that loss should be quantified in the particular circumstances of this case.

[231] Part of the difficulty with quantification lies with the fact that the plaintiff has basically never worked as an employee of a business owned by somebody else. He has always been self-employed, and has never had a formal business plan. His work has evolved organically, starting with landscaping and renovations, transitioning into

heavy equipment operation (primarily excavators), and ultimately morphing into snow removal. He has always been the “key man” in his own business, at all times literally “hands on”, whether it be doing demolition, carrying materials and heavy objects, shoveling dirt, or operating machinery.

[232] Given his limited education and learning disability, it is not surprising that the plaintiff relied on others to deal with “paperwork”, accounting, preparation of income tax returns and/or financial statements. He is an astute individual, one who recognized and was willing to take advantage of economic opportunities as they presented themselves, but his ability to explain at trial minutiae in financial documents was generally poor—particularly because of the concentration and cognition problems he experiences as a result of his injuries.

[233] As noted earlier, certain books of documents were marked as exhibits at trial by consent, subject to the terms of a Document Agreement that was also marked as an exhibit. These documents included corporate and personal income tax returns, general ledger entries, and various contracts related to snow removal services and the leasing or sale of equipment. Regrettably, the Court was not provided with the formal financial statements of the plaintiff's business following his incorporation, nor with any expert evidence analyzing the viability or profitability of the plaintiff's business and its future prospects in the Vancouver Island or Lower Mainland marketplaces.

[234] The defendants do not deny that the plaintiff has sustained some economic loss as a consequence of his injuries, but they suggest these losses are relatively modest. They point to the lack of expert opinion evidence on the matter, stating that “all told, the plaintiff has made broad allegations of losses but he has failed to lead evidence that is adequate to prove what would likely have happened [in his business endeavours] but for the accidents. He has also failed to lead evidence sufficient to allow the court to quantify any losses.”

Past Loss of Earning Capacity

[235] *Meckic, MacKinnon* and *Thiessen* all fell into the “less challenging” category of cases described in the BCCA trilogy (i.e. plaintiffs employed long term by third-party employers where the lifelong injuries—chronic pain—meant a return to full-time employment would never occur). Therefore, the “arithmetical” approach to quantification, as opposed to the so-called "capital asset" approach, was appropriate in each case.

[236] In this case, however, we are dealing with a plaintiff who has always been self-employed, initially by way of an unincorporated proprietorship and later as a sole shareholder of a formally incorporated business. The remuneration of the business owner (the plaintiff) is determined with reference to the profitability of the business undertaking and the amount of cash available to pay the owner from time to time. The expense side of the ledger can, and in this case does, include the cost of workers hired to replace the contributions that would otherwise have been made by the plaintiff if he had not been injured. It also includes other expenses such as equipment or vehicle lease payments, repairs/maintenance costs, insurance costs, material costs, equipment rentals, professional and banking fees, and so on.

[237] The plaintiff submits, and I agree, that a person such as Mr. Moen who carries on business through a company of which he is the sole shareholder, is entitled to claim in his own name the value of any loss of earning capacity to the company/business caused by the injuries sustained: *Rowe v. Bobell Express Ltd*., 2005 BCCA 141 at para. 35. In such circumstances, the corporation’s potential loss of profits is sometimes an appropriate substitute for the true loss of past earning capacity on the part of the sole shareholder who would be able to claim those profits as income as the “alter ego” of the corporation: *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2015 BCCA 232 at para. 20, citing *Rowe*.

[238] The past loss of earning capacity claim involves the assessment of the first two scenarios described in para. 111 of *Meckic* as follows:

1. what has actually happened to the plaintiff and his business in the past, including the period between the accident(s) and the trial; and,

2. what would have occurred to the plaintiff and his business between the date of the accident(s) and the trial, had the accident(s) not occurred (the past hypothetical “without-accident” scenario).

[239] It is the difference between these two scenarios, assessed in monetary terms with reference to all appropriate contingencies and adjustments, which represents the plaintiff's past loss of earning capacity.

Defendants’ Submissions

[240] The defendants’ written submissions emphasize that the plaintiff has failed to lead any expert evidence offering any “forensic analysis” of the plaintiff's business. They state they were providing the Court with “guidance in the form of reasoning flowing from the case law and the evidence presented at trial”, starting with certain numbers derived from the plaintiff's personal and corporate income tax returns.

[241] The plaintiff's personal income tax returns from 2011 through 2016 are as follows and, where appropriate, defence counsel included non-cash items as an ”add back”:

Year	Gross	Net	Add back CCA	Total
2011	$141,399	$12,400		
2012	$21,944	$12,607		
2013	$12,776	$12,171		
2014	$28,954	$20,853		
2015	$67,685	$35,605		
2016	$104,259	$18,756	$8,354	$27,110
2017	$164,806	$27,978	$16,143	$44,121
2018	$289,925	$19,492	$32,471	$51,973
2019	$219,147	$26,289	$20,677	$46,966

[242] In November 2019, the plaintiff incorporated. The corporation’s fiscal year ends on October 31. The corporate tax returns for each fiscal year following incorporation reflect the following:

Year ending October 31	Gross	Net	Amortization	Total
2020	$305,594	$100,820	$13,280	$114,100
2021	$323,144	$95,013	$33,780	$128,793
2022	$349,685	$28,675	$37,153	$65,828

[243] The plaintiff's personal tax returns for tax years 2020, 2021 and 2022 show dividend income of $97,068, $98,039 and $57,500 respectively. In 2022, the return also reflected self-employed business income of $15,964, which was apparently the recovery of a pre-incorporation bad debt, resulting in total income for that year of $73,464.

[244] The defendants acknowledge that “to a large extent, the plaintiff's father stepped into his shoes” after the accidents, even though the plaintiff himself also continued to work in the business. However, they point out there is no record of the number of hours that Mr. Canfield actually worked and that none of the evidence from Mr. Canfield, Mr. Zander or Mr. Rae allows the Court to make any “but for the accidents, there goes the plaintiff” sort of ruling.

[245] In the end, the defendants submit “the plaintiff has likely some past losses, but these are difficult to assess with much precision”. They say that if the plaintiff was treated simply as an employee with a stable income from operating machinery, he would have been earning approximately $80,000 a year, an amount he actually exceeded in recent years. While the evidence is “insufficient to allow assessment of the quantum of increased costs related to functional limitations on the part of the plaintiff”, the defendants say the sum of $70,000 i.e. seven years at $10,000 per year, would be “reflective of the likely amount of increased expenses, the one lost contract, as well as possible limited ability to work” in the pre-trial period.

[246] Plaintiff's counsel, however, paints a radically different picture and I turn to that submission now.

Plaintiff's Submissions

[247] As noted above, the plaintiff did not commission or adduce any expert assessment of the plaintiff's income loss, whether in the past (date of accident to date of trial) or in the future (post-trial for balance of working life). Instead, plaintiff's counsel relies on his own forensic analysis of the plaintiff's financial information.

[248] The starting point is an assumption that, but for the accidents, the plaintiff would have worked full time earning the maximum amount of business revenue he could have generated—initially from his renovations business for the first couple years, then as an excavator business, and then finally as some combination of both excavator and snow removal contracts. He also assumes that, as was the case before the accidents, the plaintiff would not have regularly retained subcontractors or employees to provide additional assistance with the enterprise.

[249] With these assumptions in mind, plaintiff's counsel then submits a claim for past loss of earning capacity that combines three separate components, namely:

1. payment of subcontractor costs and wages (that would not have otherwise been incurred);

2. loss of excavator contracting work (i.e. additional work that the plaintiff would have done but for his injuries); and

3. loss of snow removal contracts (contracts that would have been obtained/performed but for the injuries).

[250] Counsel starts with the following table:

Table of Gross Business Earnings

	2015	2016	2017	2018	2019	2020 (Oct 2019- Oct 2020)	2021 (Oct 2020- Oct 2021)	2022 (Oct 2021- Oct 2022)	2023 (Oct 2022- Oct 2023)
TidyGrounds Reven	$67,685.70	$104,529.66	$164,806.30	$282,925.52	$219,147.55	$305,594.00	$323,144.00	$349,685.00	/

ue (from ITR) (Exhibit 3, Tabs 10-14, 18-20)									
From Contracting (Exhibit 3, Tab 21, Invoice Reports)	Equivalent to full income of TidyGrounds	Equivalent to full income of TidyGrounds	Equivalent to full income of TidyGrounds	Equivalent to full income of TidyGrounds	Nearly equivalent to full income of TidyGrounds	$184,231.46 or $174,008.93 (manually added from Jan - Dec)	$160,200.43 or $146,250.61 (manually added from Jan - Dec)	$71,724.56 or $119,434.26 (manually added from Jan - Dec)	$61,789.70 or $14,080 (manually added from Jan - Dec mainly from sale of tandem trailer and Bobcat dumping hopper: Exhibit 3, Tab 30)
From Snow Removal (Exhibit 3, Tab 22, Invoice Reports)	/ (no snow removal services)	/ (no snow removal services)	/ (no snow removal services)	/ (no snow removal services)	/ (beginning of first snow removal season)	$109,719.58 or $137,629.31 (manually added from Jan - Dec)	$161,739.93 or $154,143.96 (manually added from Jan - Dec)	$278,688.09 or $271,892.21 (manually added from Jan - Dec)	$278,688.09* or $213,801.40 (manually added from Jan - Dec)

*this is likely a typographical error. The gross profit number for that year actually referenced in the exhibit is $247,180.28**.**

[251] The numbers in the above table are extracted from a combination of financial documents that were put into evidence by consent pursuant to the Document Agreement, including the plaintiff's personal and corporate income tax returns, certain "invoice reports" for the renovation/excavation businesses (2015–2019) and for the excavation/snow removal businesses (2020–2023).

[252] Plaintiff's counsel then relies on the personal and corporate income tax returns to identify subcontractor and casual employee costs as follows:

Substitute Labor Costs

	Amount
2016	$32,052
2017	$31,046
2018	Subcontracts: $38,449

	Wages: $29,621
2019	Subcontracts: $25,421 Wages: $27,713
2020	Subcontracts: $26,983 (minus Healing Soil Microbes dispatching: $200) (minus Healing Soil Microbes clerical: $400) Wages: $10,014
2021	Subcontracts: $7,290 (minus Bill Moen: $300) Wages: $20,440
2022	Subcontracts: $24,100 Wages: $21,885

[253] Plaintiff's counsel says his client acknowledges that there “may have been minor subcontracting expenses outside of the monies paid to [his] father (Mr. Canfield)” but these would have been nominal. He adjusts downwards and rounds the total of the above sums to come up with a claim of $250,000 representing subcontractor and wage expenses incurred as a result of the plaintiff's inability to do the tasks he would have done but for the accidents.

[254] With respect to the reduction of contracting work, the plaintiff posits a claim based on the difference between the plaintiff's actual annual net business profit and what is said to be an “industry comparator” of expected annual net profit for an owner-operator excavation business. That comparator is basically the explanation given by Mr. Rae of the anticipated rate of profit based on an excavator owner who operates the machinery themselves (gross $150/hour equipment rate, minus $20/hour for fuel costs for a midsized machine minus $15/hour for overhead including insurance and maintenance = net $115/hour x 2,000 annual average hours of work = $230,000 annually).

[255] The evidence is uncontradicted that the plaintiff was working full time, indeed more than full-time hours, before the accidents and would have continued to do so if the accidents had not occurred. Counsel therefore calculates the loss as follows:

	Rae comparator of expected annual net profit for owner operator	**Actual annual net profit** (Exhibit 3, Tab 13 x 50%)	**Difference**
2018	$230,000	$190,000	$40,000
2019	$230,000	$110,000	$120,000
2020	$230,000	$90,000	$140,000
2021	$230,000	$75,000	$155,000
2022	$230,000	$60,000	$170,000
2023	$230,000	$7,000	$223,000

[256] The plaintiff therefore claims approximately $850,000 as a loss of “excavating profits” in the years 2018–2023.

[257] Lastly, plaintiff's counsel adds to the equation the anticipated profits of snow removal work, which peaked in 2022 at 27 customer contracts and which was reduced to only 12 such contracts in 2023 which, according to the evidence of Ms. Jackson, were mostly performed by friends and family (she stated that Mr. Moen only really worked three of the contracts that season).

[258] Ms. Jackson, who does the bookkeeping for the company, stated that the company's gross snow removal income for the 2023–2024 season to date at trial was only $75,000, less than half the previous year’s rate of income.

[259] At trial, the plaintiff gave evidence about the loss of two specific snow removal contracts that were turned down in October 2023 because he was unable to physically perform sidewalk clearing and salting work (this is manual labour instead of just operating the snowplow). He testified that one of the contracts was worth $35,000–$50,000 and the other was worth $7,000–$8,000.

[260] Without doing the specific arithmetic and without also directly addressing the applicable contingencies, counsel then summarizes this third element of the loss of past earning capacity claim as follows:

> Applying positive and negative contingencies, the plaintiff claims $100,000 for past wage loss tied to the snow removal business.

[261] Counsel then submits “the total amount claimed for the three aspects of the plaintiff's past wage loss is $1.2 million”, which sum is subject to reduction on account of income tax pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, an exercise that will be undertaken once the final award under this heading is made by the Court.

Determination

[262] The Court is troubled by the quality of both the evidence adduced and the analytics applied by the parties to this particular heading of damages. The plaintiff could have provided the plaintiff's financial records (financial statements, tax returns, general ledgers, equipment leases/purchases/sales, contracting/snow removal “invoice reports”, and the like) to a properly qualified expert for a more detailed forensic examination and determination of the loss of income issues, including the extent to which substitute labour was actually employed (over and above what would have been employed in any event) and the increased costs of doing business incurred as a result of the plaintiff's injuries. That expert might usefully have been able to the analyse both the past and future profitability of the plaintiff's business with regard to actual figures on the books, the mitigation measures applied, and all other appropriate adjustments.

[263] Instead, the plaintiff has simply scoop-shoveled all this material before the Court without the benefit of any professional expert analysis, except for counsel’s own submissions which, given the nature of adversarial advocacy, are prone to overstatement.

[264] The defendants essentially say the plaintiff's average adjusted net income in the four years following the accidents was “significantly more” than before the

accidents and, since incorporation, the plaintiff's business “has been doing better than ever before” even though the plaintiff claims to have been working fewer hours. They therefore submit “the plaintiff has made adjustments and has quite adequately mitigated” his pre-trial financial loss.

[265] But the defendants then concede “the plaintiff likely has some past losses” and, given the lack of precision in the evidence, suggest it be quantified at $10,000 per annum ($70,000 over seven years), which they say, without detailed analysis, “is properly reflective of the likely amount of increased expenses and the one lost contract as well as possible limited ability to work”.

[266] With great respect, I simply cannot accept the defence submissions on this issue. The plaintiff has clearly suffered and continues to suffer debilitating chronic pain as a result of the accidents, pain which severely limits his ability to work in the same manner that he did before the accidents occurred. After the accidents, he stumbled into the much more lucrative business of excavator operations and tried his best to establish that line of business notwithstanding the severe pain he was causing himself. He was significantly helped in this regard by the very generous assistance of his father, although the precise details of the work undertaken by the father over the years in question have not really been established on the evidence. The amounts paid to the father for his assistance barely amounted to minimum wage and bore no relation to the true value of his services, which likely was twice that amount, if not more.

[267] The plaintiff then stumbled upon snow removal as an even more lucrative line of work, and he again invested in that new undertaking in combination with his excavation business. He again forced himself to work through his chronic pain to try and make a go of the snow removal enterprise. Again, however, he has had to rely on considerable assistance, not only from his father but also from other friends and family members. The excavation work died away in 2022 and the snow removal work has been much reduced, as the plaintiff's own medical situation has spiralled

downward in the past year and the demands of the available work simply could not be met.

[268] In these circumstances, it is clearly wrong for the defendants to claim that the plaintiff has not suffered any meaningful financial loss in the seven years since the first accident. I have no doubt, and I find as a fact, that if the plaintiff had not been injured in the accidents, he would almost certainly have operated both the excavation business and the snow removal business in tandem and would very likely have substantially increased the net income of the corporation accordingly.

[269] It is simply no answer to say in effect “well, except for perhaps the last year, he has made more in recent years that he has ever made before”. This is because, had the accidents not occurred, the plaintiff would not have relied on replacement labor and he would have made more profit not only in the past seven years but, very probably, long into the future. His injuries and his chronic pain have clearly caused the plaintiff a substantial loss of profits, and it falls upon the Court to try and put a reasonable number on that loss, one that is based upon the evidence in the case and which is fair to both parties.

[270] For sure, when a person has been injured and is unable to work following an accident, whether at all or in a much-reduced capacity, the cost of hiring replacement labour is one method of assessing damages for loss of income earning capacity. Incurring replacement labour expenses is a way of mitigating one’s losses. Assuming that replacement labour allows for the business enterprise to generate roughly the same gross income that it would have generated had the plaintiff not been injured, reimbursement of that cost may be adequate compensation in some cases. In this fashion, the plaintiff ultimately is put in approximately the same financial position he would have enjoyed had the accidents not occurred.

[271] Where the evidence suggests that the business would have otherwise generated even more income (i.e., that the replacement labour did not fully mitigate the loss), awarding the replacement labour costs alone will not fully compensate the

plaintiff. Care must be taken, however, to avoid an assessment that might amount to impermissible double recovery.

[272] As indicated, I am not completely satisfied regarding the evidence purporting to corroborate the subcontractor and wage expenses which appear “on the books” and which are claimed to have been incurred as a result of the plaintiff's inability to perform at the same level he would have performed but for the accidents, and whether these actually created a working capacity beyond the plaintiff’s pre-accident level. There is little evidence on the granular details—i.e., who did precisely what, when, where and why over each of the seven years in question.

[273] The plaintiff hired an employee on what was supposed to be a 2-year contract, hoping he would end up with two skilled equipment operators in his business. Precisely how much was paid to this individual before he left is not clear. Nor is it clear whether the performance of the snow removal contracts in 2022 would have required additional help in any event.

[274] Notwithstanding these shortcomings, it is clear that most of these subcontractor/wage expenses were in fact incurred because the plaintiff was unable to work as hard, long or efficiently as a result of his injuries. Reimbursement of these expenses that would not otherwise have been incurred is appropriate. Doing the best I can with the numbers presented, I make a rough and ready assessment and award the sum of $225,000 under this heading.

[275] I do not accept the plaintiff's claim for an additional $850,000 representing loss of “excavating profits” over the years 2018–2023, purportedly based upon the so-called “industry comparator”. While I do not doubt the truthfulness of Mr. Rae's evidence at trial, his very basic formula is simply not corroborated, whether by his own financial statements (which were not produced) or by any reliable industry or occupational data. Such data is buried in the plaintiff's own books, particularly for the years 2020 and 2021, but the necessary forensics were not undertaken to determine the profitability of the business having regard to all the expenses.

[276] It is clear, however, that there was a reduction in gross income from the excavator side of the business over the period from 2020–2022 and, indeed, even that income has now essentially disappeared. I am satisfied that, had the plaintiff been healthy, he would have continued the excavation side of the business alongside the snow removal business and that the gross income generated from the former would have continued in at least the range of $170,000 per annum, almost the halfway point between the 2020 and 2021 gross income numbers.

[277] Hence, there has been a loss in the years 2021–2023 in the approximate amount of $10,000, $100,000 and $150,000 in each respective year for a total of $260,000 (the excavator income in 2023 was basically derived from the sale of equipment and not from actual excavation operations). I apply a somewhat arbitrary, but likely defensible, profit margin of 40% to the gross amount of $260,000 to arrive at a net income award of $105,000 rounded up, a figure I consider to be fair given that an award is also being made to reimburse the increased subcontractor and wage costs during the pre-trial period.

[278] Lastly, with respect to the snow removal side of the business, I accept that the 2022 gross income figure of approximately $280,000 is an appropriate measure to be used as a comparator for the level of income that could reasonably be expected from that side of the business absent any injury to the plaintiff. Gross income in 2023 was almost at the same level ($247,000), but has dropped to just $75,000 in the first half of the 2023–2024 season (50% of the previous years income). I therefore award 40% of $110,000 (i.e., $44,000) as a very rough and ready compensation for the loss of additional net snow ploughing income over the 2022–2023 and the pre-trial 2023–2024 seasons, again bearing in mind that the replacement labor costs incurred have also been reimbursed.

[279] All these numbers have to be adjusted for income tax pursuant to s. 98 of the *Insurance (Vehicle) Act*. The parties made no submissions on taxation of corporate income, levels of retained earnings, and cash amounts that would likely have been dividended out of the corporation to the plaintiff over the relevant years. If they are

unable to agree on the necessary adjustments, liberty is granted to apply for a ruling on the matter.

Future Loss of Earning Capacity

[280] This portion of the plaintiff's claim requires the court to consider scenarios three and four described in para. 111 of *Meckic*, namely:

3. how would the plaintiff's life in general, and his business or personal income in particular, have proceeded in the post-trial future if the accidents had not occurred (this is the future hypothetical “without-accident” scenario); and

4. how will the plaintiff's life generally and his business and personal income likely proceed in the future now that the accidents and the resultant injuries have occurred (the future hypothetical “injured” or “with-accident” scenario).

[281] Both of these scenarios involve past or future hypothetical possibilities that will be taken into consideration so long as they are “real and substantial possibilities”, appropriately linked to and measured by the evidence, as opposed to “mere speculation”.

[282] Also to be factored into the equation are both general contingencies, arising as a matter of human experience, as well as contingencies specific to the plaintiff that are supported by evidence as having a realistic and measurable chance of occurring.

Plaintiff’s Submissions

[283] Plaintiff's counsel says he has approached the valuation of the plaintiff's loss of future earning capacity with reference to different scenarios using what he describes as the “capital asset approach”, although it appears to closely resemble the arithmetic or earnings approach. He says, and I agree, the evidence clearly establishes a real and substantial possibility that the plaintiff's future income earning capacity has been impaired as a result of the accidents and that the relative likelihood of a financial loss being incurred is substantial: indeed, it is in fact already

occurring on a daily basis, and will in all probability continue to do so for the balance of the plaintiff's pre-accident working life expectancy.

[284] Counsel submits, and again I agree, that but for the accidents, the plaintiff would have continued to operate both an excavator and a snow removal business in tandem, personally performing most of the work without assistance on a full-time basis likely including overtime. He points out that one of the expert economists agreed in cross-examination that self-employed individuals tend to retire later than “ordinary” employees, on average around 70 years of age.

[285] Plaintiff's counsel then posits three scenarios to illustrate potential valuations of the plaintiff's loss:

> Scenario one: full-time employee working as an excavator operator and continued self-employment in the seasonal snow removal business.
>
> Scenario two: self-employed owner/operator in both the excavation and snow removal businesses.
>
> Scenario three: self-employed owner/operator in just the excavation business, but with two employees and thus running three excavators full time.

[286] In scenario one, plaintiff's counsel submits the evidence confirms that skilled excavator operators are hard to find and that a skilful operator such as the plaintiff would have had no trouble finding full-time employment either with Mr. Rae, Mr. Zander, or any other excavator business. The evidence is that such operator employees earn $40–$41 an hour working 2,000 hours annually, equating to annual earnings of $80,000, plus holiday pay and overtime. The present value of such earnings to the age of 70 is approximately $2,140,000.

[287] With respect to the snow removal business, counsel refers to gross income of approximately $279,000 in 2022 and suggests that a “conservative” annual net profit for that business was approximately $100,000. The present value of $100,000

annual snow removal earnings to age 70 is actuarially calculated to be approximately $2,675,000.

[288] The present value of the combined annual earnings from both excavation ($80,000) and snow removal ($100,000) to age 70 is thus approximately $4,800,000.

[289] For scenario two, plaintiff's counsel again uses the “Rae model” annual net profit of $115 per hour for 2,000 hours per annum, arriving at the previously stated “profit” of $230,000 “plus more for overtime”. The present value of $230,000 per annum to age 70 is actuarially calculated to be approximately $6,150,000.

[290] Topping up this figure with the present value of $100,000 net snow removal earnings to age 70 ($2,675,000) produces an aggregate future loss with a present value of approximately $8,825,000.

[291] The third scenario is one that simply parallels Mr. Rae's excavation business as an owner/operator with two employees running three excavators. Mr. Rae bought his first excavator in 2014 and 10 years later now owns five excavators, which he says generates annual billings of $500,000–$800,000.

[292] Counsel submits each employee makes the owner $150,000 per annum and the owner/operator himself generates $230,000 profit per annum. Rounding this profit to a “conservative” number of $400,000 annually, the present value of that amount to age 70 is actuarially calculated at approximately $10,700,000.

[293] Counsel then addresses what, if any, residual earning capacity the plaintiff might have in the future. He argues (without any meaningful evidence having been led on the point) that the plaintiff has “few, if any, opportunities for the light and sedentary work that is required to accommodate his injuries given his learning disability". He argued that “the most optimistic scenario” is that the plaintiff “will be able to maintain his current level of snow removal work ($35,000 profit), plus the occasional accommodating excavator operation project through his friends ($25,000 profit) and that the present value of the proposed annual total of $60,000 to age 70 is actuarially calculated at approximately $1,600,000”.

[294] Deducting $1.6 million from each of the three projected “without accident” scenarios described above produces a net future income loss, before contingencies, of approximately $3,200,000 (scenario one), $7,220,000 (scenario two) and $9,100,000 (scenario three).

[295] Finally, plaintiff's counsel addresses positive and negative contingencies, which are said to include:

- the plaintiff is strongly attached to his work and is motivated to earn as much as possible;
- the excavator industry offers opportunities to earn much more with overtime pay;
- the value of the plaintiff's business will increase in the long term with retained assets independent of earning trajectories;
- some improvement in the plaintiff's medical condition is possible, however the evidence establishes that any such improvement is not likely to be substantial;
- Mr. Moen may possibly have retired early or voluntarily reduced work hours (a low likelihood, says counsel, given his work attachment); and
- the contracting industry has little tolerance for equipment operators requiring accommodation because of medical conditions… they are usually let go.

[296] After referencing these contingencies, but without ascribing any particular values to the chances of their occurrence, counsel then states:

> Given the fact that the plaintiff was relatively early in his career, we agree that negative contingencies in the amount of 25% should be applied for a fair and reasonable assessment of the loss of his capital asset.

[297] Counsel then submits that, having regard to all the above, a fair award for the plaintiff's loss of future earning capacity is thus $3 million.

Defendant Submissions

[298] The defendants again make the point that this case lacks the “expert forensic evidence” necessary to properly analyse and quantify the future economic loss the plaintiff will sustain as a consequence of his injuries. They say that “a large claim is not supported by the evidence” but they “do not deny that some award is justified”.

[299] In their written submissions, the defendants do not specifically address the subject of contingencies, nor do they critique the methodology applied by plaintiff’s counsel. They do, however, state:

> It is impossible to predict the future in the business of the sort operated by the plaintiff. The weather may provide lots of work and it may not. The economy may move in a direction to encourage residential renovations and landscaping or it may not. Employees and subcontractors come and go. The plaintiff and his witnesses have noted the difficulty associated with finding and retaining good workers such that, even if the opportunities exist, it would be impossible to take advantage of them. However, the plaintiff suffers from symptoms that are likely to have some impact on his ability to work in a physical field.

[300] The defendants then state that, as with the claim for pre-trial loss of earning capacity, “the evidence support a finding of $10,000 per year loss… after the accidents”. Using the smaller multipliers provided in their expert economist’s report, they say that “a $10,000 per year loss has a present value of $187,940”. They “take the position that any award for future loss should be at or around this amount".

[301] I also repeat here the rather refreshing submissions of counsel respecting the so-called “capital asset approach" to the valuation of loss of future earning capacity:

> Under this heading, one cannot avoid discussing the capital asset assessment method’s dilemma, which arises from the fact that in many cases, the jurisprudence favours awarding on the basis of the plaintiff’s yearly income, with the award being for a number of years of income. Some decisions award in the range of 1 to 3 years and others go to 5 years, with still others going higher. Unfortunately, there is no clear guidance on how to determine the applicable range and where one should land once the range is established.
>
> The Defendants suggest that for minor disruptions, the range of 1 to 3 years is appropriate. For moderate disruptions, the range of 4 to 5 years is appropriate, and for more serious disruptions, more than 5 years is

> appropriate. There is no jurisprudence echoing this. It is offered in the absence of clear guidance.

[302] I agree there is little guidance in the current case law, including the trilogy referred to above, regarding the selection of annual income multiples, when that particular approach is taken to the valuation of loss of future earning capacity. Indeed, even describing it as the “capital asset approach” is, in my opinion, a misnomer, as both approaches are designed to value capital asset impairment; since *Andrews* (SCC) in 1978, it has been acknowledged that compensation is being made not for loss of earnings per se, but rather for loss or impairment of a capital asset: namely, the plaintiff's capacity to earn income. The “income multiples” approach is simply one example of how to value impairment of the plaintiff's capital asset. The “arithmetical approach” is another.

[303] In any event, the defendants conclude their submissions on this particular aspect of the plaintiff's claim as follows:

> In the plaintiff's case, his net income for 2015 was $35,605. The suggested award of $187,940 is approximately five years income at that rate and is appropriate for the plaintiff's level of disruption, which the defendants say is moderate.

[304] In their oral submissions, counsel for the defendants also addressed the question of the plaintiff's suicidal ideation as a major contingency warranting a substantial reduction in awarding damages for future economic loss. They specifically referenced Dr. Lu's evidence that there was a 66% chance that the plaintiff's medical condition will get worse in the future. They argued that, “as distasteful as it is to address”, the likely worsening of the plaintiff's medical condition probably means a “high likelihood of suicide” and that the chances of this occurring in the future may be “as high as 90%”.

[305] I agree that the subject is distasteful but it is one that has been squarely raised by the evidence and must therefore be addressed by the Court. I will do so in the next section of these Reasons.

Determination

[306] With great respect, I again reject the defendants' submissions regarding the value of the plaintiff's loss of future earning capacity, essentially for the same reasons I rejected their submissions regarding the pre-trial loss of earning capacity.

[307] I have already made a finding that if the plaintiff had not been injured in the accidents, he would almost certainly have proceeded with both an excavation business and a snow removal business long into the future, quite probably for the balance of his working life. Neither party adduced any evidence specifically addressing any future positive or negative contingencies that might affect such business undertakings.

[308] I agree with plaintiff's counsel that it is appropriate to attempt to value the plaintiff's loss of future earning capacity using what is effectively an earnings approach: with reference to reasonably anticipated profit margins for the combined excavation/snow removal books of business that the plaintiff had managed to develop, despite the pain to which he subjected himself in doing so. Such an approach is appropriate given that the plaintiff's lost earning capacity has already manifested itself as at the time of trial: *Rab v. Prescott*, 2021 BCCA 345 at para. 30. Given that the plaintiff's career path was sufficiently clear and certain, I find these losses are measurable in a "pecuniary way", such that it is not necessary to resort to the (admittedly arbitrary) income multiples approach: *Perren* at paras. 12, 32.

[309] The conservative approach would be to assume pretty much the same gross income the plaintiff's business managed to earn in fiscal years 2020, 2021 and 2022 by "adding back" replacement labour costs along with non-cash expenses such as depreciation.

[310] One could start with the chart prepared by counsel for the defendants summarizing the corporate tax returns for the 2020–2022 fiscal years of the plaintiff's wholly owned corporation, with the "add-backs" included:

Year ending October 31	Gross	Net (before taxes)	Amortization (add-back)	Labour Costs (add-back)	Total
2020	$305,594	$110,971	$13,280	$36,997	$151,097
2021	$323,144	$104,835	$33,780	$27,730	$156,523
2022	$349,685	$31,717	$37,153	$51,037	$116,865

[311] Again, these are only rough and ready calculations, which may not pass muster with a professional accountant or chartered business valuator, but which do illustrate the sort of increased profit margins the plaintiff's combined excavation/snow removal operations may have generated if the plaintiff had been able to work full-time and at full capacity in the business instead of requiring the assistance of costly third-party labour.

[312] For the purposes of illustration, I prefer to use the present value multipliers developed by the defendants' expert economist, Mr. Szekely. The only difference between his report and that of the plaintiff's expert economist, Ms. Clark, is that the latter used only "actuarial" multipliers, which accounted only for mortality and discounting, whereas the former developed "economic" multipliers which account not only for mortality and discounting but also for (negative) labour market contingencies such as labour force participation, unemployment, part-time work and related factors. Given the labour-intensive nature of the plaintiff's business, I consider it preferable to include labour market contingencies in the equation as being a more realistic reflection of the plaintiff's business realities.

[313] In any event, Mr. Szekely's present value multipliers from the date of trial to the plaintiff's age 70 is 18.79 and to plaintiff's age 65 is 18.03. Applying these multipliers to an assumed corporate net annual profit of, say, $150,000 generates present values in the range of 2.7 million (age 65) and 2.82 million (age 70) respectively.

[314] Extending this illustration further, to arrive at a final award for loss of future earning capacity, one has to deduct the present value of the plaintiff's "with-accident"

earning capacity for the remainder of his working life, as well as other appropriate contingencies, both positive and negative, that might reasonably affect the plaintiff's future.

[315] As noted earlier, plaintiff's counsel invited the court to assume a residual earning capacity of $60,000 per annum and a net negative contingency factor of 25%. Frankly, I consider this to be a very generous concession.

[316] For their part, the defendants made no submissions regarding residual earning capacity in the event the Court preferred the plaintiff's claims respecting substantial loss of earning capacity, and restricted their discussion of contingencies to the issue of suicide. No doubt this was because the defendants were urging upon the Court only a modest impairment of earning capacity and a correspondingly modest past and future loss award in that regard. They did suggest, however, that it might be possible for the plaintiff to simply “manage” the business rather than performing physically demanding work on site.

[317] I should add here that, as is my customary practice in personal injury cases, I gave the parties a memorandum addressing the desired format and content of their final submissions following the conclusion of the evidence at trial. In that memo, I specifically requested the parties to do the following: first, expressly address/adopt the analytical framework articulated in the Court of Appeal's recent trilogy; and second, also specifically provide quantum submissions "in the alternative" (i.e. in case their opponent’s approach found favor with the Court). Neither party fully complied with this request.

[318] It is extremely difficult for the Court to determine the plaintiff's residual future earning capacity. His medical outlook is bleak, and he will likely be impacted by chronic pain and some degree of depression for the rest of his life. He has some residual physical capacity and is theoretically able to perform some sort of part-time employment, if an appropriately accommodating environment can be found. He has thus far demonstrated extraordinary stoicism and forced himself to work in his

business, albeit in an increasingly reduced capacity and subject to such intense pain that it has recently brought him to the brink of suicide.

[319] The difficulty of assessment is compounded by the failure of the parties to tender any expert evidence from a vocational assessment specialist. Both the physicians and the work capacity evaluator involved in this case suggested that such a vocational assessment should be performed. Dr. Lu very strongly recommends that the plaintiff continue to work, albeit in a much-reduced capacity, because the concept of work is so important to the plaintiff's self-esteem and his mental health. The problem is that there is simply insufficient evidence before the Court enabling it to realistically determine what the plaintiff's working future, if any, might look like, let alone make any informed assessment of the economic value of that residual earning capacity.

[320] Similarly, neither party has really helped the Court with the matter of contingencies. I rather suspect that the plaintiff's approach of simply listing a number of positive and negative possibilities and plucking a 25% deduction out of the air would not pass muster with the Court of Appeal in light of the analytical framework established by the recent trilogy and other cases decided since, such as *Steinlauf v. Deol*, 2022 BCCA 96, *Lamarque v. Rouse*, 2023 BCCA 392 and *Murphy v. Snippa*, 2024 BCCA 30.

[321] The defendants' use of the "annual income multiples" approach to assessment (the misnomered "capital asset approach") may allow contingencies to be "folded into" the selection of the multiplier without much specific discussion. However, this provides little assistance to the Court, who prefers the plaintiff’s arithmetic approach to valuation and wishes to adopt and apply the trilogy’s approach to assessing and applying future contingences.

[322] If, despite being specifically requested to do so, the parties do not properly address contingencies in their submissions, the Court will not "fill the analytical gap" for them. If this results in awards they consider to be too high or too low, so be it.

[323] The contingency of “suicidality” was expressly raised and must be addressed. I agree with the defendants that it is a “possibility”. Whether it is a measurable “real and substantial” possibility is a different question. I note, however, that Dr. Lu did comment in his evidence that some chronic pain patients do indeed experience suicidal ideation, and that some of those patients may in fact actually attempt suicide in moments of despair.

[324] As a matter of law, it may be inappropriate and contrary to public policy for a tortfeasor, whose wrongdoing inflicts such pain and misery that the victim ultimately takes his own life, to be “rewarded” by a contingency damage discount. But I do not think it necessary to address that question here.

[325] The defendants have already noted, albeit in the context of reducing their general damages exposure, that the plaintiff “has no active plan” to take his own life. On the two occasions when the plaintiff actually found himself on the brink, he withdrew and in the most recent episode, reached out for professional help. Such professional assistance will remain available in the future.

[326] In these circumstances, I considered the potential for suicide to be a purely speculative consideration and not a measurable real and substantial possibility warranting a discount in the assessment of damages in this case.

[327] I would note in any event that, according to Dr. Lu, most suicide attempts do not actually succeed. He said some of these attempts actually have the unfortunate result of causing catastrophic injury instead of death, a possibility which would only increase financial loss. Thus, to the extent that this contingency should be considered at all, its potential for both “positive” and negative financial effects effectively cancel each other out.

[328] In the result, I give suicidality no weight as a negative contingency.

[329] Turning to the plaintiff’s submissions, I acknowledge that the scenario of the plaintiff as a full-time excavator operator employee provides one helpful illustration of the value of the plaintiff's earning capacity “capital asset”. The present value of his

employment as such ($80,000 multiplied by 18.79) is $1.5 million. I do not, however, accept this scenario as the appropriate approach to valuation in this case. Nor do I accept the third scenario (the “Rae Model”), because it is simply speculation that has no real grounding in the evidence as it pertains to this particular the plaintiff.

[330] In my view, a much more realistic approach for assessment purposes in this case is the second scenario suggested by plaintiff's counsel—i.e., an analysis of the plaintiff continuing to be a self-employed owner/operator in both the excavation and snow removal businesses. This, in my opinion, is what the plaintiff would most likely have done in the future had the accidents not occurred, very probably for the balance of his working life.

[331] The difficulty I have with the numbers proposed by plaintiff's counsel, however, is that he again employs the “Rae Model” to propose an annual profit in the excavating business in the amount of $230,000. I have rejected that model as being insufficiently grounded in the evidence including, most particularly, the failure to include many other expenses that the excavating business would (and, in the plaintiff's case, historically did) incur.

[332] The plaintiff's approach also fails to realistically recognize the challenges presented in operating both an excavation and a snow removal business full time and at the same time. For sure, the snow removal business is only seasonal, but the fulfilment of some 22 snow removal/de-icing contracts during any given snowfall event is almost assuredly several day’s work. It is highly unlikely that the plaintiff would do that work and also be involved in an excavation project on the same days. It is therefore unrealistic to propose a model which sees maximum earnings from snow removal at the same time as receiving maximum earnings from excavator operations. It is much more likely that the excavation operations would, to some degree, yield to snow removal and the aggregate income would be reduced accordingly.

[333] In the end, I return to the “illustration” earlier modelled above. I consider an annual net profit of $150,000 to be a realistic outcome for the combined snow

removal and excavator operations business. It has some grounding in the actual performance of the plaintiff's business when it was supplemented with substitute third-party labour. It is, I acknowledge, likely on the conservative side but I will factor that into my treatment of the residual earning capacity issue and the assessment of contingencies generally.

[334] As noted earlier, the evidence does not allow me to make any reasonable assessment or valuation of the plaintiff's residual earning capacity. He will very likely suffer from chronic pain for the rest of his life and he is competitively unemployable in his current vocation, whether on a full-time or part-time basis in the marketplace. He is not completely physically disabled and has some remaining functionality, but the parties have led no evidence demonstrating what sort of opportunities might exist in the marketplace for a person with the plaintiff's functional and educational disabilities.

[335] I consider it highly unlikely that the plaintiff can simply "manage" his current level of business using employee/subcontractor operators, alongside his own occasional labor when his medical condition permits (or even despite that condition with him simply continuing to endure the resultant pain it triggers). The evidence is that finding reliable employees is very challenging. The plaintiffs own ongoing contributions have been slowly reduced (now limited to just three of the snow removal sites). Even that much reduced contribution triggered a recent episode of pain-induced suicidal ideation. Snow removal income has drastically diminished, as has the number of clients. The chances are very high the business will soon fail altogether.

[336] In the result, I find on the evidence before me that the plaintiff's future residual earning capacity is extremely limited and has little value as a factor reducing any award for loss of future earning capacity.

[337] With respect to other contingencies, I have already concluded that the possibility of medical treatment improving the plaintiff's condition is likely outweighed by the greater probability that his condition will worsen. I give the contingency of

suicide no weight for the reasons provided earlier. Plaintiff's counsel may not have provided an analysis that strictly complies with the recent Court of Appeal case law respecting contingencies, but he does suggest that a combined negative contingency in the range of 25% is appropriate.

[338] In my opinion, a 25% deduction for contingencies alone is likely too high. However, it is a fair and appropriate deduction once an allowance for some residual earing capacity is also factored into the equation.

[339] I agree that the plaintiff was strongly attached to his work and was motivated to earn as much as possible. Given the fact that his self-esteem was very much related to his work, it is doubtful that he would have retired early or voluntarily reduced his work hours as he got older. His chosen vocation was, however, labour-intensive work, and I consider it more likely than not that the plaintiff would not have continued to work in such a physically demanding occupation to the age of 70, but more probably would have retired a few years earlier than that.

[340] In the result, I award the plaintiff $2 million for his loss of future earning capacity. It represents the present value (using an economic multiplier) of an annual income (profit) of $150,000 to age 65 (approximately 2.7 million) reduced by negative contingencies in the range of 25%, which include a small allowance for residual earning capacity. It is, I would respectfully suggest, a relatively conservative assessment and one that is fair to both parties.

COST OF FUTURE CARE

General Principles

[341] The general principles governing claims for cost of future care in personal injury cases were summarized in paras. 181–188 of *Meckic*:

> **A. General Principles**
>
> [181] *Kallstrom v. Yip* summarizes the relevant law governing entitlement to this type of award:

[429] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

> * the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
>
> * the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
>
> * the test for determining the appropriate award is an objective one based on medical evidence;
>
> * there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
>
> * the concept of "medical justification" is not the same, or as narrow as, "medically necessary";
>
> * admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
>
> * however, specific items of future care need not be expressly approved by medical experts... It is sufficient that the whole of the evidence supports the award for specific items;
>
> * still, particularly in non-catastrophic cases, a little common sense should inform the analysis, despite however much particular items might be recommended by experts in the field; the court should have regard for whether any particular expense will actually be incurred and an allowance can be made for any contingency, any real and substantial possibility, that the cost may not in fact be incurred;
>
> * in motor vehicle cases, given the distinction between mandatory and discretionary benefits under s. 88 of Part 7 of the Insurance (Vehicle) Regulation, BC Reg. 447/83 and the requirement of mandatory deductions under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, it is desirable for the trial court, where possible, to assign specific amounts for each future care item claimed;
>
> * properly considered, homemaking costs are awarded for loss of capacity and are distinct from future cost of care claims; and

* no award is appropriate for expenses that the plaintiff would have incurred in any event.

See *Andrews v. Grand & Toy Alberta Ltd*.; *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), [1990] 49 B.C.L.R. (2d) 33 (S.C.), aff'd (1987), [1990] 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd.* (1996), 1996 CanLII 3429 (BC SC), 19 B.C.L.R. (3d) 63 (S.C.); *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128; *Sunner v. Rana*, 2015 BCCA 406.

[182] Quantification of claims for future cost of care can be complicated. Pre-trial expenses incurred are classified as special damages and, assuming the costs were reasonably incurred and are reasonable in amount, will usually be compensated in full, including an allowance for pre-judgement interest where appropriate.

[183] The cost of future care and other similar expenses is first divided as between (1) initial capital outlay, and (2) ongoing expenses. The first is calculated as a straightforward lump sum. The second, much like other future pecuniary loss such as earning capacity, is awarded by way of a lump sum representing an amount which, conservatively invested, will produce a stream of income sufficient to cover the future costs when incurred and which fund will be depleted when such costs will no longer be incurred. The calculation involves the application of a "real rate of return" (gross rate of return minus rate of inflation, in British Columbia presently, the 2% rate mandated by the regulation made under section 56 (3)(b) of the *Law and Equity Act*) grossed-up to deal with taxation of such returns, and adjusted for appropriate contingencies.

[184] Contingencies applicable to damages for cost of future care often warrant separate consideration from those related to future loss of earnings (earning capacity). The inquiry under the two heads of damages has a different focus. Whereas the concern under loss of earnings is mostly into "what would have been but for the accident", the cost of care inquiry is into "what will now occur, as a result of the accident". The exercise is still a manifestation of the "simple probability" standard of proof referred to earlier in this judgment, where possibilities and probabilities are weighted according to the degree of likelihood of their occurrence.

[185] The contingency inquiry takes into account the real and substantial possibility that the estimated future care expenses will not in fact be incurred, as well as the possibility that they might actually be more than the original assessment contemplated. In many cases, the negative and positive contingencies specific to the plaintiff may counterbalance each other. It is also not uncommon for competing possibilities to be accommodated in the initial calculations which are almost always just a "best estimate" of the plaintiff's future needs in any event.

[186] In British Columbia, once all of the above complicated assessments and calculations have been performed, the award for future care expenses is

> then further adjusted to account for a statutory deduction mandated by section 83 of the *Insurance (Vehicle) Act*. That section provides for a "deemed release" by the plaintiff to the extent she "receives or is entitled to receive benefits respecting the loss on which the claim [for damages] is based". The term " benefits" is defined in the *Act* to include:
>
> > * first party no-fault benefits paid or payable by ICBC to the plaintiff for health care, rehabilitation and related expenses; and,
> >
> > * similar benefits provided under (1) other insurance policies, (2) certain specified programs offered by both levels of government, and (3) also under the terms and conditions of any employment or collective bargaining agreement.
>
> This legislation can significantly reduce the amount of future care damages that would otherwise have been awarded by the court under common law principles governing the assessment of damages for personal injury. Instead of being awarded a larger lump sum amount of money which the plaintiff would otherwise control, the plaintiff ultimately receives not only a lesser sum but is also required to deal with ICBC, potentially for the rest of her life, in respect of various aspects of her ongoing healthcare, medical treatment and rehabilitation expenses.
>
> [187] The statutory deduction mandated by section 83 of the *Insurance (Vehicle) Act* is usually resolved by the parties directly or, if necessary, by way of a further application to the court before any final judgment is formally entered.
>
> [188] The process often renders moot significant portions of the court's assessment of future care damages (and the related judicial effort in that regard).

[342] The “deemed release” provided for in s. 83 of the *Insurance (Vehicle) Act* has been the subject of considerable litigation in recent years. One of the concerns animating some of the litigation is that a plaintiff is at risk of being “short- changed” if the damage award for cost of future care is reduced on account of future benefits payable by ICBC which are never actually received, either because the plaintiff does not wish to navigate the necessary bureaucratic processes or the insurer refuses to pay for one reason or another. Some cases have addressed such uncertainties by applying a contingency reduction to the amount of the “deemed release” applied to the tort damages award: see *Watson v. Fatin*, 2023 BCCA 82 and *Blackburn v. Lattimore*, 2023 BCCA 224. Others, particularly those cases where ICBC has a history of treating the plaintiff's benefit claims poorly, have resulted in a denial of the

"deemed release" altogether: see, for example, the most recent decision of *Taylor v. Peters*, 2024 BCSC 417.

[343] As noted, any issues respecting s. 83 of the *Insurance (Vehicle) Act* will be dealt with in the second phase of this proceeding should the parties be unable to settle the matter between themselves. I will therefore confine myself at this stage to assessing the relevant damages in accordance with the tort principles set out above.

Plaintiff's Submission

[344] The plaintiff commissioned a cost of future care analysis from his expert, Mr. Shew who is a Certified Cost of Future Care and Life Care Planner. He reviewed the expert reports of Drs. Ailon and Lu, researched the cost of any future treatments recommended by the physicians or himself, and compiled a summary of future care items, their estimated cost and estimated frequency. Plaintiff's counsel repeated that chart (with some modifications) in his submissions, adding the present value of various items using the appropriate multiplier for the remainder of the plaintiff's life expectancy as calculated by the plaintiff's expert economist, Ms. Clark. I repeat the plaintiff's chart here:

Item or Service	Cost	Estimated Replacement	Total Cost
BADLs, IADLs, Mobility and Symptom/Pain Management			
Assistive or Adaptive Aids	$200 - $300	Every 2 – 4 years	$1,577 - $4,578
Household Environment			
Deeper, Non-Daily cleaning	$1,074 - $1,213	Yearly	$30,711 - $34,674
Gutter Cleaning	$158 - $189	Every 2 years	$4,503 - $5,404
Household Repairs or Maintenance	$960 - $1,530	Yearly*	$28,820 - $45,932
Allied Health			
Occasional Physiotherapy or Kinesiology	$405 - $1,500	Yearly	$13,509 - $45,031

Fitness Equipment or Membership	Initial - $500 Replacement of Equipment - $250 Membership - $528	One time then every 3 - 5 years* Yearly*	$297 - $495 $813 - $2,338 $15,851
Occupational Therapy	Treatment - $960 - $1,560 Travel - $288 - $468	One time*	$950 - $1,543 $285 - $463
Psychological Treatment (Initial Assessment)	$2,025 - $3,760	One time	$2,003 - $3,720
Present Medication			
Tylenol Muscle & Body	$207	Yearly	$5,932
Tylenol #3	$30 - $34	Yearly	$901 - $1,021
Cambia	$2,192 - $2,922	Yearly	$65,806 - $87,721
Other Considerations and/or Contingencies			
Intermittent Treatment Sessions	$1,008 - $1,512	Yearly	$32,423 - $45,031
Additional, Potential Medication			$ - $
Vocational Assessment and Counselling	Assessment - $1,575 - $1,890 Counselling - $126 - $157.50/hour	One time*	$1,484 - $1,781
Chronic Pain Program(s)			Covered by MSP

[345] Plaintiff's counsel then submits:

> The plaintiff's total cost of future care ranges from $215,111-$320,746 less $5,404-$13,509 allotted for snow removal (at the plaintiff's home). Weighing the positive and negative contingencies, the plaintiff submits that an award of $300,000 is reasonable.

Defendants' Submissions

[346] The defendants challenge a number of the future care items listed by Mr. Shew. They note that many of the suggested assistive aids for daily living do not

appear in the medical reports. They say there is therefore “inadequate support for such equipment”.

[347] With respect to household maintenance, the defendants opine that many of these tasks are matters that the plaintiff can likely manage himself from time to time, pointing out that there is “inadequate evidence” to indicate that he needs help and suggesting he has already been managing current demands one way or another. Other items such as “assistance with household repairs and maintenance” are considered to be so vague and lacking in detail that they do not allow quantification. They point out that the plaintiff has always been hesitant to take medication and so any award in that regard should be limited. They say the plaintiff is already well-established in his chosen occupation and there is no need for any vocational assessment or counselling in that regard.

[348] The defendants summarize:

> From the foregoing, the defendants submit any future care award should be quite limited. Attendance at a publicly funded multi-disciplinary clinic such as the one in Nanaimo is justified and an award for six sessions of “allied health” treatments, focusing on workout modification and actual treatment as needed is reasonable. As per the Clark report, the present value of $1,000 to age 65 is $22,753. Allowing for miscellaneous expenses over and above this, the defendants submit that a future care award of $30,000 is reasonable.

Determination

[349] Once again, I find the submissions of the parties to be less than entirely helpful. I will do the best I can with what has been put before me.

[350] First, I make no award for assistive aids of living or with respect to housekeeping or household repairs and maintenance. This is because such claims were waived by the plaintiff who has received an “augmented” award of nonpecuniary damages in recognition of his loss of housekeeping capacity. Furthermore, if history is any indication of the future, it is rather likely that the plaintiff will insist on performing routine household maintenance notwithstanding the pain triggered by such activities.

[351] Next, I make no award for the cost of any chronic pain clinic. Previous cases have awarded considerable sums for the costs of such clinics in a private setting, including the costs of out-of-province travel for the purpose of attending such clinics. However, the plaintiff makes no claim for such costs and is seemingly content with the publicly funded alternative notwithstanding lengthy wait lists. It is not the role of the Court to comment on the wisdom of such a choice.

[352] With respect to medication, the plaintiff presently takes regular Tylenol, Tylenol 3 for muscle and body pain, and Cambia for headaches. I agree that this is appropriate to his needs and accept the plaintiff submissions regarding the lifetime cost of such medication. I assess aggregate damages for these medications in the amount of $75,000.

[353] The independent medical examiners recommend other medications including antidepressants and sleep medication. I have no report from the plaintiff's family doctor regarding past or present prescriptions, and I infer the additional suggested medications have not actually been prescribed. The plaintiff's own chart of costs is blank under this heading. In such circumstances, I am unable to make any award for additional medication, but I likely would have done so if I had been asked and if it was supported by one of the plaintiff's current health providers.

[354] With respect to “allied health” services, I agree that they are supported by the evidence and an award should be made. The plaintiff has undergone physiotherapy in the past, but has found it of little assistance. Indeed, on occasion, it actually worsened his pain. He did, however, find massage therapy to be particularly helpful and I expect this will remain the case in the future. Mr. Shew estimates the yearly cost for monthly one-hour sessions to be approximately $1,500. The present value of that cost over the plaintiff's lifetime is $45,000, which is the amount I award in that regard.

[355] In previous chronic pain cases, where the plaintiff did not have the benefit of a family doctor proactively triaging their various medical treatments, I awarded damages so that an occupational therapist might provide such case management

services. Mr. Shew comments on this in his report, suggesting 8 to 12 sessions with such a therapist with the latter individual ultimately determining whether further sessions might be required. He estimates the cost of this to be approximately $2,000, including travel expenses, and I therefore award that amount on a one-time basis.

[356] All the physicians recommended regular physical exercise as an important component of the future treatment for the plaintiff's chronic pain. Whether this be exercise in a swimming pool or a gym facility or simply self-directed outdoor exercise, the involvement of a kinesiologist to provide occasional assistance with regimen adjustments is also recommended. The cost for an annual pass for recreational facilities in the area in which the plaintiff lives is approximately $500, the present value of which for the balance of the plaintiff's lifetime is $15,000. I therefore award that amount—not only for the annual pass, but also as including ongoinging consultations with appropriately qualified kinesiologists.

[357] I also agree that the cost of a vocational assessment is appropriately awarded in this case. It is possible that the plaintiff will continue attempting some snow removal work in the future notwithstanding the pain it has caused him in the past and will likely cause him again. It is, however, highly likely that business is not sustainable and will fail like the excavator operations before it. I agree that he needs a vocational assessment for work options in light of both his physical and learning disabilities so that he can make some informed choices in the event that alternative forms of even just limited part-time employment become possible. The cost of such an assessment along with some related counselling is approximately $2,000, which is the amount I award in this case.

[358] I recognize that some psychological treatment for the plaintiff is almost certainly going to be required. It appears from the evidence, however, that this is now available in the publicly funded chronic pain clinic in Nanaimo for which no costs were claimed. Hence no separate award for available cost-free psychological treatment is warranted at this time.

[359] In summary, the plaintiff is awarded the following amounts as damages for the cost of future care:

Medication: $75,000

Massage Therapy: $45,000

Occupational Therapist: $2,000

Annual Recreational Pass and Consultations for Kinesiologists: $15,000

Vocational Assessment: $2,000

TOTAL: $139,000

[360] I expect most, if not all, of the above future care treatments would be covered under the Part 7 no-fault benefits available to the plaintiff and that the deemed release provisions of s. 83 of the *Insurance (Vehicle) Act* might therefore negate most, if not all, of this award. If so, adjustments to the award for tax gross-ups may not be necessary. Should the parties be unable to agree on these or related matters, they are at liberty to apply for a ruling from the Court.

SPECIAL DAMAGES

[361] The plaintiff incurred certain out-of-pocket expenses related to the treatment and care of his injuries. The parties have agreed to quantify his claim for special damages in the amount of $15,000, and I award that amount under that heading.

[362] The claim for special damages is of course subject to prejudgment interest, and I leave it to the parties to make the necessary calculation for the purposes of any final order.

IN-TRUST CLAIM

General Principles

[363] In *Dykeman v. Porohowski*, 2010 BCCA 36, the Court of Appeal set out various principles related to this type of award, which may be summarized as follows:

- it is settled law in this province that, in certain circumstances, the court may make an award of damages where third persons, usually but not always limited to family members, have provided services to the injured plaintiff which, although gratuitous, nevertheless have real economic value;

- such services usually relate to the plaintiff's personal care or the maintenance of their household, but can also relate to the provision of assistance with the plaintiff's business and other family responsibilities;

- such awards are colloquially referred to as “in-trust” even though it is the plaintiff who recovers them and the British Columbia courts do not generally impose trust terms in their orders, but rather treat the matter as part of the plaintiff's loss;

- such claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services themselves and also with respect to the question of causation;

- the court will consider whether the services were provided simply as part of the usual “give-and-take” between family members, in which event they will generally not be compensable, or whether they were “above and beyond” that level such that some compensation is appropriate;

- as well, the court will consider whether the services were actually necessitated by the plaintiff's injuries or whether they would have been provided in any event… in the former situation, damages may be awarded but not so in the latter;

- the amount of compensation must be commensurate with the plaintiff's loss and must be reasonable… care must be taken to avoid excessive awards;

- as noted in *Bystedt v. Hay*, 2001 BCSC 1735, quantification should reflect the true and reasonable value of the services performed, taking into account the

time, quality and nature of those services and also reflecting the wage that might be paid to a third-party substitute provider; and

- the maximum value for such services will generally be the reasonable cost of obtaining them from outside the family, however where the opportunity cost to the family member providing the services is actually lower than the cost of obtaining the services independently, the court will generally award that lower amount.

[364] In an earlier case, *Ellis v. Star,* 2008 BCCA 164, the Court of Appeal stated that in-trust claims must be expressly and properly pleaded with a “degree of specificity”.

[365] In this case, the three Notices of Civil Claim issued by the plaintiff do not expressly plead an in-trust claim but instead simply allege “the following loss and damage… as a result of the Collision and injuries sustained”:

> “(b) special damages for: …
>
> III. wages lost and expenses incurred by third parties on behalf of the plaintiff, either voluntarily or for remuneration;”

[366] In their respective Responses to Civil Claim, each set of defendants purport to expressly deny “the facts alleged” in the above paragraph of the plaintiff's pleading and, for their own part, plead “additional facts”, namely, that “the plaintiff sustained no injury, loss, damage or expense as a result of the collision(s)”.

[367] In my view, the in-trust claim is likely not pleaded by the plaintiff with the specificity required by the Court of Appeal. However, the defendants were well aware that such a claim was being pursued and no doubt obtained discovery of the details. For sure, the trial brief filed by the plaintiff in each of the three actions specifically identifies the in-trust claim as an issue in dispute, noting that “the plaintiff claims general and special damages in-trust for the care and services provided by

his family". In each of their respective trial briefs, the defendants expressly state that they "deny entitlement to an in-trust claim".

[368] In their submissions regarding this claim, the defendants took no issue with the manner in which the claim had been pleaded I will therefore say nothing further about that aspect of the matter.

Plaintiff's Position

[369] The plaintiff claims an in-trust award of damages for the "constant assistance" of the plaintiff's father, Mr. Canfield, provided to Mr. Moen and his business soon following MVA#1 and MVA#2. Counsel points to Mr. Canfield's evidence that he has been working essentially on a full-time basis for the plaintiff from 2016 to the time he decided to "pull back" in 2022 or 2023. He says Mr. Canfield was present on nearly all the contracting projects (except the one in Burnaby in 2022) and he performed all tasks for the plaintiff's business "from the most demanding labour, to excavator operation, to salting". Counsel claims these contributions "far exceeded the ordinary relationship" between the plaintiff and his father and, indeed, "took a toll" on the latter's own life ("financial troubles" due to the "reduced pay" he was receiving from the plaintiff and the stress on his family).

[370] Counsel quantifies the claim with reference to Mr. Canfield's oral evidence that he was making gross business income of $165,000 and net income of $85,000 annually from his own line of work before the plaintiff's accidents. Mr. Canfield also estimated that his current hourly rate in his business is $100 an hour.

[371] Counsel therefore advances a claim for the shortfall between "the value of Mr. Canfield's work rendered", based on his previous annual earnings and the payments received from Mr. Moen, coming up with a claim totaling $300,886 comprising the following:

	Expected Full-Time Earnings	Amount Received from Mr. Moen	Source	Loss

2016	$85,000	$32,052	Exhibit 3: Tab 11, p.2	$52,948
2017	$85,000	$31,046	Exhibit 3: Tab 12, p.2	$53,954
2018	$85,000	Subcontracts: $38,449 Wages: $29,621	Exhibit 3: Tab 13, pp. 2-3	$16,930
2019	$85,000	Subcontracts: $25,421 Wages: $27,713	Exhibit 3: Tab 14, pp. 2-3	$31,866
2020	$85,000	Subcontracts: $26,983 (minus Healing Soil Microbes dispatching: $200) (minus Healing Soil Microbes clerical: $400) Wages: $10,014	Exhibit 3: Tab 18, Tab 24 p.2	$48,603
2021	$85,000	Subcontracts: $7,290 (minus Bill Moen: $300) Wages: $20,440	Exhibit 3: Tab 19, Tab 25 p.2	$57,570
2022	$85,000	Subcontracts: $24,100 Wages: $21,885	Exhibit 3: Tab 20	$39,015

[372] Above and beyond these amounts, an additional in-trust amount is claimed for all of Mr. Canfield's work on the plaintiff's new home, which basically required

renovation “inside out and top to bottom”. The plaintiff testified that the cost of materials for the home renovation project was approximately $160,000. In the plaintiff's experience, labour costs are roughly the equivalent to the cost of materials and he estimates that his father had probably performed $100,000 worth of labour on the project.

[373] Counsel also presents what he says is “Mr. Canfield's estimate” of his “loss”: 30 hours x current hourly rate $100/hour x 50 week/year = $150,000. However, “Mr. Canfield claims $125,000 for the renovation work done on the home, as a midpoint between his and Mr. Moen's rough estimates”.

[374] Hence, counsel submits, “Mr. Canfield advances an in-trust claim, encompassing both assistance with Mr. Moen's business and his home renovation, totaling $425,886”.

Defendants Submissions

[375] The defendants acknowledge that “there is some support in the jurisprudence for the theory of making an in-trust award regarding Mr. Canfield's labour” but emphasized that such an award can only be made “if the plaintiff can establish the necessary facts”. They say that “the evidence in support of this claim is spotty at best” and argue that the plaintiff has failed to establish entitlement. They say “in the alternative, any such claim should be very, very limited” (sic).

[376] A little more substantively, the defendants also make the following points:

- none of Mr. Canfield's evidence is corroborated… there are simply no records setting out what work the he did, how long he took to do it, or what he was paid… Mr. Canfield's “allegation” that his labour is worth $100 per hour is also entirely without corroboration;

- Mr. Canfield declared bankruptcy (in 2018) and, although he denied it when it was put to him, “the question arises whether the decision not to take full

payment was in some way tied to a desire to limit assets that would be rolled into the bankruptcy"; and,

- having "received the benefit" of partially free labour from Mr. Canfield, the plaintiff is "now seeking to recover the dollar value of that free labour so as to benefit himself and his business a second time" … "this is impermissible double recovery".

Determination

[377] I must confess to some doubts regarding the proper legal basis for these types of in-trust awards. Both the personal injury bar and the court seem to agree that there is no legal basis for the person(s) supplying the gratuitous services to the plaintiff to bring a claim for compensation in their own name against the tortfeasors. Hence, presumably, the notion of the plaintiff bringing a claim for the value of services received which he then holds "in-trust" for the benefit of the service provider.

[378] I am not aware of any cases where a (presumably ungrateful or greedy) plaintiff received such an in-trust award, failed to pay it to the "beneficiary", and the latter successfully sued for its recovery. There may be some basis in law that might impose such liability and perhaps this is why the claim is colloquially called an "in-trust" claim/award, albeit without the court expressly imposing any such trust obligation on the plaintiff to whom the money is actually paid.

[379] Nevertheless, the Court of Appeal has expressly endorsed the making of these types of award if appropriate circumstances exist and it is not therefore necessary for me to peer too deeply into murky academic waters.

[380] I too am concerned about the complete lack of documentary corroboration respecting Mr. Canfield's work hours on behalf of the plaintiff and the market value of that labour.

[381] One of the documents provided to the Court by counsel for the defendants during their cross-examination of Mr. Canfield was a nine-page Form 68 “Notice of Bankruptcy, First Meeting of Creditors” dated April 3, 2018. The document was not marked as an exhibit, but reference was made to, and Mr. Canfield acknowledged, an attached Monthly Income and Expense Statement which stated “net self employment income-per 2016 T-1 tax return in the monthly amount of $3,529”. None of Mr. Canfield's tax returns were put into evidence, nor were any accounting records from his sole proprietorship “Canfield Services” to corroborate his testimony about pre-accident net income from his business at $85,000 per annum.

[382] The Form 68 Notice, which is a sworn document, discloses mostly small creditors, the two most substantial being the mortgagee of Mr. Canfield's residence ($364,000) and the Canada Revenue Agency (approximately $90,000). The reasons for his financial difficulty were stated to be “in 2009 the economy collapsed, there was no work. Fell behind on payments and ended up in debt due to inconsistent income and poor money management”.

[383] I do not doubt that Mr. Canfield essentially came to work on a full-time basis for the plaintiff and that it was his contributions to the business that were largely responsible for much of the profit generated by that business and ultimately received by the plaintiff personally by way of dividends. Mr. Canfield's assistance to the plaintiff's company was far beyond the usual “give-and-take” of services that might be expected from time to time between family members.

[384] It is also probably true to say that the value of Mr. Canfield’s services in the marketplace generally exceeded minimum wage, and it is not really clear on the evidence how he and the plaintiff ultimately came to agree on the (perhaps modest) level of compensation that was actually paid.

[385] Without satisfactory corroboration, I am unable to accept Mr. Canfield's evidence that he had a net income of $85,000 from his own home maintenance business. It would have been a simple matter for his income tax returns and/or historical accounting information to have been provided to substantiate the claim.

According to his own sworn statement, he had “inconsistent income” before the accidents, and his net self-employment income in 2016 was approximately $40,000-$45,000.

[386] It follows that I cannot accept the methodology urged by plaintiff's counsel—namely, assessing the award for Mr. Canfield's contributions as the difference between what he actually received from the plaintiff's company and “expected full-time earnings” of $85,000. I do, however, agree that Mr. Canfield was likely “underpaid” for his contributions and that some additional compensation is warranted.

[387] I do not know what the Court of Appeal means when it says the awards should be “commensurate with the plaintiff’s loss”, and neither party addressed this concept in their submissions. I am however, alert to the requirement that the award should not be excessive, and the Court should consider possible “double recovery” implications.

[388] One very rough and ready approach, one that I think is fair to both sides, would be to award the plaintiff, on behalf of Mr. Canfield, an extra $10,000 per annum from 2017 to 2022, in recognition of the value of his extraordinary contributions to the plaintiff beyond the amount he was actually paid. That amounts to $60,000.

[389] Likewise, I cannot accept Mr. Canfield's claim that the renovation work he carried out to the plaintiff's house has a value of $100 per hour and $150,000 in total. Mr. Canfield has never made that much money in the past … as noted above, his annual income is claimed to have been $85,000 annually.

[390] There is no doubt that the house required substantial repairs and that the plaintiff was not able to do those repairs by himself (as would have been the case but for the accidents). I accept and find as a fact that Mr. Canfield did contribute a substantial amount of his time gratuitously to the project, and I again accept that it was likely above and beyond the sort of “give-and-take” often made by family

members, one that in this case was caused by, indeed required because of, the plaintiff's injuries. Even without those injuries, however, I expect the father would have contributed some of his time in helping his son carry out the required work on the house in any event, and he would have done so without any expectation of compensation. The question, then, is how to value the “extra” contribution made in that regard.

[391] I simply do not have the independent evidence which allows for a reasonable and fair evaluation of Mr. Canfield's contribution to the renovations. It is much more than zero and much less than $125,000. In the result, I award $25,000, recognizing that this is somewhat arbitrary and likely a conservative number.

[392] The total in-trust award for Mr. Canfield’s services to the plaintiff to the date of trial is thus $85,000.

SUMMARY AND CONCLUSION

[393] For the reasons stated, I award the plaintiff damages against the defendants jointly and severally in the following amounts:

Non-Pecuniary General Damages	$300,000
Past Loss of Earning Capacity	$374,000 (+ Prejudgment Interest)
Future Loss of Earning Capacity	$2,000,000
Cost of Future Care	$139,000
Special Damages	$15,000 (+ Prejudgment Interest)
In-Trust Claim	$85,000
Total:	**$2,913,000**

[394] Should the parties be unable to agree on any adjustments to the award, whether in respect of income tax on past loss of earning capacity, tax gross up on the cost of future care, or deductions mandated by the provisions of the *Insurance (Vehicle) Act*, you may apply for a determination of the matter in the usual manner.

[395] Likewise, should anything have occurred between the parties that might affect any award of costs in this case and which cannot be settled between them, the parties may apply for a hearing in the usual manner. Otherwise, costs will follow the event and are awarded to the plaintiff to be assessed on Scale B of Appendix B of the Supreme Court Civil Rules.

"Kent J."