IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Van Sprang v. Tweed,*
2021 BCSC 69

Date: 20210115
Docket: M54488
Registry: Vernon

Between:

Dion Van Sprang

Plaintiff

And

**Omar Harold Tweed, Darcy Westendorp,
and Conestoga Trucking Ltd.**

Defendants

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:	J.D. Cotter A. Edwards
Counsel for the Defendant Omar Harold Tweed:	D.M. Darman
Place and Date of Trial/Hearing:	Vernon, B.C. June 15 – 18, October 20 – 22, 2020
Place and Date of Judgment:	Vernon, B.C. January 15, 2021

Introduction

[1] The plaintiff seeks damages for injuries he received in a motor vehicle collision that occurred in Salmon Arm, British Columbia, on February 10, 2017. The defendant denies liability for the motor vehicle collision and challenges the plaintiff's assertion as to the severity of his injuries and their impact upon him. The defendant also alleges that the plaintiff has failed to mitigate his damages.

[2] The claims against the defendants Darcy Westendorp and Conestoga Trucking Ltd. were discontinued by consent.

Background

[3] The plaintiff is 36 years old. He is married to Amanda Johnson and they have two young children. Cole, now six, and Amanda Johnson were both in the vehicle at the time of the collision. Olivia, the plaintiff's second child, was born after the motor vehicle collision.

[4] The plaintiff lives with his family and his father near Scotch Creek in the Shuswap region of British Columbia, approximately one hour from Salmon Arm. He grew up in Calgary, Alberta, but followed his father, Darren Van Sprang ("Darren"), to BC in or about 2003. He and his father both lived in the Kelowna area before moving to the Shuswap where he met his wife Amanda.

[5] Darren is 57.

[6] Their current residence was acquired in 2017 after the motor vehicle collision. It is a 1.7 acre rural property which is a combination of naturally forested and landscaped areas surrounding the home. Darren lives in a suite in that home.

[7] The plaintiff's interests outside of his work focus on outdoor activities. Prior to the motor vehicle collision these included snowboarding, snowmobiling, fishing, dirt bike riding and hiking.

[8] The plaintiff quit school in grade 11. He initially worked in construction before following his father's lead in his employment pursuits. Darren is a journeyman sheet

metal worker. The plaintiff followed his father to several employers in that industry in Alberta before Darren obtained similar employment in Kelowna, British Columbia. Soon after, the plaintiff moved to Kelowna and again obtained work with the same employer as his father. In or about 2007, Darren decided to start his own company and incorporated Protech Heating and Air Conditioning Ltd. (“Protech”). Darren is the sole shareholder.

[9] Since its incorporation, the plaintiff has worked with his father under that company banner. As a result of a desire for a more rural lifestyle and to seize an opportunity to become a dealer of a brand of heating and air conditioning equipment, the two moved the business and their residence to the Scotch Creek area in or about 2010. Since that time, the plaintiff and Darren have continued to work together and for the most part have shared residences. Those residences had been rented. Like the property they now own, they were selected on the basis of their ability to also serve as a base of business operations.

[10] Protech does heating, ventilation and air conditioning ("HVAC") work including sheet-metal work for residential and commercial customers. The plaintiff has not pursued any apprenticeships or specialized education to augment the business potential or his earnings.

[11] The plaintiff's income in accordance with an agreed statement of facts entered as an exhibit in this trial is:

Year	**Income**
2014	$14,155
2015	$16,039
2016	$25,455
2017	$16,366
2018	$17,257

[12] The corporate financial statements for Protech show the following:

YEAR	REVENUE	COSTS	SUBCONTRACTING	NET INCOME
2012	$156,765.81	$112,153.82	$15,268.22	-$2,739.70
2013	$162,230.29	$129,661.92	$11,622.68	$1,939.88
2014	$193,964.28	$151,428.21	$20,565.00	-$8,076.69
2015	$233,093.32	$179,727.23	$25,619.81	-$1,067.56
2016	$241,742.28	$174,532.10	$22,815.00	$9,086.05
COLLISION **Feb 10, 2017**				
2017	$203,744.22	$151,079.23	$35,453.81	-$213.51
2018	$185,454.87	$150,258.95	$17,260.00	-$3,081.47
2019	$345,398.75	$280,059.67	$63,271.27	$6,124.07

[13] There is no clear indication of Darren's income from the financial statements. The expenses recorded in them include management fees of $3,500 annually but there is nothing that is recorded specifically as a payment to him. There are other expenses that benefit him such as vehicles, telephones and rent but the evidence of Darren did not deal with these in any detail in his testimony to explain further.

[14] Prior to the collision, the plaintiff had no medical conditions except well-managed asthma. He was able to meet all of the physical demands associated with the work for Protech.

[15] The collision occurred at approximately 2:00 PM on February 10, 2017.

[16] Many of the facts and circumstances surrounding the motor vehicle collision are not in issue and are set out in some detail including photographs in the agreed statement of facts/chronology. At the time of the collision, the plaintiff was travelling

in his full-size 2003 Ford F150 pickup. Darcy Westendorp was operating a 2005 Peterbilt semi-truck with a tri-axle van-style trailer connected (the "Westendorp Vehicle"). The defendant, Omar Tweed ("Tweed"), now deceased, was driving a 2003 Honda CRV. Both the plaintiff and Mr. Westendorp were eastbound in adjoining lanes on the TransCanada Highway. The plaintiff was in the centre lane and Mr. Westendorp in the curb lane to the right. They were travelling through the intersection at 30th Street Southwest. Traffic entering the TransCanada Highway from the north and intending to proceed eastbound, as Tweed was doing, was obligated to yield to through traffic as they use a short merge lane. The agreed statement of facts contains this summary of the mechanics of the collision:

> 13. As the plaintiff approached and passed through the intersection, he was travelling in the left of the two eastbound lanes.
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> 14. As the plaintiff approached and passed through the intersection, Mr. Westendorp was travelling in the lane to his right.
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> 15. The plaintiff and Mr. Westendorp passed through the intersection on a green light.
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> 16. As the plaintiff and Mr. Westendorp cleared the intersection, the plaintiff accelerated his vehicle.
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> 17. As or just after the plaintiff and Mr. Westendorp passed through the intersection, the defendant Tweed attempted to enter onto the Trans-Canada Highway eastbound, from 30th Street SW (northbound), for which the defendant Tweed had a yield sign.
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> 18. Prior to entering onto the Trans-Canada Highway from 30th Street SW, the defendant Tweed would have passed the yield sign.
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> 19. When the Defendant Tweed entered onto the Trans-Canada Highway, his vehicle collided with Mr. Westendorp's vehicle.
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> 20. When the Defendant Tweed pulled onto the Trans-Canada Highway, Mr. Westendorp braked and steered his vehicle to the left.
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> 21. After passing through the intersection, a collision occurred between the plaintiffs vehicle and Mr. Westendorp's tractor trailer. Thereafter, the plaintiffs vehicle spun in front of Mr. Westendorp's tractor and flipped onto its side, coming to a rest on the right side of the Trans Canada highway (eastbound).
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> 22. After the plaintiff's vehicle came to a stop, it was struck by the defendant Tweed's CRV.

[17] Tweed was issued a violation ticket for failing to obey a yield sign. He did not dispute the ticket.

[18] Following the motor vehicle collision, the plaintiff and his family obtained transportation home. The next day the plaintiff attended the local hospital. After assessment, he was given a prescription for Tylenol 3.

[19] On February 16, 2017, he attended his family physician, Dr. Welder for the treatment of injuries he alleges arose from the motor vehicle accident. He attended on three more occasions up to June 5, 2017. He next returned to his family physician in 2019, on July 15 and August 2. There are no records or expert reports from his family physician in evidence. Dr. Welder did however testify at trial regarding the various attendances by the plaintiff.

[20] The plaintiff testified that chiropractic, physiotherapy and/or massage treatments were recommended by Dr. Welder. The plaintiff attended Shuswap Physiotherapy Services on two occasions in March 2017.

[21] The plaintiff was assessed for court purposes by two experts for the plaintiff: a physiatrist, Dr. McKee; and an occupational therapist, Nadia Hudon. Dr. McKee saw the plaintiff on January 24, 2019, and his report is dated April 22, 2019. Ms. Hudon conducted a functional capacity evaluation on November 5, 2019, and formulated recommendations for future care. Her report is dated February 7, 2020.

[22] The plaintiff's principal complaints during his 2017 attendances with his doctor were in relation to his back. At trial, the plaintiff testified that he continues to have pain in his back on a constant basis and pain in his neck every two to three days and headaches two to three times per month.

[23] Dr. McKee opines in his report that the plaintiff ". . . has evidence of thoracic spine dysfunction, with facet joint and ligament involvement, along with secondary myofascial pain involving muscles in the left interscapular region."

[24] The plaintiff has continued his employment with Protech to the date of trial. He testified that he did miss some time from that work but it was not documented and did not result in any deduction in his pay.

Issues and positions of the parties

[25] Both liability and quantum are in issue.

Liability

[26] All the mechanics of the collision are agreed. The parties disagree on what specifically caused the plaintiff's vehicle and the Westendorp Vehicle to come into contact. The defendant argues that the plaintiff lost control of his vehicle and collided with the Westendorp Vehicle as the plaintiff attempted to accelerate past the Westendorp Vehicle. The defendant argues that, if not the sole cause of the accident, the plaintiff's negligent loss of control in the wet and slushy conditions was a contributing factor to the collision. The defendant agrees that absent a finding that the plaintiff lost control of his vehicle, liability must rest entirely with the defendant Tweed.

[27] The plaintiff argues that Tweed's illegal and negligent driving in entering the lane of travel of the Westendorp Vehicle resulted in Mr. Westendorp breaking hard and steering left resulting in the collision with the plaintiff's vehicle. He argues that Mr. Westendorp likely entered the plaintiff's lane of travel. The plaintiff says that the defence assertion that, at the same moment Mr. Tweed entered the TransCanada Highway, the plaintiff lost control of his vehicle is not supported by any objective evidence and is so improbable that it should simply be rejected.

Quantum of damages

[28] The general proposition of the plaintiff underlying his various damage claims is that he was a healthy and active young man prior to the accident and he is now faced with a life of chronic pain.

[29] He says that he was a capable employee of his father's company and on a path to assuming ownership but that he also had other career alternatives. All of his options were in physically demanding occupations. The result of the motor vehicle collision, he argues, is permanent pain in his neck and back resulting in loss of functional capacity limiting his capacity to do the HVAC work of his father's

company. If he is able to assume control of the company after his father's retirement, the business will be less profitable. Absent employment with his benevolent father and with the reduction in his physical capacity, his career options are significantly constrained by the ongoing effect of his injuries.

[30] The defendant acknowledges that the plaintiff was injured in the collision and is dealing with ongoing back issues as a result. The defence argues that any complaints of neck pain are not caused by the accident. The defendant says that the severity of the plaintiff's complaints is partially the result of his failure to mitigate his damages by undertaking appropriate treatment. Further, and in any event, his symptoms do not significantly restrict his function. The defendant says that the plaintiff has and will continue to work as he had done prior to the accident and has not suffered or is likely to suffer any loss of income or income earning capacity.

[31] These divergent positions have, not surprisingly, resulted in drastically different positions as to the appropriate assessment of the quantum of damages. The following table sets out those respective positions:

Damage	**Plaintiff's position**	**Defendant's position**
Non-pecuniary loss	$135,000.00	$50,000.00 - 70,000.00
Loss of earning capacity	275,000.00	0.00 - 17,500.00
Cost of Future Care	250,000.00	0.00
Loss of Housekeeping Capacity	50,000.00	0.00
Special damages	2,839.80	2,839.80
Total	$712,839.80	$52,839.00 - $90,339.80

Analysis

Liability

[32] The defence argument on liability depends on his proposition that the plaintiff lost control of his vehicle at the same time that Tweed merged into Mr. Westendorp's lane of travel on the TransCanada Highway.

[33] Each of Mr. Westendorp, the plaintiff and Amanda Johnson gave evidence as to whether the Westendorp Vehicle or the plaintiff's vehicle might have crossed into the other's lane of travel. Mr. Westendorp testified that although he moved left in response to Tweed's actions, he did not leave his lane of travel. The plaintiff and Ms. Johnson maintain that the plaintiff did not leave his lane of travel. There is no objective evidence to support either proposition.

[34] The defendant argues that there is circumstantial evidence to support the proposition that the plaintiff lost control. These include the road conditions as evidenced by the photographs of the accident scene, that the plaintiff was accelerating, that Mr. Westendorp remained within his lane of travel and that both the plaintiff and Amanda Johnson described feeling an initial “bump” before the contact that caused the rollover.

[35] While there had been some snow that day, the evidence generally and the photographs specifically indicate that the roads were simply wet with some slush. While the agreed statement of facts confirms that the plaintiff accelerated his vehicle after clearing the intersection, there is nothing in the evidence to indicate he was travelling at an excessive speed or that the acceleration was so rapid as to result in a loss of control.

[36] Where precisely the Westendorp Vehicle and the plaintiff's vehicle were within their lanes of travel prior to Mr. Westendorp moving left in response to Tweed is unclear.

[37] On the whole of the evidence, it is my conclusion that the sequence of events that caused the plaintiff's vehicle to spin and roll began with Tweed's entry onto the

road, contact with the semi, and Mr. Westendorp's response to it. I am not satisfied that, contemporaneous with Tweed's actions, the plaintiff lost control. It is my conclusion that irrespective of the precise positioning of the Westendorp Vehicle and the plaintiff's vehicle relative to their lanes, no contact would have occurred but for Tweed's actions and there was no negligence on the part of the plaintiff in the operation of his vehicle that contributed to the collision.

[38] Accordingly, I find the defendant 100% at fault for the collision.

Quantum of damages

[39] Before dealing with the specific heads of damage, I will set out my conclusions as to the nature and extent of the plaintiff's injuries that can be attributed to the accident and address the defence argument of failure to mitigate.

[40] Prior to the action, the plaintiff was an active and fit young man. His asthma was not a factor that inhibited his lifestyle or his capacity to work physically. He undertook, where possible, the heavier physical tasks associated with the jobs Protech had.

[41] The only medical opinions in evidence are those of Dr. McKee. In addition to his assessment of the plaintiff, he had for review in preparing his opinion the records of Dr. Welder, Shuswap Lake General Hospital, and Little Shuswap Physiotherapy Services. He summarized the history as follows:

> [The plaintiff] did not experience any pain at the scene at the accident noting that he had a lot of "adrenaline". He declined to go to the emergency room that day. He did note the next morning that he had aching all over his body, with the pain most significant in the interscapular (between the shoulder blades) area and he also had a "horrible headache". He was assessed in the emergency room at Shuswap Lake Hospital and he reported that x-rays were done.
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> He saw his family physician 5 to 6 days post motor vehicle accident and was prescribed cyclobenzaprine. It was reported that he did take different medications, but experienced gastric side effects. He went physiotherapy for 2 to 3 months. He noted with pressure point therapy he would have an increase in pain. If he went before work, he would have more pain the rest of the day, but in the long run, he did feel that physiotherapy was helpful. He

> has not had any other treatment. A couple of months prior to this evaluation, he went to the Hot Springs and this was of benefit.
>
> . . .
>
> There was there were clinical records from Dr. Clay Welder from the Salmon Arm Medical Clinic. On March 20, 2017, it was noted that he was still suffering from back pain that he felt was from the MVC. X-rays done on his cervical spine on February 12, 2017, showing normal alignment with mild degenerative disc disease at C56 and C67.
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> Mr. Van Sprang was assessed by Dr. Fu Tran in the Emergency Department at Shuswap Lake Hospital on February 11, 2017, . . . he complained of soreness of his right arm and neck, with headaches, sore chest and sore back. He was noted to be sore in the right mid-back with palpation and was tender along the right paraspinal muscles on palpation as well as the whole right arm as he braced himself for the impact.
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> Records were available from Little Shuswap Physiotherapy Service. . . It was noted that on February 10, 2017, a semi sideswiped his vehicle and he ended up in a ditch upside down. The pain was getting worse all day and overall was getting progressively worse affecting his daily activities. The pain diagram was X'd in over the posterior neck region over the interscapular region bilaterally (between the medial border of the shoulder blades) and over the lower back region . . . there were clinical records only from March 10 and March 14, 2017.

[42] I note that the plaintiff's indication to Dr. McKee that he went to physiotherapy for two to three months is not accurate. This is reflected by the comments at the end of the above quote that "there were clinical records only from March 10 and March 14, 2017".

[43] Dr. McKee's report makes no reference to complaints or findings of ongoing neck pain at the time of his assessment. It does describe findings of pain in the upper back and interscapular area, identifying the thoracic spine at T3-4 and T4-5 and significant tenderness on the left at T5-6, as well as tenderness over the posterior ribs and muscles and the left interscapular area between the spine and medial border of the shoulder blade. His conclusions are captured in these three paragraphs from his report:

> I have outlined the clinical problem/diagnoses with regard to Mr. Van Sprang. He has evidence of thoracic spine dysfunction with facet joint and ligament involvement along with secondary myofascial pain involving muscles in the left interscapular region. He may also have involvement of the left posterior ribs. . .

> Mr. Van Sprang was assessed close to two years since the indexed motor vehicle accident. Despite this passage of time and some treatment he continued to have significant pain symptoms, limitations and objective findings at the time of my assessment. Mr. Van Sprang will have permanent symptoms and limitations as a direct result of the injuries suffered in the motor vehicle accident of February 10, 2017. There is a real possibility that his symptoms will continue to compromise his ability to carry out employment related activities and his ability to engage fully in house or yard work now and into the future.
>
> Mr. Van Sprang may benefit from further treatment. I recommend that he be followed by a physiotherapist with advanced manual therapy skills and experience in the intramuscular stimulation (IMS) technique, a needling technique to treat myofascial trigger points. I have outlined that he has evidence of injury to facet joints, particularly on the left and the upper to mid-thoracic spine. I recommend that he be referred for facet joint injections, which would be a benefit both from a diagnostic and hopefully a therapeutic perspective. These are done by Dr. Rory Trow in Salmon Arm and I recommend a referral.

[44] Dr. McKee goes on in his report to describe progressive treatment modalities. This was elaborated on in his testimony at trial. As to the long-term outcome, his report said this:

> He has very significant myofascial trigger points in the left interscapular muscles. Hopefully with further physiotherapy treatment, facet procedures and prolotherapy, these muscles would become more treatable and techniques such as IMS and/or active release would be more effective. Depending on the severity of the myofascial involvement he ultimately may require Botox injections.
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> This treatment would take place over a prolonged period of time and would require extensive third-party funding. The degree of improvement would only become apparent over the course of treatment and as noted will not bring complete resolution of the motor vehicle accident related injuries. It is difficult to ascertain without reviewing the results of treatment whether any functional gains would be made even with comprehensive treatment. It is probable that he will require some level of "maintenance" treatment in the long term such as physiotherapy to be able to function optimally.

[45] As of the date of the trial, the plaintiff had not undertaken any of the treatments recommended. A referral to the Pain Clinic was made by Dr. Welder but the plaintiff has not attended. Evidence at trial indicates the Pain Clinic attempted to make contact with the plaintiff but when they received no response took no further steps. The plaintiff denied having received any contact and did not pursue the

matter. No further steps were taken by either the plaintiff or the Pain Clinic or his family physician.

[46] The plaintiff testified that he has significant apprehension, which he characterized as a phobia, of invasive treatments that involve any sort of needles. This captures most of the recommendations of Dr. McKee.

[47] It is the plaintiff's failure to have undertaken recommended treatments that gives rise to the defence argument that the plaintiff has failed to mitigate his damages.

[48] Ms. Hudon's functional capacity evaluation identifies limitations consistent with Dr. McKee's report.

[49] The testimony of witnesses including the plaintiff, his wife and his father also described limitations consistent with the observations recorded by Dr. McKee. There are features of those descriptions, however, that are somewhat difficult to reconcile. Most notably this is between the plaintiff and his wife as to the severity of the symptoms and the extent of the limitations they impose upon the plaintiff. Her descriptions paint a picture of more serious impact.

[50] A specific, and, in my view, important example is in relation to the plaintiff’s involvement in cutting firewood post-MVC. It is important because it is more specific and concrete allowing for more direct comparison. The plaintiff testified that he now bucks the wood on site but hauls it home to split it when he has the time. He used to do all that onsite. He now does smaller loads. Ms. Johnson’s evidence was that since the MVC, friends get much of their firewood and she does much of the work when she and the plaintiff get any.

[51] In 2019, the company took a contract for a commercial job which Darren said did not generate the returns or goodwill that he had hoped. He attributed the shortcomings directly and indirectly to the plaintiff’s limited capacity. The foundation of his comments regarding the profitability was a perception based on a credit card balance. The balance was not direct measure but rather the credit card balance is

used by him as a barometer of the business's success at a point in time This is a reflection of the lack of precision in the business records. That evidence was not compelling, although I accept the project did not proceed as smoothly as Darren had hoped. I accept however that the plaintiff was less productive generally. I also note that Darren gave the plaintiff a raise in that time period.

[52] On the whole, it is my observation and conclusion that the plaintiff has ongoing back pain in the thoracic spine area which is aggravated by work and recreational activities. Whatever sporadic neck pain he may have is of little impact in his personal life and not functionally relevant to his employment. His back symptoms have, to date, reduced his efficiency and capacity in his work and have resulted in a substantial decline in his ability or desire to engage in his recreational activities. They have also impacted the scope and quality of his interactions with his wife and children. It is the extent of the impact that is the challenge.

[53] A significant feature of the evidence as a whole is the uncertainty as to what level of success the plaintiff may have should he undertake the recommended treatments in future. The plaintiff's inaction to date is the basis of the defence argument of failure to mitigate. As it influences the future prognosis, it is also important to assessments of damages independent of the failure to mitigate argument.

[54] The uncertainty arises from the high degree of variability in outcomes referenced by Dr. McKee. In addition to the comments above in his report, he testified that there is no consistency among patients as to outcome when they do take treatment. Since the plaintiff has not pursued the treatment, there is no evidence of any success or failure to inform the longer term prognosis.

[55] One of the elements of the defence of failure to mitigate that must be proved is the extent, if any, to which the plaintiff's damages would be reduced had he acted reasonably with respect to the recommended treatment. The only opinion on the subject comes from Dr. McKee, who says that the extent of benefit from the treatments is highly variable among individuals and cannot be predicted. He says

with certainty that there will not be full recovery or elimination of the symptoms, but I, as the trier of fact, have no ability to assess the extent, if any, to which the plaintiff's damages would have been reduced. In the result, I am unable to conclude that the defence has established a failure to mitigate.

[56] That does not mean, however, that the prospect of benefit from future treatments is irrelevant to the assessment of damages. An award of nonpecuniary damages for a man of Mr. Van Sprang's age is in large measure based on findings of fact as to how his injuries will affect him in the future. This is also true with losses of opportunity of earning capacity and cost of future care.

[57] With these heads of damage, substantial possibilities are therefore relevant. In *Gao v. Dietrich*, 2018 BCCA 372, Savage J.A. described standards of proof for future and hypothetical events in this way:

> [34] With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility". The standard of a "real and substantial possibility" is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.
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> [35] In *Athey v. Leonati*, [1996] 3 S.C.R. 458, the Supreme Court of Canada addressed "the fundamental distinction between the way in which courts deal with alleged past events and the way in which courts deal with potential future or hypothetical events" (at para. 26). While past events must be proved on a balance of probabilities, hypothetical events and future events need not be proved on that standard.
>
> [36] A hypothetical or future event will be taken into consideration "as long as it is a real and substantial possibility and not mere speculation" (*Athey* at para. 27; see also *Rousta v. MacKay*, 2018 BCCA 29 at para. 17). Establishing a real and substantial possibility means that any employment loss must be shown to be realistic, having regard to what the plaintiff's circumstances would have been absent the injury: *Graydon v. Harris*, 2014 BCCA 412 at para. 27. There must be an evidentiary foundation to the plaintiff's claim: *Morlan v. Barrett*, 2012 BCCA 66 at para. 59.
>
> [37] If the plaintiff establishes a real and substantial possibility, then the court must weigh the hypothetical or future event according to its relative likelihood: *Athey* at para. 27. For example, "if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk" (*Athey* at para. 27). In determining a fair and reasonable damage award, a

> court should make an assessment rather than a purely mathematical calculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 54.

[58] The plaintiff has to date not undertaken any meaningful treatment of his injuries but in his testimony suggested some evolving appetite to do so. That his commitment is equivocal is clear when the plaintiff in submissions said this in response to the defence argument that the plaintiff has no interest in pursuing Dr. McKee's recommendation:

> In fact, the plaintiff testified that he is getting increasingly prepared to pursue intramuscular stimulation in the near future and that he would consider other therapies in (sic) the road, if needed.

[59] It is of note that the plaintiff claims for the costs of the various treatments as part of his cost of future care. His submissions as to those costs include the following:

> With respect to the treatments such as prolotherapy and facet joint injections, the plaintiff testified that he continues to be fearful of these treatments. However, he has continued to educate himself on the alternatives, and taking into his young age, he is prepared to consider them as options in the future. He is increasingly willing to undergo the IMS treatment.

[60] His explanation of a “phobia” of needles for not taking the treatments is not compelling. There is no medical or psychological evidence of an actual diagnosis to support the proposition he has a phobia. The current cautious willingness to proceed suggests it is nothing more than a hesitancy or apprehension. A skeptical interpretation of the evidence might be that the pain issues are just not that serious and have not driven the plaintiff to be more proactive. Another interpretation might be that his fear is severe and he has been willing to tolerate a great deal of pain rather than try the treatments. Still another may be that he harbours a legitimate apprehension which, coupled with the inconvenience of the treatment and the fact that he has been able to carry on without it, has prompted the decision not to pursue the treatments to date. On the whole of the evidence I am inclined to the latter.

[61] I am satisfied, having considered Dr. McKee's evidence both in his written expert report and his testimony, that there is a real and substantial possibility of

meaningful reduction and/or effective management of the plaintiff's symptoms if he engages in one or more of the recommended treatment modalities. His report states it conversely when he says "There is a real possibility that his symptoms will continue to compromise his ability to carry out employment related activities and his ability to engage fully in house or yard work now and into the future".

[62] This would reduce the functional impact of his injuries. Dr. McKee could not be specific about the potential benefits of treatment noting that full symptomatic resolution will not happen and there is the possibility of no benefit. I am left to consider this in the context of the whole of the evidence and apply my conclusions in the damage assessment. There is a real and substantial possibility that there will be benefit. I accept that, even with full engagement in treatment, full symptom resolution will not occur.

Non-pecuniary damages

[63] I must consider the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34, in the context of my observations above regarding the nature and impact of his injuries. In addition, I must consider the prospects of improvement in the plaintiff's symptoms and/or more effective management from treatment.

[64] Both parties have referenced helpful authorities in their respective submissions. They are useful examples but, as counsel readily acknowledge, they can do no more than provide guidance. It is always possible to seize on specific findings of the courts in those decisions to argue the decisions support a certain result in this case. Looking for those similarities is a hallmark of a useful precedent but it is not enough. Reading those decisions with the object of understanding the judges overall impression of the various plaintiffs and the impact of the injuries is also necessary.

[65] In *Bellaisac v. Mara*, 2015 BCSC 1247, the plaintiff was left with chronic pain and diagnosed depression. Reviewing the findings of the court there, I am satisfied that this plaintiff's injuries have had a lesser impact. In addition, Mr. Ballaisac was found to have been diligent in pursuing his recovery including a regime of exercise,

medication for physical pain and depression as well as injection therapy for his back pain. This eliminated much of the uncertainty about the plaintiff's future and specifically whether he would improve. He was awarded $140,000 in non-pecuniary damages.

[66] My observations regarding *Sekihara v. Gill*, 2013 BCSC 1387, are similar although in that case the prognosis for the depression was more favourable than in *Bellaisac*. There, an award of $130,000 was made.

[67] Finally in *Gill v. Lai*, 2018 BCSC 101, an award of $140,000 was made where there was found to be permanent chronic pain with additional unique features including a decision by the plaintiff to forego having another child as a result of her injuries.

[68] The defence provided *Soltan v. Glasgow*, 2019 BCSC 1527 ($70,000); *Young v. Shao*, 2018 BCSC 2017 ($55,000); and *Juelfs v. McCue,* 2019 BCSC 1195 ($65,000). Reviewing these authorities provides impressions of the respective plaintiff's injuries that seem more modest than what I have found to be the case for Mr. Van Sprang.

[69] Having regard to those authorities and the findings I have made regarding this plaintiff and making allowance for the prospect of improvement with treatment, I award $97,000.

Loss of earning capacity

[70] There are three key considerations or determinations that influence my assessment of this claim. The first is whether the plaintiff will pursue treatment. The second is what, if any, reduction in his symptom complex he may achieve through treatment if he in fact pursues treatment. The third is how his future employment trajectory has changed as a result of the MVC. I have commented on the first two above. The third is potentially impacted by the first two, but it is at least possible if not probable that the trajectory will not change regardless of what, if any, treatment he does and will remain as it would have been without the MVC. That is to say, that

he will continue working for his father with the prospect of assuming the operation of the business when his father retires regardless of whether he undertakes treatment and irrespective of its impact.

[71] The plaintiff has established a modest income as an employee with his father and shown no inclination before or after the MVC to alter that course. He has taken no steps toward obtaining any certifications or professional qualifications. Change of any kind has received no more than passing consideration before or since the MVC.

[72] Without the MVC and in the shorter term, it seems obvious that, but for the MVC, he would have continued to work for his father until his father retired. It is less obvious, but highly likely, that he would have assumed operation and ownership thereafter.

[73] Since the MVC, the plaintiff has carried on working for his father and there is nothing to indicate any movement or serious consideration of an alternative in the shorter term. Similarly, the likelihood that he will assume the business after his father retires seems little changed. The plaintiff's argument supports this conclusion when he says "he will continue [working for his father] for as long as he can. The reasons for this are that he now has few feasible alternate employment options. Also, he is working with his father in a family run business, which he enjoys. As such, it is submitted that the most likely outcome will be that Mr. Van Sprang will continue to struggle through his pain in order to support his family as a sheet metal worker."

[74] What has changed is his functional capacity. As noted, the extent of that in the longer term is uncertain. The evidence of Ms. Hudon regarding the plaintiff's current functional capacities is generally consistent with the findings of Dr. McKee but it presents its own challenges in the context of his future employment.

[75] She has referenced the National Occupation Classification ("NOCC") for sheet metal workers. It sets out the nature of job demands and, as to strength, it says in part "work activities involve handling loads between 10 kg and 20 kg." Ms. Hudon's report actually describes the requirement in these terms: ". . . Having to

exert up to 20 kilograms occasionally, and/or up to 9.07 kilograms of force frequently and/or up to 9.07 kilograms of force constantly to move objects." Her report also equates those requirements to a hard line such that any demonstrated ability that falls short of the limit means he does not meet the job requirements. The plaintiff was found able to lift 18.14 kg occasionally and therefore she concluded he did not meet the job requirements.

[76] The defence argues for a much different interpretation. The defence says that the NOCC requirements should be read that if the plaintiff can lift within the 10-20 kg range, he meets that job requirement.

[77] I reject both interpretations. If either was what was intended there would be no need for a stated range. Specific job placements may well have different demands. The interpretation that I adopt is that a functional limitation at or near the upper extreme of the NOCC job classification will make performance of the job in some placements challenging. Not surprisingly, that is precisely the plaintiff's experience.

[78] If the plaintiff's functional capacity is improved by treatment and/or services provided at home, that challenge may be reduced. Such conclusions do not lend themselves to mathematical calculation and looking at only a single marker of his capacity is not enough on its own. There are many variables that will influence a person's ability to do a job and job requirements will vary. Calculations can, however, be helpful in providing perspective. Using the single lifting metric of 20 kg (there are obviously many others), Ms. Hudon's testing shows the plaintiff was at approximately 91% of the upper end of the job requirement. Another test of lifting shoulder to overhead, which is not specifically set out in the NOCC job demands' summary, had the plaintiff at 45% of the stated requirement. Is it reasonable to expect that he could achieve a 10% improvement in his occasional lifting capacity through treatment or other future care items? In my view, there is a very good prospect of that. If the overhead lifting demand is in fact an appropriate metric for the

job, is a 55% improvement reasonable? That seems far less certain but a real possibility.

[79] I have no expert evidence of the plaintiff's aptitudes for alternative employment. His has limited education and his experience is labour oriented work.

[80] In this context, I am required to assess what, if any, past or prospective loss of earnings capacity has been established.

[81] There are two excerpts from the British Columbia Court of Appeal's decision in *Tsalamandris v. McLeod*, 2012 BCCA 239, that provide helpful summaries of applicable principles:

> [18] The appellants rely on the recent statement of the law governing proof of damages for lost earning capacity found in *Perren v. Lalari,* 2010 BCCA 140, 317 D.L.R. (4th) 729. There, at para. 23, Madam Justice Garson adopted and emphasized the following language of Mr. Justice Donald in *Steward v. Berezan*, 2007 BCCA 150, 64 B.C.L.R. (4th) 152:
>
> > [17] ... <u>The claimant bears the onus to prove at trial a substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur: *Parypa* ¶ 65</u>.
>
> [19] Garson J.A. went on to summarize the governing principles in the following passages:
>
> > [30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452. These principles are:
> >
> > 1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
> >
> > 2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].
> >
> > [31] Furthermore, I conclude that there is no conflict between *Steward* and the earlier judgment in *Pallos*. As mentioned earlier, *Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.
> >
> > [32] A plaintiff must <u>always</u> prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading

> to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* or a capital asset approach, as in *Brown.*
>
> [Emphasis added by Garson J.A.]
>
> . . .
>
> [31] . . . The trial judge set out to apply the principles canvassed in *Rosvold v. Dunlop,* 2001 BCCA 1, saying at para. 259:
>
> > The principles that govern the measurement of damages for loss of earning capacity were thoroughly discussed in *Rosvold v. Dunlop*, 2001 BCCA 1, 84 B.C.L.R. (3d) 158. The principles set out in that case can be summarized as follows:
> >
> > 1. the assessment of damages is not a precise mathematical calculation but a matter of judgment;
> > 2. a plaintiff is entitled to be put in the position she would have been but for the accident;
> > 3. an award for loss of earning capacity recognizes that the ability to earn income is an asset and the plaintiff deserves compensation if this asset has been taken away or impaired;
> > 4. since these damages must often be based on a hypothetical, the standard of proof of a hypothetical is "real and substantial possibility" and not mere speculation;
> > 5. the court must consider the real and substantial possibilities, and give weight to them according to the percentage chance they would have happened or will happen;
> > 6. one starting approach to valuation may be to compare the likely future of the plaintiff had the accident not happened, and the likely future of the plaintiff after the accident has happened, and to consider the present value of the difference between the amounts earned under these two scenarios. (I note that in using the word "likely", the Court on this point was meaning what hypothetical was a real and substantial possibility);
> > 7. however, the overall fairness and reasonableness of the award must be considered, taking into account all of the evidence.

[82] In *Brown v. Golaiy*, [1985] BCJ No. 31, Finch J. (as he then was), provided examples of what may serve as indicia of a loss of earning capacity where the capital asset approach is being applied:

> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;

2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[83] A review of the considerations set out in *Brown v. Golaiy*, would support the finding of a loss of capacity based on the present limitations experienced by the plaintiff.

[84] In the context of the employment for his father, an obviously benevolent employer, he has carried on and even been given a raise since the MVC. If he becomes the business owner, he has complete control over his job requirements and can hire someone with the professional designations needed to do the work and with the physical capacity to do those portions of the work beyond the plaintiff's abilities. Indeed this is, in part, what his father was doing as he has aged. This does not change the nature of his loss of capacity but impacts its valuation.

[85] There are factors that exist independent of the MVC that might affect his ability to assume control of the company. This uncertainty lies, not in his skills to do the work itself, but in the uncertainty about his skills to run a business and his professional qualifications. He has yet to take steps toward being a certified sheet metal or HVAC worker. There is no evidence as to whether he could do the work of the company without someone with the certification. There is no evidence of any plans to do this before the MVC and he has taken no steps since the MVC. Once Darren retires, the plaintiff could hire someone with such qualifications. Even if he were to obtain the qualifications and/or employ a person or persons with the qualifications, does he have the management skills needed to run the business? These are not concerns that arise from the MVC injuries, but if he were to leave the business because of them his reduced functional capacity would have a greater potential impact on his earnings.

[86] Another consideration is the income potential from Protech. The plaintiff has had very modest income from his employment in the business. Complicating things further is the absence of clear evidence as to Darren's income. It is difficult to fully understand his income because a number of personal expenses are paid by the business but are not clearly accounted for. I simply cannot say what his income is. Even he does not appear to know. The business' financial statements do serve only to satisfy me that Darren's effective income is also modest. This implies that as long as the plaintiff stays with the business before or after his father's retirement his income is likely to be similarly modest.

[87] There is no evidence that his income would have changed significantly in the business in the without MVC scenario. With the MVC, it is reasonable to conclude that his reduced capacity will impair the profitability of the company to some degree and therefore affect the money available to Darren to pay the plaintiff and, after Darren retires, the net income available to the plaintiff. The potential moderation of that reduced capacity must be taken into account. If he were to change employment paths as a result of the MVC, many entry level jobs could replace that income. As noted in the quote from *Rosvold v. Dunlop* above, "a plaintiff is entitled to be put in the position she would have been but for the accident". If the plaintiff is able to secure employment that replaces the income that he would otherwise have had, his position is unchanged. His choices will, again subject to improved functional capacity, be reduced.

[88] I turn then to my assessment of the plaintiff's claims. I am satisfied that there is a loss and that the appropriate method of assessment is the loss of earning capacity approach.

[89] It is my conclusion that the plaintiff will continue to work in his father's business at least until his father retires. That date may be extended as a result of the MVC but there will be no specific loss of income at least until that date.

[90] The plaintiff's argument is that the company has been and will continue to be less profitable and therefore he has a past and future loss of opportunity. Given the

plaintiff's continuing employment income, it is my conclusion that there has been no past loss of opportunity. The plaintiff's argument that the company would have been more profitable is logical but that does not establish that he would have benefited from that. The plaintiff received a raise despite his limitations. Given the company structure, any increase he receives is a decrease in income available to his father. More profitability seems unlikely to have meant an even larger raise for him but rather that Darren might have been able to receive more income. I am not satisfied on the evidence before me that a past loss of opportunity has been made out.

[91] The plaintiff's reduced capacity will logically have an impact on the company's bottom line in the future. Darren is unlikely, while he is with the company, to indefinitely sacrifice his income for the plaintiff. This satisfies me that there will be a loss for the plaintiff. When Darren does retire the potential for a loss is amplified. All of this is moderated by the potential for benefit from treatment and home services as set out below in the claim for future care analysis.

[92] With so many variables and uncertainties, the assessment of the loss of capacity is very difficult. To provide some perspective, a loss of $1,000 annually to age 64 has a net present value of $22,506. His modest earnings provide the only known quantity. I fix it at $85,000.

Costs of Future Care

[93] This claim is based on the report of Ms. Hudon. She provided costs for the treatments recommended by Dr. McKee as well as a list of interventions and services she opined were appropriate, based on her functional capacity assessment and the report of Dr. McKee. Some involved ranges of costs. The plaintiff retained an economist who calculated the net present value of that list using the high and low cost estimates. The totals ranged from $352,879 to $493,220.

[94] The plaintiff's position advanced in argument represents a global reduction to $250,000. Those submissions do not deal with individual items but the authorities require that I do.

[95] Included in the costs are allowances for travel. The plaintiff lives in a rural area that involves some travel to the various services. This is an impediment to the plaintiff's participation given his family and work schedules and limited commitment to the treatments. It also significantly increases the costs of services that would travel to his location.

[96] In *Gignac v. ICBC*, 2012 BCCA 351, Justice Kirkpatrick, articulated the test to apply in these terms:

> [29] The purpose of the award for costs of future care is to restore, as best as possible with a monetary award, the injured person to the position he would have been in had the accident not occurred.
>
> [30] The award is "based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: (*Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.) and adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41

[97] She proceeded to deal with the individual items awarded by the trial judge and in doing so demonstrated the application of the test in a variety of scenarios. Some of that reasoning can be applied to the claims advanced here.

[98] As to the provision of contingencies, she referred to *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.) at 14, for the distinction between general and specific contingencies. That decision described them in these terms:

> These cases, and those which have applied them, tell me that contingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record.

[99] She reduced an award for counselling fees in the future care costs, despite the clear evidence that it would be of considerable assistance to the plaintiff because the plaintiff was only "considering" going to counseling (para. 54).

[100] As noted above, it is my conclusion that treatments recommended by Dr. McKee have the real potential to reduce symptoms or the effects of those

symptoms. These satisfy the requirements of being medically justified and reasonable.

[101] To date the plaintiff has not pursued any of the treatments. I accept that he is likely to pursue at least some of them but, in my view, the likelihood is variable depending on the treatment. Some are covered by BC Medical so any contingency adjustment for participation would be to the travel costs only That has a minimal impact on the final award.

[102] I will deal with the various future care items in the order they appear in the economist's tables.

[103] The first is physiotherapy. Some physiotherapy recommended is linked directly to various treatments and some is described as routine maintenance. What I award is at the low estimate as, in my view, that adequately incorporates a contingency for the likelihood of participation. For routine maintenance the award is $13,940 plus $13,720 travel.

[104] Physiotherapy connected to prolotherapy, must be further adjusted for the likelihood the plaintiff would undertake the prolotherapy. I fix that at 50%, so the award is 50% of $2,335 ($1,167.50) plus 50% of travel $2,314 ($1,157).

[105] The facet joint injections, radiofrequency ablation and prolotherapy are all covered by BC Medical and travel costs were limited to one trip. There is no deduction from those costs.

[106] Botox injection costs are not determined by the economist or Ms. Hudon so there is no evidentiary foundation to support an award. This is not a process likely to be undertaken by the plaintiff in any event. I make no award for this.

[107] The cost of care report recommendations include an allowance for a vocational assessment. The plaintiff has shown no appetite for a change of employment given his circumstances. His own submissions are founded on the

proposition that change of occupation is unlikely. This is not an appropriate expense on the facts before me.

[108] Ms. Hudon recommends a kinesiology program for one year to educate the plaintiff on managing his movements and to create a self-directed program. I find this to be reasonable at the low cost estimation of $1,320 plus $1,598 for travel.

[109] There is, in addition, a recommendation by Ms. Hudon for a gym membership. She opines this is needed to carry out his kinesiology program. I reject this claim. Given the plaintiff's residence, this involves travel. It is not something recommended by Dr. McKee. I am unable to accept the plaintiff would travel to attend a gym on a regular basis to age 60 or beyond as suggested. Further there is nothing in the evidence to indicate the education from the kinesiologist could not be applied in a home based setting.

[110] Ms. Hudon also recommends a number of services based on his functional limitations. The first is for home maintenance assistance. She relies on statistical data indicating the average male's time spent on such tasks and then calculates an award based on 75% of that time. The proposition of the plaintiff requiring assistance is reasonable but based on the plaintiff's evidence and what he has been doing together with the prospect of gains through engagement in treatment make the recommendation excessive. The low cost estimate is valued at $103,204 plus $20,641 travel. I award $25,000 for services and travel.

[111] Ms. Hudon makes specific recommendation for tree pruning and edge trimming. I accept that both activities aggravate his symptoms but the time quoted for edge trimming is excessive. The range of estimates is approximately $38,000 to $42,000. The evidence of the frequency it would be required on the rural property is not established. In addition, it seems likely the plaintiff could and would be able to deal with it in sections rather than all at once. Again there is the prospect for improvement in his tolerance with treatment.

[112] I allow the claim for tree pruning at 80% of the claimed $6,116 ($4,892.80) plus 80% of travel $3,058 ($2,446.40). The award for edge trimming services is $5,000.

[113] The plaintiff heats his home with firewood. He has historically obtained that himself. The evidence on this subject is referenced in my comments on credibility above. The plaintiff enjoys the process although less so now. It is my conclusion that he will continue to obtain his own wood and that the prospects of gains in capacity through treatment will make this more likely. I do accept that there may be difficulties at times and there should be some allowance for acquisition of cut and delivered wood. The low cost estimate from the economist's report represents a reasonable allowance. The amount awarded is $7,339.

[114] The costs for vehicle maintenance is denied. It is a twice annual process that I find the plaintiff is likely to continue to do on his own. Improvements that may come from treatment will only ensure that this is so.

[115] Finally, I turn to medications. At the time of trial, the plaintiff was taking non-prescription sleep aids and pain medication. He had no prescriptions and testified to some resistance to using medications. An award for Aleve, Melatonin and Robax at the low estimate is reasonable based on the plaintiff's evidence. These total $6,661.

[116] In summary, the costs of future care awards are:

Item	**Award**
Physiotherapy	$27,660.00
Physiotherapy related to prolotherapy	2,324.50
Facet joint injections, radiofrequency ablation and prolotherapy as covered by BC Medical plus travel costs	281.00
Botox	Nil
Vocational assessment	Nil
Kinesiology	2,918.00

Gym membership	Nil
Home maintenance assistance	25,000.00
Tree pruning	7,339.20
Edge trimming	5,000.00
Firewood	7,339.00
Vehicle maintenance	Nil
Medications	6,661.00
TOTAL:	$84,522.70

Loss of Housekeeping Capacity

[117] The plaintiff argues that there should be a separate award under this head separate from the awards for cost of future care and non-pecuniary damages. I am unable to agree.

[118] In *Ali v. Stacey*, 2020 BCSC 465, Gomery J. summarized two Court of Appeal decisions addressing such claims as follows:

> [67] Read together, these two judgments establish that a plaintiff's claim that she should be compensated in connection with household work she can no longer perform should be addressed as follows:
>
> a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
>
> b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.
>
> c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
>
> d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.

[119] In *Firman v. Asadi*, 2019 BCSC 270, Justice Verhoeven remarked:

> [236] Duplication in the award must be avoided. Where potential costs for housekeeping assistance are awarded, in the context of costs of future care, then the case for a separate pecuniary award for loss of housekeeping capacity is lessened and perhaps eliminated, depending on the specific facts of the case. In this case a minor award for housekeeping assistance has been made.

[120] On the evidence before me no separate award is justified.

Special Damages

[121] These are awarded as agreed between the parties at $2,839.80.

Conclusion

[122] Damages are awarded as set out in the chart below:

Damage	**Plaintiff's position**	**Defendant's position**	**Award**
Non-pecuniary loss	$135,000.00	$ 50,000.00 - 70,000.00	$ 97,000.00
Loss of earning capacity	275,000.00	0.00 - 17,500.00	85,000.00
Cost of Future Care	250,000.00	0.00	84,522.70
Loss of Housekeeping Capacity	50,000.00	0.00	0.00
Special damages	2,839.80	2,839.80	2,839.80
Total	$712,839.80	$ 52,839.00 - 90,339.80	$269,362.50

"Betton J."