

CANADA / JUDGMENT

Burnett v. Granneman

2023 BCSC 1425

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Supreme Court of British Columbia

DECIDED

16 August 2023

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2023 BCSC 1425 Burnett v. Granneman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Burnett v. Granneman,

2023 BCSC 1425

Date: 20230816

Docket: M206221

Registry: Vancouver

Between:

Scott Kenneth Burnett

Plaintiff

And

Johannes Lodewyk Granneman

Defendant

Before: The Honourable Madam Justice J. Hughes

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

March 27-31,

April 3-6, 11, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 16, 2023

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Overview

- [1] The plaintiff, Scott Burnett, seeks damages arising from a motor vehicle accident that occurred on August 2, 2018, at the intersection of Maebelle Road and Port Alberni Highway, in which Mr. Burnett was rear-ended by the defendant, Johannes Granneman ("Accident"). Liability is admitted.
- [2] Mr. Burnett was 36 years old at the time of the Accident and 41 years old at trial. Mr. Burnett and his former partner, Jessica Philpott, have a son together who was born in August 2017. Mr. Burnett and Ms. Philpott separated in April 2019 and have shared custody of their son.
- [3] Prior to the Accident, Mr. Burnett was healthy, active, and had no prior history of pain or mood disorders that impacted his ability to work or participate in sport and recreational activities. To the contrary, he began working in physically demanding jobs as a teenager and continued to do so throughout his adult life, until the Accident. At the time of the Accident, he was employed in physically demanding roles as a community healthcare worker with Vancouver Island Health Authority ("VIHA") and a care aid with the Port Alberni Association for Community Living ("PAACL").
- [4] Following the Accident, Mr. Burnett suffered soft tissue injuries to his neck, left trapezius, and back that rendered it difficult for him to continue working as a community health worker and care aid. He returned to work at PAACL in December 2018, but left in May 2019 in favour of a sedentary role with WorkBC. Mr. Burnett is currently employed by Service Canada and earns a higher income than he did prior to the Accident. He nonetheless claims

for loss of earning capacity in respect of his inability to supplement his income by working weekends as a casual care aid and to his full capacity as a massage therapist in the evenings.

Background

- [5] Mr. Burnett spent the bulk of his adult life prior to the Accident working long hours in physically demanding roles. He grew up working on a hobby farm and, when he was 15 years old, began working part time in shipping and receiving and in construction with a form rental business. He left school in grade 11 to work as a commercial fisherman. He worked in that industry for approximately six years, including as a deckhand, setting and pulling crab traps.
- [6] In 2005, Mr. Burnett began working at Hub City Fisheries, a fish processing plant, where he worked eight- to 16-hour days on a line gutting fish, hauling large totes of ice for commercial fishermen, and shoveling it into their boat hulls. Mr. Burnett also worked on the log booming grounds, running and stowing logs with Salt Air Marine in Ladysmith.
- [7] While working full time at Salt Air Marine, Mr. Burnett returned to school. He received his General Educational Development/Dogwood Diploma in 2007. He then returned to commercial fishing, where he fished tuna and worked for a restoration company in between fishing seasons.
- [8] In 2009, Mr. Burnett perceived commercial fishing to be a dying industry and consulted an employment agency. This led him to enroll at Sprott Shaw College, where he earned a dual diploma in Resident Care Aid and Community Support, which he completed in 2010, with Honours.
- [9] Mr. Burnett worked multiple jobs following the completion of his dual diploma. At various points in time, Mr. Burnett worked a full-time job concurrent with part-time jobs. Mr. Burnett continued to work long hours in physically demanding roles with the goal of earning as much income as possible. For example, following his practicum, he worked full time as a care aid providing full service to clients at Lodge on 4th in Ladysmith, worked extra shifts on weekends, and also worked as a casual employee with a restoration company.
- [10] In 2012, Mr. Burnett left care aid work for a brief period of time to work as an owner/operator for Purolator as he had heard that it was a job that paid quite well. He worked 12-hour days driving and delivering packages. However, this endeavor did not prove to be as profitable as expected, and he left Purolator in the summer of 2014.
- [11] Mr. Burnett quickly found full-time work with Declan Industries, who hired him as a delivery driver and saw sharpener. In 2015, Mr. Burnett was working full time at Declan Industries during the weekdays and also working shifts with VIHA on weekends, and sometimes in the evenings as well. Mr. Burnett was regularly working seven days a week during this period of time, working 40 hours per week at Declan and an approximately 16 additional hours per week with VIHA.

- [12] In mid-October 2015, when Mr. Burnett and Ms. Philpott travelled to Southeast Asia, Mr. Burnett enrolled in a three-month course with Ms. Philpott to learn Thai Massage. They then spent three additional months travelling.
- [13] After returning to Canada in April 2016, Mr. Burnett re-applied to work as a community health worker with VIHA. He was re-hired as a casual employee and began working to build up his hours with VIHA. However, Mr. Burnett was not getting sufficient hours as a casual community health worker with VIHA, so he also applied to work as a nursing assistant and was hired as a casual employee.
- [14] In January 2017, Mr. Burnett applied to work as a support worker with PAACL and was hired as a casual employee. He worked predominantly at PAACL's Westporte Residence ("Westporte"). By this time, Ms. Philpott was pregnant with their son, and the job with PAACL was attractive to him because it had benefits and did not require as much driving as his job with VIHA.
- [15] Mr. Burnett's work as a community health worker with VIHA and care aid with PAACL was very physically demanding. Many of his clients were immobile or had limited mobility such that they required full care. Mr. Burnett's job duties included performing general hygiene and providing personal care, including changing diapers, toileting, feeding, grooming, showering, and bathing. He also administered medication and changed catheters. Mr. Burnett was required to transfer clients into and out of their beds and their wheelchairs, prepare meals, and feed clients. His job duties also included loading and unloading clients in their wheelchairs into a passenger van for outings. Mr. Burnett was also required to perform various household tasks, including mopping, sweeping, washing dishes, and laundry. These tasks required repetitive motions of overhead reaching, bending forward, squatting, twisting, pushing, and pulling. Mr. Burnett would assist anywhere from five to ten clients who weighed between 100 to in excess of 200 pounds.
- [16] In May 2017, Mr. Burnett secured a temporary line at PAACL that, along with supplemental shifts, provided him with full-time hours at Westporte. He was also simultaneously working shifts with VIHA. Mr. Burnett took eight months of parental leave in April 2017 when his son was born. Following this leave, he returned to the temporary line at PAACL. That line expired in May 2018, and he secured his own permanent/regular part-time line with PAACL at Westporte that guaranteed 20.5 hours per week. He also continued to pick up additional shifts with VIHA.
- [17] In addition to working significant hours with PAACL and VIHA, Mr. Burnett enjoyed an active lifestyle outside of work in the years leading up to the Accident. He played slow-pitch softball with two teams where he was an active and talented player, diving for balls and sliding into bases. He also enjoyed hiking and would do lengthy day hikes in trails around Port Alberni, and went on multi-day trips that involved hiking with camping and other gear.

Credibility

- [18] The plaintiff's credibility is a key issue in this trial. As the Court noted in *Gee v. Bock*, 2019 BCSC 1348 at para. 36, "[t]his is not unusual in cases of chronic pain, where the court must always be concerned with the reality of the plaintiff's complaints of ongoing pain in order to determine the existence and extent of the injuries and properly assess damages based on such complaints". This is the case as the absence of objective findings in chronic pain cases increases the opportunity for exaggeration, distortion, or even fabrication: *Wells v. Kolbe*, 2020 BCSC 1530 at para. 83.
- [19] I am also guided in my assessment of the plaintiff's credibility by the approach set out by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, 35006 (7 March 2013), and *Faryna v. Chorny*, 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.).
- [20] Mr. Burnett appeared nervous at times in his testimony, but nonetheless testified in a forthright and careful manner. He did not waiver under cross-examination and conceded matters where appropriate. By way of example, he admitted that he was able to work long hours (13-14-hour double shifts on occasion) as a care aid following the Accident, albeit by relying on assistance from his coworkers and experiencing an exacerbation of his injuries as a result.
- [21] Mr. Burnett's evidence as to his ability to perform the job functions of a care aid before and after the Accident was consistent with and corroborated by his coworkers, Carrie Creber and Patricia Hall. I place significant weight on their evidence as disinterested, independent witnesses who had firsthand opportunities to observe Mr. Burnett performing the job duties of a care aid before the Accident, and attempting to perform them after the Accident. Neither Ms. Creber or Ms. Hall had personal relationships with Mr. Burnett outside of work, nor did they have contact with him since he left PAACL.
- [22] That being said, Mr. Burnett's evidence as to the continued severity and frequency of his neck and trapezius pain and headaches after he left PAACL and began working in sedentary roles is difficult to reconcile with the preponderance of the evidence before me, including in particular, his continued participation in extensive sport and recreational activities. Mr. Burnett testified that his neck pain is "constant, always there" and is aggravated by nearly everything he does, namely sports, hobbies, extended sitting, bending, reaching, and performing massage treatments. He also testified that he has pain in his trapezius every day that is aggravated by essentially all of his activities, and he has daily headaches that come and go.
- [23] The picture this testimony paints of an individual in constant, daily pain stands in contrast to the multitude of sport and recreational activities he testified to participating in post-Accident, which included skiing, mountain biking, hiking, squash, ball hockey, surfing, paddle boarding, and softball. Mr. Burnett's evidence that he modifies his participation or effort level was, in relation to softball, corroborated by his teammates. However, this does

not, in my view, fully explain the tension in his evidence, particularly given the variety of different activities in which he participated.

- [24] This is all the more so the case when one considers the cumulative effect of participating in such activities in addition to working full time at Service Canada and caring for a young child as a single parent two weeks a month. Similarly, Mr. Burnett's testimony that he endures daily headaches that cause "a pain that doesn't go away" is also difficult to reconcile with his evidence that his headaches do not impact his work, sports, or hobbies.
- [25] Mr. Burnett's claim to be suffering constant daily pain in his neck and trapezius is likewise difficult to reconcile with his decision to undertake additional training in a physically demanding profession and start a massage therapy practice. His explanation that he needed to supplement his income, and massage therapy was an avenue he wanted to explore to do so, was not persuasive when considered in light of the preponderance of the evidence, particularly his evidence that performing massage treatments aggravates his neck pain.
- [26] Mr. Burnett was also at times unable to recall matters that could be perceived as inconsistent with his evidence or unhelpful to his case. For example:
- a) He testified that he could not recall being contacted by VIHA's disability management team to discuss his return to work. His only recollection of correspondence with VIHA after the Accident was calling his manager to report it, and then a subsequent call asking him to return his cell phone. Yet, VIHA records indicate that in March 2019, he told VIHA's disability case manager that he had "no medical concerns";
 - b) He could not recall visits with his massage therapist, Kathryn Belisle, where her associated clinical notes reflected statements from Mr. Burnett suggesting that he was not seeking treatment for his Accident-related injuries. In one note on December 8, 2022, Mr. Burnett indicated he had "no real areas of concern";
 - c) He could not articulate with any specificity why despite being unable to do the physically demanding work of a care aid, he nonetheless chose to start a massage therapy business, which also required him to work in a physically demanding capacity; and
 - d) He could not recall how many massage clients he had treated in the three months immediately prior to trial, after admitting under cross-examination that his 2021 calendar entries did not reflect all of his clients and that he had possibly treated four or five additional clients.
- [27] Accordingly, while I find Mr. Burnett's evidence about his pre-Accident physical capabilities and the impact of his Accident-related injuries on his ability to continue working at PAACL and VIHA credible, I must treat his evidence as to the nature and severity of his ongoing pain and headaches with caution. More specifically, I find that Mr. Burnett tended to exaggerate the ongoing frequency, severity, and extent of his headaches and pain in his neck and trapezius.

The Accident

- [28] The Accident occurred on August 2, 2018, at the intersection of Maebelle Road and Port Alberni Highway in Port Alberni. Mr. Burnett was stopped at a stop sign waiting to turn when he was rear-ended. The impact pushed his car forward. It also threw his body forward and back. Mr. Burnett was wearing his seatbelt, which activated and caught his body.
- [29] After the Accident, Mr. Burnett pulled over and called in to VIHA to report that he had been in an accident. He felt pain in his neck, trapezius, and lower back. He also experienced a headache, light sensitivity, and ringing in his ears. Mr. Burnett went to a walk-in clinic to see a doctor, then went home. He did not go back to work and could not do his scheduled shift that day. Later that evening, the pain in his neck and trapezius got worse. He also had pain in his back, and his hips were getting stiff.
- [30] Mr. Burnett returned to work for two shifts with PAACL in the days following the Accident. However, he experienced significant pain in doing so and was unable to continue working. Mr. Burnett then remained off work until December 2018.

Plaintiff's Post-Accident Circumstances

Physical Condition

- [31] Mr. Burnett testified that he experienced significant pain in his neck and trapezius in the weeks immediately following the Accident. His headaches and sensitivity to light were also quite bad. He also experienced dizziness, jaw pain, and soreness in his legs.
- [32] Mr. Burnett testified that the pain in his neck and left trapezius persisted in the months after the Accident. He went for various forms of treatment, including acupuncture, chiropractic treatments, massage therapy, and osteopathy, and obtained some short-term relief from that treatment such that the stabbing pain became "tingling" or "dull burning" pain.
- [33] Mr. Burnett's description of his injuries in the months immediately following the Accident is generally consistent with Ms. Philpott's evidence. While she was preoccupied with other matters at that time, she recalled Mr. Burnett being very tired when he got home from work and seeking out therapy for his injuries. She also recalled him having difficulty holding and caring for their son, and that he would often be lying on the couch. She did not recall this changing at any time before she and Mr. Burnett separated in April 2019.
- [34] Mr. Burnett testified that his sensitivity to light gradually improved, as did the ringing in his ears. He also experienced gradual improvement of his headaches. The initial "hard, pounding" headaches he experienced subsided. However, he still experiences headaches that come and go depending on his level of activity.

- [35] Mr. Burnett testified that his pain is more manageable since he left PAACL in May 2019. However, he testified that he continues to experience daily neck pain, left trapezius pain and back pain, daily headaches, and ringing in his ears that varies from high to low pitch. The pain in his neck, left trapezius, and back ranges from mild to severe depending on the nature and extent of his work and recreational activities.
- [36] Mr. Burnett sought out multiple forms of treatment following the Accident, including physiotherapy, massage therapy, acupuncture, chiropractic treatments, and osteopathy. He also received trigger point injections, but those did not prove helpful to him. Mr. Burnett does self-massage, stretches, and uses a foam roller to manage his symptoms at home. He has also attended yoga classes.
- [37] Nearly five years post-Accident, Mr. Burnett has returned to many of his sports and hobbies and has also participated in various new recreational activities. However, he testified that he does so with pain, and that his pain has caused him to modify his participation in sport.
- [38] As it relates to softball, Mr. Burnett's evidence is consistent with that of two of his teammates, Keith Chouinard and Christopher Maust, both of whom played with him before and after the Accident. Mr. Chouinard testified that prior to the Accident, Mr. Burnett was a very competitive player who outdid everyone on the field and was one of the team's better hitters. After the Accident, Mr. Burnett was slower, needed to stretch a lot, did not dive for balls or slide into bases and could not hit the ball like he used to. Likewise, Mr. Maust testified that Mr. Burnett was a changed player after the Accident: he was a top athlete before, but after, his style of play completely changed in that he was slower getting to the ball and running the bases, less aggressive, and did not have as much power in his swing. Mr. Maust also noticed Mr. Burnett often stretching out his neck before and during games.
- [39] Mr. Burnett lives in a rental home. Prior to the Accident, he and Ms. Philpott shared household chores, and he was responsible for tidying, cleaning, sweeping, vacuuming, taking out the garbage, and general household maintenance. Mr. Burnett was also responsible for yard maintenance. After the Accident, he required help with household tasks. Following his separation from Ms. Philpott, Mr. Burnett now lives alone and manages to do household chores and maintenance himself by spreading out the tasks. He testified that doing the dishes still causes him back pain.

Employment

- [40] In December 2018, Mr. Burnett returned to his 20.5-hour line at PAACL. He did not return to work at VIHA at any point after the Accident. Mr. Burnett returned to PAACL instead of VIHA because he had a guaranteed 20.5-hour line, extended health benefits, and was able to pick up additional shifts to obtain full-time hours. Mr. Burnett also felt that given his injuries and ongoing pain, he was better suited to working at Westporte where he had the support of coworkers rather than at VIHA where he worked alone.

- [41] Mr. Burnett testified that when he returned to work, he experienced quite a bit of pain in his neck, back, and trapezius and headaches. He found loading and unloading wheelchairs into transport vans and hands-on client care (e.g. dressing, changing, and repositioning clients, some of whom weighed up to approximately 200 pounds) very difficult. He was able to continue working by relying on help from his coworkers with the more physically demanding aspects of his work.
- [42] Mr. Burnett's difficulty working as a care aid following the Accident was corroborated by his coworkers, Ms. Creber and Ms. Hall. Both worked with Mr. Burnett at Westporte on average of three to four times per week, both before and after the Accident.
- [43] Ms. Creber described Mr. Burnett prior to the Accident as a physically strong coworker who was always an asset and had no issues performing any of his job duties. She referred to him as "Super Scott" who was very efficient and could "work circles" around her and others. She noted that when they were short-staffed, he would pick up the extra workload, assisting his assigned client and then moving on to the next. After the Accident, she described Mr. Burnett as having slowed down and having changed from someone who would help others to someone who needed help from others. Ms. Creber observed a physical decline in Mr. Burnett's general work abilities and recalled him frequently holding his neck.
- [44] Ms. Hall also referred to Mr. Burnett as "Super Scott" and described him as an "awesome" worker who was efficient and had no difficulty with any of his tasks. Following the Accident, Ms. Hall testified that Mr. Burnett needed assistance to complete his tasks, especially those requiring bending and lifting, and was no longer able to take on additional clients. Ms. Hall often assisted Mr. Burnett by doing heavy lifting for him and taking on the more physical demands of client care.
- [45] Nonetheless, Mr. Burnett testified that he continued to work through the pain, relying on assistance from his coworkers, to provide for his family. Indeed, Mr. Burnett worked approximately 45 hours per week in late December 2018 and January 2019, and testified that he was capable of working 13-14-hour shifts, albeit not without pain.
- [46] In March 2019, Mr. Burnett was offered a job with WorkBC as a front-end worker at an employment resource center. He started at WorkBC in May 2019, working 40 hours per week, Monday to Friday and earning \$19 per hour. This role involved sedentary work. Mr. Burnett assisted clients with preparing resumes and looking for jobs, and ordering work equipment.
- [47] Mr. Burnett testified that he was not looking for alternative work despite his pain because being a care aid was what he knew how to do, and he was pushing through working as much as possible to earn money after months off work following the Accident. He testified that the opportunity at WorkBC presented itself unexpectedly and that he left PAACL because his body could no longer handle the physically demanding work as a care aid.

- [48] In December 2019, Mr. Burnett also took on a home share client. He testified that he did so as it was another opportunity to earn income, and he had space in his home following the breakdown of his relationship with Ms. Philpott. The client had intellectual rather than physical disabilities and thus did not require the type of physical care that Mr. Burnett provided to his clients at PAACL or VIHA. The home share client moved out in December 2020.
- [49] In approximately March 2021, Mr. Burnett transitioned to working as an employment counsellor with WorkBC, which included a pay increase to \$23 per hour. Mr. Burnett's work at WorkBC remained sedentary. He testified that he was still sore from working, but the pain was not as bad absent the physical demands of care aid work. The pain in his neck and trapezius persisted, as well as his back, but was less frequent than when he was working as a care aid. He continued to seek out treatment, and the relief it provided lasted longer with his sedentary role. Mr. Burnett also utilized a standing desk to help him manage his pain symptoms while at work.
- [50] In February 2021, Mr. Burnett enrolled in a hot stone massage course. His intention was to utilize the massage training he acquired prior to the Accident to supplement his income by operating a massage therapy business from his home.
- [51] In July 2021, while continuing to work at WorkBC, Mr. Burnett opened Twin City Wellness to provide massage therapy to clients. He offers three types of massages: hot stone, Thai, and foot reflexology. Mr. Burnett provides massage treatments to his clients in the early evening, after working at WorkBC (or later Service Canada). He testified that he sees on average three clients per month, but is unable to see more clients due to his injuries from the Accident.
- [52] In January 2022, Mr. Burnett left WorkBC after he obtained employment with Service Canada as a Citizen Service Officer at \$29 per hour. Mr. Burnett was initially hired to work Tuesday to Friday at the Port Alberni office. Shortly thereafter, he was offered and accepted a Monday shift in Nanaimo, which at the time of trial, he worked alternating Mondays. Like WorkBC, his work at Service Canada is sedentary in nature, and he utilizes a standing desk and ergonomic chair.

Expert Medical Evidence

- [53] The plaintiff tendered expert reports from a physiatrist and occupational therapist. The defendant did not tender any expert evidence.

Dr. R. Nairn Stewart - Physiatrist

- [54] Dr. Nairn Stewart is a physiatrist who was qualified to provide expert opinion evidence in the area of physical medicine and rehabilitation, including the diagnosis, causes, prognosis, treatment, and impact on function of musculoskeletal injuries and headaches. Dr. Stewart assessed Mr. Burnett on July 6, 2022, and provided a report dated December 18, 2022.

- [55] Based on her examination of Mr. Burnett, the oral history he provided, and her review of his clinical records, Dr. Stewart opined that Mr. Burnett sustained soft tissue injuries to his neck, which she testified included the shoulders and trapezius area, and lower back in the Accident.
- [56] Dr. Stewart also opined that Mr. Burnett presented as a tense person and that increased tension in his muscles aggravated his neck and shoulder pain, and that he has secondary muscle tension headaches. Given the amount of time that had passed since the Accident, Dr. Stewart opined that "it is likely that Mr. Burnett will continue to experience all of his current symptoms and limitations resulting from his injuries in the future".
- [57] In Dr. Stewart's view, Mr. Burnett had appropriate rehabilitation for his injuries by way of massage therapy, acupuncture, and chiropractic treatment. She noted that Mr. Burnett reported noticing an improvement in his symptoms over time, but continued to experience headaches, neck and left shoulder (trapezius muscle) pain, ringing in both ears, and positional dizziness with imbalance.
- [58] With respect to his employment, Dr. Stewart opined that it was appropriate for Mr. Burnett to be off work for four months following the Accident, and that it was also appropriate for him to give up the physically demanding work of a care aid in favour of a sedentary position. Dr. Stewart opined that it would be advisable for Mr. Burnett to avoid the physically demanding work of a care aid and massage therapist in the future, and concluded that it is unlikely he will be able to increase his hours working as a massage therapist due to his ongoing symptoms.
- [59] Finally, Dr. Stewart provided a highly generalized opinion that Mr. Burnett's injuries limited his household and leisure activities. In light of this, she recommended that he see a kinesiologist to review his sporting activities. She also recommended that he have regular housekeeping assistance (three hours every two weeks and assistance with heavier household cleaning) and regular assistance with yard work.

Matthew Gregson - Occupational Therapist

- [60] Mr. Gregson is an occupational therapist who was qualified to provide expert opinion evidence in the area of repetitive testing, functional capacity evaluation, in-home assessments, and cost of future care. Mr. Gregson assessed Mr. Burnett over two days on November 16 and 17, 2022, and provided a report dated January 11, 2023. Mr. Gregson's opinion regarding Mr. Burnett's functional capacity was based on a comprehensive interview, review of medical records, and his clinical findings on assessment.
- [61] Mr. Gregson concluded that Mr. Burnett provided high and consistent effort on assessment and that his demonstrated physical effort was likely representative of his general functional abilities. Indeed, Mr. Gregson opined that Mr. Burnett was likely capable of slightly heavier material handling than demonstrated, given the limited testing weights available with which to conduct the assessment. However, with respect to the reliability of Mr. Burnett's pain and

disability reports, Mr. Gregson noted that Mr. Burnett's perceived capacity (light category) was less than his demonstrated capacity (medium strength), though Mr. Burnett estimated his own abilities with reasonable accuracy. Nonetheless, Mr. Gregson concluded that "[a]s a result of reliabilit[y] findings", objective data were emphasized when formulating his opinion regarding Mr. Burnett's functional capacity.

- [62] Mr. Gregson opined that when facilitated by ergonomic equipment and postural flexibility, Mr. Burnett is a job match for his current role with Service Canada. However, sedentary positions that require prolonged periods of sitting without the allowance of ergonomic intervention would not be a full-time match. In the result, Mr. Gregson opined as follows:

In traditional Sedentary positions he will likely require these accommodations/ergonomic interventions to promote durable employability long-term. In my opinion he has limitations that impact his ability to earn income in all of the professions he was able to prior to the subject MVA. He will likely require accommodations in the form of personnel, equipment and/or additional breaks that may impact his competitive employability in the open labour market. In my opinion he has a reduced ability to work as many hours in these same positions as he was capable of prior to the subject MVA.

- [63] With respect to assisted living support worker/care aid work, Mr. Gregson concluded that Mr. Burnett likely meets the weight bearing demands for these roles provided he has the opportunity to offload his weight and alternate his posture as needed. Mr. Burnett demonstrated sedentary/limited, light and medium strength functional capacity, but utilized compensatory strategies while stooping moderately to severely. In simulated patient handling, Mr. Burnett was able to boost and roll a light patient of 50 pounds and reported an increase in pain in his left shoulder and lower back while doing so. Mr. Gregson was unable to assess Mr. Burnett's capacity in handling heavier patients due to limited equipment available on assessment.

- [64] However, Mr. Gregson opined that Mr. Burnett is not a full-time match for long term employment as a care aid. In order to facilitate part-time employment, clients would need to be paced throughout the day and staggered throughout the week. In Mr. Gregson's opinion, if Mr. Burnett were to work in a physically demanding care aid role as he did prior to the Accident, there would likely be functional ramifications in daily activities performed outside of work. This is consistent with Mr. Burnett's evidence that he required assistance from his coworkers when he returned to work at PAACL after the Accident and experienced exacerbation of his symptoms from care aid work.

- [65] Finally, Mr. Gregson opined that Mr. Burnett is a match in terms of the strength demands of massage therapy, though he utilizes compensatory strategies to minimize stooping. Mr. Gregson concluded that while Mr. Burnett is likely capable of performing sessions intermittently with periods of recovery afterwards, performing massage demands on a regular basis would likely result in functionally limiting pain. Mr. Burnett is capable of performing massage therapy on a "very part-time" basis of approximately once per week, in

addition to his sedentary employment, but this may result in decreased function in activities outside of work.

Findings Regarding Mr. Burnett's Accident-Related Injuries

[66] The applicable analytical framework was summarized in *Rattan v. Li*, 2022 BCSC 648 as follows:

[105] The onus is on the plaintiff to prove on a balance of probabilities that the defendants caused or contributed to the injuries for which she seeks compensation. The general test for causation is the "but for" test, which requires a plaintiff to show that the injury for which they seek compensation would not have occurred but for the defendant's tortious act: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 13-14 [*Athey*].

[106] Tortfeasors must take their victims as they find them in the sense that the defendant is liable for the plaintiff's injuries, even if those injuries are more severe than might be expected in the average person: *Athey* at para. 34. At the same time, the defendant is not required to put the plaintiff in a better position than she would have occupied absent the wrongdoing. The defendant is liable for the injuries caused, but need not compensate for the effects of a pre-existing condition if there is a "measurable risk" that the plaintiff would have suffered those effects in any event: *Athey* at para. 35.

[107] Unrelated intervening events are taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the defendant's wrongful conduct is not as great, and damages are reduced proportionately: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 36 [*T.W.N.A.*].

[108] The question of whether the plaintiff's original position would, regardless of the tort, have been adversely affected by a pre-existing condition or an unrelated intervening event turns on a consideration of hypothetical events. Hypothetical events need not be proven on a balance of probabilities--rather, they are given weight according to their relatively likelihood. A future or hypothetical event will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. Where the evidence establishes a real and substantial possibility of the occurrence of a future or hypothetical event, this is a contingency that must be accounted for into the assessment of damages: *T.W.N.A.* at paras. 35 and 48.

[67] Mr. Burnett described suffering from neck, back, left trapezius, and leg pain; tinnitus; headaches; temporomandibular joint ("TMJ") issues; and light sensitivity at various times following the Accident.

- [68] In his closing submissions, the defendant accepted that Mr. Burnett suffered the following physical injuries as a result of the Accident: neck pain, left shoulder/trapezius pain, and back pain. However, the defendant disputes the balance of Mr. Burnett's alleged injuries and says that Mr. Burnett's claim that he experiences constant daily headaches and neck, back, and trapezius pain is not substantiated in the evidence.
- [69] Mr. Burnett relies on Dr. Stewart's opinion to establish causation and the nature and extent of his injuries. The weight to be given to the opinion of an expert depends on the degree to which the underlying assumptions have been proven by other admissible evidence: *Mazur v. Lucas*, 2010 BCCA 473 at para. 40. Dr. Stewart's opinion relies in large part on Mr. Burnett's subjective reporting of his symptoms. The only objective symptoms that Dr. Stewart noted were tenderness on palpation on the left trapezius muscle and a mild decrease in range of motion in Mr. Burnett's neck. Dr. Stewart noted no objective findings in relation to Mr. Burnett's low back pain. In the circumstances, my conclusion that Mr. Burnett tended to exaggerate the frequency and severity of his pain impacts the reliability of Dr. Stewart's opinion, and by consequence, lessens the weight that I can give to it: *Wettlaufer v. Air Transat A.T. Inc.*, 2013 BCSC 1245 at para. 49.
- [70] Bearing this in mind and considering the evidence as a whole, I find that Mr. Burnett suffered the following injuries from the Accident: (a) soft tissue injuries to his neck, left trapezius, and lower back; and (b) secondary muscle tension headaches.
- [71] I also find that Mr. Burnett continues to experience headaches and back, trapezius, and neck pain from his injuries. However, I do not accept that he experiences these symptoms on a constant daily basis. Rather, I find that that he experiences these symptoms intermittently and that they do not limit his function to the extent he testified. In this regard, I note in particular:
- a) Mr. Burnett's July 26, 2019, statement to his general practitioner, Dr. Hermann S. Nell, that he was only having neck pain once or twice per week;
 - b) Dr. Stewart noted limited objective findings on her assessment of Mr. Burnett in July 2022;
 - c) Mr. Burnett's demonstrated physical abilities on assessment by Mr. Gregson in November 2022; and
 - d) Mr. Burnett's December 8, 2022, statement to his massage therapist, Ms. Belisle, that he had "no real areas of concern".
- [72] Dr. Nell and Ms. Belisle's clinical records and VIHA's employment records were admitted by consent as business records pursuant to s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124. They are thus admissible for the truth of the facts contained therein. The defendant also contends that pursuant to *Egan v. Andrychuck*, 2022 BCCA 110, statements made by Mr. Burnett as reflected in those clinical records are also admissible for their truth as admissions against interest.

- [73] Egan also dealt with admissibility of clinical notes for the truth of statements recorded therein in the context of a jury trial. A central issue at trial was whether the motor vehicle accident in issue caused Mr. Egan's ongoing shoulder injury: paras. 4-5. A clinical note was tendered, indicating that his shoulder pain had "cleared": para. 20. The jury relied on the note, concluding that the injury was not caused by the accident: paras. 28-29. Mr. Egan appealed on the basis that the note was proof a statement was made but was not admissible for the truth of its contents. The Court of Appeal disagreed. Where the subject of the clinical note is a party to the litigation, the party-admissions rule applies, and the note is admissible for the truth of its contents: para. 53. In so concluding, the Chief Justice reasoned as follows:
- [55] In application of the above law, the trial judge here did not err in her approach to admissibility of the subjective notes as evidence that Mr. Egan made the statements therein recorded and as evidence of the truth of those statements. The judge accepted Dr. Yang's testimony that she had and complied with a duty to record accurate and contemporaneous notes about patient visits. The subjective notes purporting to record statements made by Mr. Egan were admissible under s. 42 as evidence that Mr. Egan made those statements, subject to the jury's assessment. And if the jury was convinced that the statements were made, because Mr. Egan is a party, the party-admissions exception further allowed Mr. Egan's statements to be treated as evidence of their truth, again subject to the jury's assessment. The weighing of the evidence at both of these stages is properly left with the jury unless the judge in their gatekeeping role is of the opinion that the prejudicial effect of the evidence outweighs its probative value: see e.g., *R. v. Khelawon*, 2006 SCC 57. The trial judge here understood the potential prejudicial effects inherent in these sorts of clinical records (see *Edmondson* at paras. 36-37) and provided instructions to the jury to limit those prejudicial effects. And the procedural prerequisites prescribed by s. 14 of the Evidence Act were complied with: see Transcript at 257-258. This evidence could properly be relied upon by the jury in answering the question regarding causation of Mr. Egan's ongoing shoulder injury.
- [74] Likewise, I accept Ms. Belisle and Dr. Nell's evidence that they complied with their duties to make accurate and contemporaneous notes, though in Ms. Belisle's case, this was not always completed on the same day as the patient's treatment. Moreover, both Dr. Nell and Ms. Belisle testified that where a statement was marked with quotation marks, it represented a direct quote from the patient, in this case from Mr. Burnett. Accordingly, I accept that the statements indicated in quotation marks in Dr. Nell and Ms. Belisle's clinical records were made by Mr. Burnett and can be treated as evidence of the truth of those statements at the time they were made. I thus conclude that in July 2019, Mr. Burnett was having neck pain one to two times per week, and had no medical concerns when he saw Ms. Belisle on December 8, 2022.

- [75] Mr. Burnett's claim of constant ongoing neck and trapezius pain and daily headaches is also undermined by his decision to undertake further training and then commence a new business venture in a physically demanding profession like massage therapy, and his ability to participate, even at reduced intensity, in the variety of sporting and leisure activities he testified to, including in particular activities such as mountain biking and skiing.
- [76] While Mr. Burnett continues to complain of pain and headaches, there has been improvement in the years leading up to trial. He has also decreased the amount of therapeutic treatments for his complaints in recent months, which supports my view that his condition has continued to improve and is not as debilitating on a daily basis as his evidence suggests.
- [77] Finally, I find that Mr. Burnett has not met the burden on him of establishing that the leg pain, tinnitus, TMJ issues, or light sensitivity were caused or contributed to by the Accident. There is no medical expert evidence establishing this to be the case. Dr. Stewart stated that ringing in Mr. Burnett's ears and disturbance of his vision were "suspicious" of a vestibular injury sustained at the time of the Accident, but indicated that this type of injury was not within her area of expertise and that she would defer to an ear, nose, and throat specialist. Dr. Stewart also recommended that Mr. Burnett undergo an audio-vestibular assessment, attend a tinnitus clinic, see a TMJ specialist, and have treatment as recommended. There is no evidence before me as to whether Mr. Burnett did in fact pursue assessment, diagnosis, or treatment.

Non-Pecuniary Damages

- [78] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and those they will likely suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39.
- [79] Common factors influencing an award of non-pecuniary damages include: the plaintiff's age; the nature of the injury; the severity and duration of pain; level of disability; emotional suffering; loss or impairment of life; impairment of family, marital, and social relationships; impairment of physical and mental abilities; and loss of lifestyle: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006). Generally, stoicism should not penalize the plaintiff: *Rattan* at para. 123; *Tisalona* at para. 39, citing *Stapley* at para. 46. However, it is also recognized "as a matter of ordinary experience and common sense, a person's ability to tolerate chronic pain diminishes with age": *Davidge v. Fairholm*, 2014 BCSC 1948 at para. 166(e); *Morlan v. Barrett*, 2012 BCCA 66 at para. 41.

- [80] An award of non-pecuniary damages must be fair and reasonable to each party, with fairness measured in part against awards made in comparable cases: *Rattan* at para. 124. However, other cases only serve as a rough guide, as each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. The amount of the award depends on the seriousness of the injury considered in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39; *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, 1981 CanLII 35.
- [81] Mr. Burnett seeks an award of non-pecuniary damages in the range of \$85,000 to \$95,000, relying on *Mannella v. Obregon*, 2020 BCSC 715, and *Bal v. Makichuk*, 2022 BCSC 1695. Mr. Burnett does not seek a separate award for loss of housekeeping capacity.
- [82] The defendant says that if--as I have found--Mr. Burnett's symptoms continued past July 2019 and limit his functionality, then an award of \$40,000 to \$60,000 is appropriate. The defendant relies on the following authorities, among others, in support of his position: *Chapman v. Zilm*, 2020 BCSC 695, *Palmer v. Pozniak*, 2021 BCSC 1703, and *Callow v. Van Hoek-Patterson*, 2023 BCCA 92.
- [83] Before the Accident, Mr. Burnett was healthy, energetic, and active. He had a history of working long hours in physically demanding roles, and sought out and availed himself of opportunities to increase his income when they presented themselves to him. In this regard, he had a demonstrated history of working in excess of full-time hours in multiple jobs. Mr. Burnett's strong work ethic was evidenced in his work as a care aid with PAACL. In that capacity, he did not have difficulty with any aspects of his jobs at VIHA and PAACL. He was able to perform the physical tasks associated with care aid work without issue or assistance from others, and indeed, assisted his co-workers in that respect.
- [84] Following the Accident, Mr. Burnett continues to suffer from intermittent headaches and neck, trapezius, and back pain. He is no longer able to sustain long-term physically demanding work on a full-time basis and requires various accommodations to sustain full-time employment in a sedentary role. It is clear that Mr. Burnett has been negatively impacted by the Accident and that it has significantly impacted his enjoyment of life.
- [85] However, Mr. Burnett has returned to many of his recreational activities and taken on new ones, albeit with modified participation levels. He is able to play softball and participate in a variety of other sport and recreational activities, but has modified his participation on account of his pain. He is careful with prolonged physical exertion and spaces out his household chores.
- [86] Mr. Burnett's ability to return to a multitude of sport and recreational activities and commence a massage therapy business is due at least in part to his stoicism and does not detract from his pain and suffering. Stoicism is a factor that must be considered in conjunction with other factors, and it would be unjust for the plaintiff to be penalized in that regard: *Gardner v. Yoo*, 2019 BCSC 2230 at para. 70, citing *Beaton v. Perkes*, 2016 BCSC 2276 at paras. 53-54.

- [87] In my view, the authorities cited by the defendant better accord with the circumstances in issue here than those relied on by Mr. Burnett. By way of example, while the plaintiffs in Mannella and Bal suffered similar injuries to Mr. Burnett, the impact on their lives was more significant. In Mannella, the plaintiff was unable to participate in his prior sporting activities and struggled to perform household chores: para. 28. In Bal, the plaintiff continued to endure daily neck and back pain that also prevented him from participating in sport and recreational activities he regularly engaged in prior to the accident: paras. 61-63.
- [88] The present circumstances are most akin to Callow, where the plaintiff had both similar injuries and impacts to Mr. Burnett. In that case, the plaintiff continued to suffer from neck, shoulder, and back pain, sometimes experienced discomfort from prolonged sitting or after exercise or exertion, was able to engage in sports and recreational activities by monitoring his physical exertion, and could perform household chores with caution: para. 7. The Court of Appeal held that the present range for non-pecuniary damages in such circumstances was \$50,000 to \$60,000 and considered the mid-point of that range to be fair to both parties, awarding \$55,000: para. 23.
- [89] In the circumstances before me, based on my consideration of the Stapley factors as applied to Mr. Burnett's circumstances as I have found them, along with the authorities cited by the parties, I find that \$55,000 is a reasonable award of non-pecuniary damages.

Loss of Earning Capacity

- [90] Mr. Burnett acknowledges that he has earned more income in each year following the Accident than in the years prior. However, he nonetheless seeks compensation for loss of past earning capacity during his absence from work immediately following the Accident.
- [91] Mr. Burnett's claims for both past and future loss of earning capacity are premised on the same assumption, namely that but for the Accident, in addition to his sedentary full-time work at WorkBC/Service Canada, he would have:
- a) Taken on additional massage clients on weekday evenings, thereby treating 10-20 clients per month; and
 - b) Worked two to four eight-hour shifts as a casual care aid with PAACL on weekends in each of the two weeks per month that he does not have custody of his son.
- [92] An award of damages for past or future loss of earning capacity compensates for a plaintiff's pecuniary loss. Compensation for past loss of earnings is based on what a plaintiff would have--not could have--earned but for the accident-related injuries: *Sekhon v. Cruz*, 2023 BCSC 319 at para. 78, citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [93] The burden of proof of actual past events is a balance of probabilities. However, an assessment of both past and future earning capacity involves consideration of hypothetical events. An award for past loss of earning capacity requires the court to assess how a

plaintiff's life would have unfolded in the pre-trial period absent the injury. Such hypothetical events need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and substantial possibility and not mere speculation: *Dornan v. Silva*, 2021 BCCA 228 at paras. 63-64, citing *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27, 1996 CanLII 183.

[94] Assessing loss of future earning capacity involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident. Accordingly, the central task for the court is to compare the plaintiff's likely future working life with and without the accident: *Rattan* at para. 145, citing *Dornan* at paras. 156-157; *Bains v. Cheema*, 2022 BCCA 430 at para. 21. The approach to this assessment post-trilogy was aptly summarized in *Rattan* as follows:

[146] The assessment of a claim for loss of future earning capacity involves consideration of hypothetical events. Hypothetical events need not be proved on balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event. Allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [Rab], citing *Goepel J.A.*, in dissent, in *Grewal* at para. 48. The assumptions may prove too conservative or too generous; that is, the contingencies may be positive or negative.

[147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[95] The three-step process for considering claims for loss of future earning capacity is as follows:

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

See Rattan at para. 148, citing Rab v. Prescott, 2021 BCCA 345 at para. 47.

- [96] When an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future, the first and second steps of the analysis may well be foregone conclusions since the plaintiff clearly lost capacity and income: Ploskon-Ciesla v. Brophy, 2022 BCCA 217 at para. 11. The assessment is then not simply whether there was a loss of capacity, but whether that loss gave rise to a real and substantial possibility of a future loss and the value of that loss: Ploskon-Ciesla at para. 11; Rab at para. 33; Ker v. Sidhu, 2023 BCCA 158 at para. 44.
- [97] A real and substantial possibility of future income loss can also be made out where a plaintiff has a secure job and plans to continue working in that job without difficulty, if the plaintiff is nonetheless put at a competitive disadvantage in the market as a result of their injuries. Even in circumstances where the plaintiff is able to continue with their employment and is unlikely to change careers, the loss of ability to work without pain and exhaustion is compensable under loss of future earning capacity: Broman v. Pang, 2023 BCSC 353 at para. 163. This is so even where non-pecuniary damages have already addressed a loss of satisfaction and joy in the time the plaintiff spends working: Cheung v. MacDonald et al., 2004 BCSC 222 at paras. 88-89.
- [98] At the third step of the analysis, damages may be assessed using the "earnings approach" or the "capital asset approach". The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, and typically involves a determination of the plaintiff's without-accident future earning capacity, using expert actuarial and economic evidence as well as the plaintiff's past earnings history: Kim v. Baldonero, 2022 BCSC 167 at para. 91, citing Lo v. Vos, 2021 BCCA 421 at para. 109; Dornan at paras. 155-156. Where the capital asset approach is appropriate, the loss of capacity in the future may be valued through various methods, including the use of one or more years of the plaintiff's pre-accident income as a tool: Rab at para. 72, citing Pallos v. Insurance Co. of British Columbia, 100 B.C.L.R. (2d) 260 at para. 43, 1995 CanLII 2871 (C.A.); Mackie v. Gruber, 2010 BCCA 464 at paras. 18-20.
- [99] At the final stage of the damage assessment process, the court must determine whether the damage award is fair and reasonable: Lo at para. 117.

Rab Steps One & Two

- [100] I am satisfied that the evidence discloses a potential future event that could lead to a loss of capacity: as a result of the Accident, Mr. Burnett suffers from headaches and neck, trapezius, and back pain that have caused functional impairment, thereby limiting his ability to work in physically demanding roles, including as a care aid. These injuries have, in my view, rendered Mr. Burnett less competitively employable overall, thereby creating a lack of capacity that satisfies the first step of the Rab analysis.

- [101] I am also satisfied that there is a real and substantial possibility that his injuries from the Accident will impair his earning capacity in the future, as it has done in the pre-trial period. While Mr. Burnett was able to work full time as care aid for approximately five months after the Accident, this was not without exacerbation of his injuries, and Mr. Gregson opined that Mr. Burnett is not a match for full-time employment in the role of a care aid.
- [102] I am thus satisfied on the evidence that Mr. Burnett has suffered a future loss of earning capacity. Due to his injuries, he is unlikely to be able to sustain full-time employment in physically demanding roles in the future, or perform such work in addition to a full-time sedentary role. I am satisfied that there is a real and substantial possibility that this future limitation will lead to a pecuniary loss because he is no longer able to work at the same capacity as he was prior to the Accident, namely working full-time in physically demanding roles, or taking on additional shifts in that capacity. Thus, the second step of the Rab analysis is satisfied.

Rab Step Three - Valuation

Past Loss of Earning Capacity

PAACL & VIHA - August 2, 2018 to December 1, 2018

- [103] The defendant accepts that Mr. Burnett suffered a loss of income from PAACL of \$6,397.44 during this time period. This represents the loss of Mr. Burnett's guaranteed part-time line of 20.5 hours. It does not include any loss in respect of additional shifts that would have been available to Mr. Burnett, which he says he would have accepted but for the injuries he sustained in the Accident.
- [104] The defendant also accepts that Mr. Burnett suffered a further loss from PAACL in the amount of \$2,547.54 during this time frame, bringing his past loss of capacity from PAACL from August 2, 2018, to December 1, 2018, to \$8,944.98.
- [105] Mr. Burnett received \$9,208 in employment insurance benefits in 2018, some of which were received during his parental leave and some of which he received after the Accident. I am not able to determine on the evidence before me what proportion of Mr. Burnett's 2018 employment insurance benefits relate to the post-Accident period and am not prepared to simply allocate 50% of the benefits to this period, as suggested by the defendant. In the event that the parties are unable to agree on the appropriate deduction, they may seek leave to make further submissions before me.
- [106] Mr. Burnett's inability to work during this time frame also resulted in a loss of earning capacity in respect of his employment as a community health worker with VIHA. The defendant agrees that Mr. Burnett suffered some loss of capacity in this respect, but disagrees with Mr. Burnett's calculation of this loss.

- [107] Mr. Burnett submits that this loss ought to be assessed using his average hours worked at VIHA between January 2017 (when Mr. Burnett began balancing his VIHA and PAACL jobs) and July 2017 (the last full month he worked before starting parental leave), and from April 2018 (when he returned from parental leave) to July 2018 (last full month of employment prior to the Accident). Mr. Burnett's hours worked at VIHA during this time frame average out to approximately 71.75 hours per month. Mr. Burnett's hourly rate as a community health worker with VIHA at the time of the Accident was \$20.46, which would result in a loss of \$5,872 over the relevant four-month period.
- [108] The defendant says that Mr. Burnett overestimates his loss of capacity with respect to his employment with VIHA. I agree. Mr. Burnett's life changed significantly with the birth of his son in August 2017 and affected his ability to work more than full-time hours as he did prior to becoming a parent. This is reflected in the evidence, which shows that he worked markedly more hours at VIHA in the January to July 2017 timeframe than from April to July 2018. In my view, Mr. Burnett's loss of capacity from VIHA is more accurately reflected by his hours worked in the post-parental leave period from April to July 2018, where he averaged approximately 24-26 additional hours per month. This results in a past loss of capacity from VIHA of \$2,045 (25 hours per month x four months x \$20.45 per hour).
- [109] Mr. Burnett does not claim loss of capacity from VIHA as of December 2018 because he focussed his additional capacity towards taking additional shifts at PAACL from that point onwards. In the result, I assess Mr. Burnett's past loss of earning capacity from PAACL and VIHA as \$10,990 (\$8,944.98 + \$2,045).

Weekend Care Aid Work - June 2019 to Trial

- [110] Mr. Burnett submits that but for the injuries he suffered in the Accident, in addition to working full time at WorkBC (and later Service Canada), he would also have continued working as a casual care aid on weekends. Mr. Burnett submits that he would have worked two to four eight-hour weekend care aid shifts per month and seeks an award in the range of \$14,098 to \$28,197 for this loss of capacity.
- [111] The defendant takes the position that Mr. Burnett has not suffered any loss of capacity after December 1, 2018, because his hours worked at PAACL were equal to his prior combined hours at both PAACL and VIHA, and he then obtained full-time employment with WorkBC.
- [112] The relevant question is what Mr. Burnett would have, not could have, earned during this time frame: Rowe at para. 30. Mr. Burnett's work history at PAACL shows that supplemental shifts were available to him, and that he often worked them in addition to his 20.5-hour part-time line. After he left PAACL in May 2019, Mr. Burnett remained on the casual care aid call-out list until July 2019, when he was removed from the list due to his failure to accept shifts.
- [113] Ms. Hall and Ms. Creber both testified that Westporte was often short-staffed, shifts were available to PAACL's part-time or casual staff, and that shifts often went to overtime because no one was available after the call-out list had been exhausted. While they did not have a

specific recollection of calling Mr. Burnett, and he likewise did not recall being called, PACCL nonetheless removed him from the callout list in July 2019 because he failed to accept shifts. Taking this in combination with Ms. Creber and Ms. Hall's evidence regarding the frequency and extent of staffing issues at Westporte and significant efforts they would go to at times to find staff, I infer that additional shifts at PACCL were available to Mr. Burnett during this time frame. I am thus satisfied that there is a real and substantial possibility that the opportunity to work additional weekend shifts as a care aid was available to Mr. Burnett and that he would have accepted at least some of the shifts offered to him.

- [114] However, I do not accept there is a real and substantial possibility that Mr. Burnett would have been offered and worked as many shifts at PACCL during this time frame as he submits, namely two to four weekend shifts every month. Mr. Burnett would have been working these shifts in addition to his fulltime weekday employment. The evidence does not, in my view, substantiate a real and substantial possibility that a sufficient number of weekend shifts were available to casual workers, and would have been offered to Mr. Burnett specifically, on both days of the two weekends per month when he did not have care of his son and was thus available to work. In my view, the evidence establishes at best that Mr. Burnett would have worked a maximum of two additional shifts per month at PAACL from June 2019 to trial.
- [115] Mr. Burnett acknowledges that a contingency ought to be applied to account for vacation and sick days that would have reduced the number of shifts he would have worked at PAACL. In my view, a negative contingency is necessary to account for not only vacation and illness, but also Mr. Burnett's unavailability to work additional shifts on weekends due to other factors, including his childcare responsibilities, commitment to playing softball on Sundays from approximately April to late July each year, the likelihood that he would have chosen to engage in other leisure activities on weekends (e.g. skiing, biking, and hiking), and to account for Ms. Hall's evidence that by early 2023, Westporte, where Mr. Burnett predominantly worked while at PAACL, was fully staffed for the first time in the six years she had worked there. In my view, a 50% negative contingency is appropriate in the circumstances.
- [116] Accordingly, I assess Mr. Burnett's pre-trial loss of capacity in respect of his inability to work as a casual care aid on weekends from June 2019 to trial at \$15,824 (eight hours x two shifts per month x \$21.50 per hour x 46 months). Applying a 50% negative contingency, I assess Mr. Burnett's pre-trial loss of capacity with respect to casual care aid work at \$7,912.

Massage Therapy - July 2021 to Trial

- [117] Mr. Burnett began his massage therapy business, Twin City Wellness, in July 2021. He offers three types of massages: reflexology (\$75 per hour), Thai (\$85 per hour), and hot stone (\$95 per hour). Approximately 95% of the massages he performs are hot stone. Mr. Burnett's gross income from Twin City Wellness was \$2,105 in 2021 and \$3,750 in 2022.

- [118] Mr. Burnett testified that absent the Accident, he would have been capable of seeing 10-20 clients in the evenings after working his day job during the two weeks per month that he does not have custody of his son (e.g. five to ten massages per week, two weeks per month). Mr. Burnett thus submits that using \$85 as the average rate of the three services he provides, he is entitled to an award in the range of \$850 to \$1,700 per month for this past loss of earning capacity.
- [119] The defendant takes the position that Mr. Burnett has not met his onus of establishing a real and substantial possibility that but for the Accident, he would have had any more massage clients than the clients he currently treats per month. The defendant says that Mr. Burnett has not established the necessary factors to substantiate a real and substantial possibility of a loss of capacity with respect to the massage therapy business he runs through Twin City Wellness.
- [120] Mr. Burnett's claim under this head of damages is based in large part on projections about revenues from Twin City Wellness, a business that was relatively new and for which there is only a short earnings history, which entirely post-dates the Accident. Such projections must be firmly rooted in the evidence and not based on mere speculation: *Bricker v. Danyk*, 2015 BCSC 2404 at para. 149, citing *Ostrikoff v. Oliveira*, 2015 BCCA 351.
- [121] The relevant question is what evidence must be led by a plaintiff to establish that but for an accident, a new business would have continued to grow and increase its revenues: *Bricker* at para. 150. The factors to be considered were articulated in *Bricker* as follows:
- [150] While each case will necessarily turn on its own facts, where the operation and success of the business is inextricably tied to the injured plaintiff, there are a number of factors that the court may consider when assessing the strength of the plaintiff's claim, including:
- a) the plaintiff's education and training as it relates to the business in issue;
 - b) the plaintiff's employment history;
 - c) the plaintiff's earning history, both before the creation of the business and through the business;
 - d) the existence (or absence) of a business plan setting out how the plaintiff intended to develop the business;
 - e) actual steps taken to implement the business plan;
 - f) the performance of similar businesses;
 - g) market conditions that might impact the business, both positively and negatively, and
 - h) existing and anticipated clients.

- [151] This is by no means an exhaustive list and the presence or absence of one or more factors will not be determinative. The point is that the court must assess the evidence as a whole to determine whether the plaintiff has met his or her burden.
- [122] Mr. Burnett was by all accounts a hard-working individual who pursued a variety of opportunities to increase his income, often working long hours in physically demanding roles to do so. However, while Mr. Burnett has some training in Thai, reflexology, and hot stone massage, he is not trained as a registered massage therapist and does not have an established history working in the massage therapy industry. While it appears that Mr. Burnett has repeat massage therapy clients, which suggests they are satisfied with the treatments he provides, there is no evidence as to how his skills were perceived by professional peers.
- [123] More importantly, there is no evidence of any prepared business plan nor any indication of the steps Mr. Burnett has taken, or would have taken but for the Accident, to develop Twin City Wellness. Nor is there any evidence of the demand for non-registered massage therapy in Port Alberni, the performance of similar businesses, or the market conditions that might impact Twin City Wellness. Mr. Burnett testified that he did not advertise his massage business other than initially because he did not feel he could handle more clients per month. However, there is nonetheless no evidence that Mr. Burnett ever turned away a client or had to turn down appointment requests from existing clients.
- [124] Mr. Burnett concedes that there is no evidence of the demand for massage services in Port Alberni generally, or specifically those provided by a non-registered massage therapist, or whether the demand would be sufficient to support him providing 10-20 massages per month if he was physically capable of doing so. In his submission, the lack of evidence on this point ought to be addressed by way of a negative contingency. I disagree.
- [125] Considering the evidence as a whole, there is no basis upon which the Court can conclude that the assumption underlying Mr. Burnett's claim--that there is sufficient demand for non-registered massage therapy in Port Alberni to support him providing 10-20 treatments per month--is a real and substantial possibility. In my view, this amounts to speculation that is not grounded in the evidence.
- [126] Moreover, even assuming sufficient demand for Mr. Burnett's services exists, I do not accept there is a real and substantial possibility that Mr. Burnett would have performed one or two massage treatments every weeknight, after working his day job at Service Canada, in each of the two weeks of the month that he does not have custody of his son. This is especially the case given that he would be doing so while also, in his submission, working two to four weekend care aid shifts with PAACL per month. Nor does it account for the time that Mr. Burnett would likely also have spent engaging in sport and leisure activities, and attending to required tasks of daily living, such as tending to his home, doing laundry, grocery shopping, and attending medical appointments.

- [127] Mr. Burnett is currently treating three to four clients per month. As he told Dr. Stewart, this represents his "magic number" given his "other commitments", namely in addition to his full-time employment with Service Canada.
- [128] In the result, I find that Mr. Burnett has not met the relatively low bar of establishing a real and substantial possibility that absent the Accident, he would be treating any more massage clients than the three to four he currently sees on a monthly basis. Mr. Burnett's assertion that but for the Accident, he would be performing 10-20 massage treatments per month in the two weeks available to him to do so, in addition to working at Service Canada, taking on weekend shifts with PAACL, attending to his parenting responsibilities, and engaging in leisure activities, is speculative and unsupported in the evidence.
- [129] In the result, I assess Mr. Burnett's pre-trial loss of earning capacity as \$18,902, comprised of \$10,990 for loss of pre-trial earnings at PAACL and VIHA and \$7,912 in respect of loss of capacity for weekend care aid work.

Future Loss of Earning Capacity

- [130] Mr. Burnett advances essentially the same position with respect to his loss of future earning capacity as he did with respect of past loss of earning capacity.

Post-Trial Without Accident Earning Capacity

- [131] Mr. Burnett's position regarding his post-trial, without-Accident loss of earning capacity is largely consistent with his pre-trial claim: but for the Accident and in addition to his full-time job at Service Canada, he would have worked two to four eight-hour care aid shifts and performed 10-20 massage treatments each month. In effect, and consistent with his pattern of work prior to the Accident, Mr. Burnett says that he would have worked seven days and 66 hours per week during the two weeks per month when he does not have custody of his son.
- [132] Mr. Burnett testified that he would not have left PAACL and VIHA in favour of WorkBC but for the injuries he suffered in the Accident. I do not accept that the only reason Mr. Burnett left PAACL was because of his Accident-related injuries. Rather, I am satisfied there is a real and substantial possibility that Mr. Burnett would have resigned from PAACL and accepted the role with WorkBC in any event. Among other factors:
- a) While he initially took a modest reduction in pay at WorkBC, it provided full-time hours while he was only guaranteed 20.5 hours per week at PAACL;
 - b) WorkBC was better suited to his family situation at the time, as it afforded him benefits and allowed him to work regular weekday hours as opposed to evening and weekend shift work;
 - c) WorkBC was a sedentary office job that was less physically demanding than care aid work; and

- d) Mr. Burnett testified that it was "a dream come true" that WorkBC was hiring and referred to it as "the job of [his] dreams" in his PAACL resignation letter, without reference to the Accident or his injuries.

[133] Accordingly, I find that irrespective of the Accident, there is a real and substantial possibility that Mr. Burnett would have left PAACL and VIHA in favour of WorkBC in May 2019.

Post-Trial With Accident Earning Capacity

[134] The parties diverge as to the appropriate basis upon which to assess Mr. Burnett's future loss of earning capacity. Mr. Burnett advocates for the earnings approach, while the defendant says a minimal award pursuant to the capital asset approach is all that is warranted.

[135] The capital asset approach is most appropriate in cases where the plaintiff continues to earn income at or above their pre-accident level, but has suffered an impairment that may affect their ability to do so in the future: Rab at paras. 30, 34. In such cases, it is difficult to calculate the loss with mathematical certainty, and a "rough and ready" estimate is necessary: Brown v. Golaiy, 26 B.C.L.R. (3d) 353 at 357, 1985 CanLII 149 (S.C.); Perren v. Lalari, 2010 BCCA 140 at para. 12. However, the award should nevertheless be tethered "as much as possible in factual and mathematical anchors. Adopting the capital asset approach does not justify an undisciplined approach": Knapp v. O'Neill, 2017 YKCA 10 at paras. 17-19.

[136] Alternatively, the earnings approach is best suited to cases where there is an identifiable loss of income at the time of trial: Ploskon-Ciesla at para. 16. Such cases often involve plaintiffs with an "established work history and a clear career trajectory": Ploskon-Ciesla at para. 16. The future loss is valued according to the plaintiff's without-accident earning capacity using actuarial and economic evidence along with the plaintiff's past earnings history: Melvin v. Li, 2023 BCSC 241 at para. 139, citing Lo at paras. 109-111; Kim at para. 91.

[137] In my view, the capital asset approach is appropriate in the present case. Mr. Burnett continues to earn income at or above his pre-Accident level, but has suffered an impairment that may affect his ability to do so in the future by way of his inability to sustain full-time employment in physically demanding roles, including as a care aid. However, my conclusion that Mr. Burnett would have left PAACL and VIHA in favour of WorkBC and Service Canada in any event of the Accident, taken in conjunction with his lack of demonstrated work history of working as a care aid on weekends, (with or without also working as a massage therapist) renders it difficult to calculate the loss with mathematical certainty. Put differently, Mr. Burnett does not have the "established work history" and "clear trajectory" that is often present where the earnings approach is utilized.

[138] The factors to be considered in assessing damages for loss of earning capacity under the capital asset approach are set out in *Grewal v. Sanghera*, 2021 BCSC 621 at para. 161, citing *Brown* at para. 8, and include whether the plaintiff:

- a) Has been rendered less capable overall from earning income from all types of employment;
- b) Is less marketable or attractive as an employee to potential employers;
- c) Has lost the ability to take advantage of all job opportunities that might otherwise have been open to them, had they not been injured; and
- d) Is less valuable to themselves as a person capable of earning income in a competitive labour market.

[139] Methods that may be used to value the loss of the capital asset are set out in *Pallos*:

[43] The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of year remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. In all the circumstances, I would regard a fair award under this head to be the sum of \$40,000.00.

[140] The typical award under the capital asset approach is one to two years' income: *Thomas v. Campbell*, 2023 BCSC 36 at para. 179, citing *Daleh v. Schroeder*, 2019 BCSC 1179 at para. 146; *Kania v. Evans*, 2021 BCSC 797 at para. 91.

[141] I find that the injuries Mr. Burnett suffered from the Accident and the ongoing pain he experiences as a result have rendered him less capable overall from earning income from all types of employment and less marketable to other employers. Mr. Burnett's inability to take full advantage of available job opportunities as a care aid and massage therapist is evidenced by his inability to do more than three massage sessions per week and inability to work as a care aid on weekends.

[142] Moreover, if Mr. Burnett were for whatever reason unable to continue working in a sedentary role, he would find it difficult to replace that full-time work and earn a comparable income in a physically demanding role in a competitive labour market. The evidence also establishes, in my view, that despite Mr. Burnett's stoicism, he is less valuable to himself as a person capable of earning income in a competitive labour market.

[143] However, for the reasons set out above, I have concluded that Mr. Burnett's assertion that but for the Accident, he would be performing 10-20 massage treatments per month in the two weeks available to him to do so, in addition to working at Service Canada, taking on

weekend shifts with PAACL, attending to his parenting responsibilities, and engaging in leisure activities, is speculative and unsupported in the evidence. Accordingly, I have not factored future loss of capacity in respect of his work as a massage therapist through Twin City Wellness into my award under this head of damages.

- [144] In the assessment of damages for future income loss, I must also consider both positive and negative contingencies: *Ploskon-Ciesla* at para. 35, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 33; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 9.
- [145] In terms of negative contingencies, Mr. Burnett may not have worked two shifts each month on account of vacation, illness, childcare responsibilities, and leisure activities. Additionally, Westporte may have remained fully staffed thereby limiting the availability of shifts to Mr. Burnett. Further, if Mr. Burnett is unable to continue in a sedentary role, his ability to replace that work with physically demanding care aid or massage therapy is limited. I must also factor in negative labour market contingencies and the prospect that Mr. Burnett's condition may worsen over time, though this is unlikely given Dr. Stewart's opinion.
- [146] On the other hand, the staffing challenges that predominated during Mr. Burnett's time with PAACL may well return to Westporte, and other PAACL facilities may become short staffed, thereby resulting in additional shifts being available to him, which he may have the capacity to take on as his son ages and requires less care. Mr. Burnett has also experienced some improvement in his pain and is able to manage by adapting his work habits and lifestyle. It is also possible that he may continue to experience further improvement. Indeed, Mr. Burnett has continued to work full time in a sedentary role in addition to starting a massage therapy business and working part time in that capacity. His income post-Accident is greater than pre-Accident.
- [147] Considering the positive and negative contingencies outlined above, and anchoring my assessment in the factual evidence available to me, I find that a fair and reasonable assessment of Mr. Burnett's loss of earning capacity on a capital asset approach is \$70,000. This is approximately equivalent to two years of Mr. Burnett's pre-Accident income. Mr. Burnett's T4 slips show earnings of \$32,059 in 2017. In 2018, Mr. Burnett worked approximately 20 weeks and earned \$13,533, which translates into an annual income of approximately \$35,000.
- [148] As the final step of the quantification process, I conclude that this award is fair and reasonable, and reflects the type and severity of Mr. Burnett's injuries and nature of his anticipated employment: see e.g. *Ploskon-Ciesla* at para. 7, citing *Gregory*. In making the award for loss of future earning capacity, I have tethered my conclusions to the available economic evidence, but remain aware that valuation is not a mathematical exercise.

Cost of Future Care

- [149] The principles that govern the assessment of cost of future care were aptly summarized in *Wishart v. Mirhadi*, 2023 BCSC 627 at para. 117:
- [117] An award for cost of future care is intended to provide a plaintiff with physical care or assistance in order to maintain or promote the plaintiff's health as a result of injuries. There must be medical justification for the items claimed, and the items claimed must be reasonable: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68-70. The medical necessity may be established by health care professionals other than a physician but there must be a link between the physician assessment and the other health care professional's recommendation: *Gao* at para. 70. The Court must consider positive and negative contingencies: *Morlan v. Barrett*, 2012 BCCA 66 at para. 76; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 64-72. The standard of proof for assessing cost of future care is real and substantial future possibilities: *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 209. If it is shown by the evidence that a plaintiff is unlikely to participate in a program, it cannot be said that an award for such a program is reasonably necessary: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 28.
- [150] Mr. Burnett claims the cost of the following future treatments: symptom management treatments (massage, chiropractic, and acupuncture); active exercise therapy (kinesiologist, gym pass, and weekly yoga classes); psychological assessment; occupational therapy; specialty equipment and supplies; and replacement services for housekeeping and yard maintenance.

Symptom Management

- [151] The defendant accepts that some ongoing massage, chiropractic or acupuncture treatment is warranted, but says that Mr. Burnett's claim for such treatment on a weekly basis is excessive in light of Dr. Stewart's objective findings.
- [152] While I accept as a general proposition that the ability to deal with chronic pain diminishes over time as one ages, Dr. Stewart opined that it is unlikely that Mr. Burnett's condition will worsen as he ages and that degenerative changes are not expected. The evidence also establishes that the frequency with which Mr. Burnett has sought treatment has diminished over time, and in some instances, he appears to have sought treatment for issues unrelated to the Accident or indicated that he did not have any medical concerns at the time.
- [153] Considering the evidence as a whole, I agree with the defendant that Mr. Burnett's proposed cost of future care for symptom management is excessive and unreasonable in light of the medical evidence. Rather, I find that that an award of one massage and one chiropractic treatment per month is medically justified and reasonable. In my view, it is reasonable to award monthly treatments for symptom management for an additional 10 years.

[154] Using the costs set out by Mr. Gregson of \$115 and \$65 per treatment for massage and chiropractic respectively, this yields an annual cost of \$2,160. Applying the present value multipliers set out in Darren Benning's report, this results in a present value of \$19,369 ($\$2,160 \times 8,967/\$1,000$), and I award that amount for cost of future care in respect of massage and chiropractic symptom management treatments.

Active Therapy

[155] Dr. Stewart recommended that Mr. Burnett see a kinesiologist. This was not strenuously disputed by the defendant, and the amount sought is reasonable. I award \$947 in this respect.

[156] The defendant takes the position that Mr. Burnett's claim for a gym pass at an annual expense of \$4,592 to age 55 and \$4,613 to age 65 is excessive, not medically justified, and unnecessary, particularly given that Mr. Burnett has access to exercise equipment in his home. Dr. Stewart also testified that lifting weights could be detrimental in aggravating Mr. Burnett's symptoms, and that he reported to her that he had given up gym activities that aggravated his symptoms. As such, I decline to make any award for gym membership.

[157] The defendant takes the same position with respect to weekly yoga classes, and notes that these can also be done online. I agree with the defendant that Mr. Burnett's claim for the cost of weekly yoga classes at a present value of \$22,313 is excessive and unreasonable in the circumstances. While Mr. Burnett is well-equipped to stretch at home, I nonetheless find that a modest one-time award for yoga classes is appropriate and medically justified to permit him to attend in-person classes from time to time. As such, I find an award of \$5,000 is fair and reasonable to the parties.

Psychological Assessment & Occupational Therapy

[158] The award sought for a psychological assessment is unsupported in the evidence before me. Likewise, I find that Mr. Burnett has not made out his claim for occupational therapy or the various forms of ergonomic equipment listed in Mr. Gregson's report. Mr. Burnett has ergonomic equipment supplied to him through his employment with Service Canada, and there is no evidence that this is not expected to continue or that he intends to leave that employment.

Specialty Equipment

[159] The defendant takes issue with many of these items being recommended by Mr. Gregson rather than Dr. Stewart. Medical necessity of future care costs can be established through non-physician healthcare professionals, such as occupational therapists, where there is a link between their recommendation and a physician's assessment: Gregory at para. 39; Gao v. Dietrich, 2018 BCCA 372, at paras. 70-78; Deegan v. L'Heureux, 2023 BCCA 159 at para. 93. In the present case, Dr. Stewart recommended and Mr. Gregson then particularized

treatments based on that recommendation.

- [160] That being said, Mr. Burnett already has an adjustable massage table, and the evidence does not substantiate the need for an additional table as a result of his Accident-related injuries, rather than as standard equipment for a massage therapist. The same reasoning applies to his claim for a rolling stool and positioning bolsters: Mr. Burnett has not established that these items are medically justified and reasonable as a result of his injuries from the Accident.
- [161] Finally, I conclude that Mr. Burnett has not met the burden of establishing that any of the following costs are medically necessary and reasonable in the circumstances: massage balls, massage gun, electrodes, an adaptive equipment fund, TENS machine, and an exercise equipment fund. There is simply insufficient evidence, aside from passing references and Mr. Gregson's bare assertion that these items are medically justified, that these items are medically justified and reasonable in the circumstances before me.

Housekeeping & Yard Maintenance

- [162] Mr. Burnett abandoned his claim for loss of housekeeping capacity separate and apart from non-pecuniary damages. However, he maintains a claim for replacement services for housekeeping consisting of "deeper cleaning" at a present value of \$15,992 and yard maintenance at a present value of \$22,773.
- [163] With respect to deeper house cleaning, Mr. Gregson recommended that Mr. Burnett continue to participate in housekeeping tasks to the best of his ability. Mr. Burnett testified that he is able to perform home maintenance tasks by pacing himself, and demonstrated the ability to do so to Mr. Gregson on assessment. However, Mr. Gregson noted that Mr. Burnett presented with a limited tolerance to functional activity involving spinal flexion that is likely to impact his ability keep up with the volume of deep cleaning required in his home.
- [164] Mr. Gregson recommended that Mr. Burnett have eight hours of assistance for deeper home cleaning twice per year, at a cost of \$25-45 per hour. In my view, an award for deeper cleaning is medically justified and generally reasonable. I find that an award of 16 hours per year at \$35 per hour to age 65 is warranted on the evidence before me. This results in an annual cost of \$560.
- [165] With respect to yard maintenance, Mr. Burnett testified that he has continued to do such tasks, including mowing the lawn, but demonstrated limitations in performing various yard work tasks (e.g. raking leaves, pruning, and trimming) when being assessed by Mr. Gregson. Accordingly, Mr. Gregson recommended that Mr. Burnett have 18 hours of yard work assistance per year in his current home, at a cost of \$40-60 per hour. I find that an award of this nature, at \$50 per hour, is medically justified and reasonable to age 65. This results in an annual cost of \$900.

- [166] However, Mr. Burnett is capable of performing some deeper cleaning and yard work tasks himself. The evidence also suggests that some of home maintenance tasks are either the responsibility of Mr. Burnett's landlord, or that Mr. Burnett has assistance from his landlord for such tasks. The extent of the deeper cleaning and yard maintenance required may also change if Mr. Burnett were to move to a different residence, particularly one that is not located on a six-acre property.
- [167] Taking these factors into consideration and also accounting for the efficiency of professional services providers, I find that the awards for replacement services ought to be reduced by 40%, resulting a net annual cost of \$876 ($\$1,460 \times 60\%$). Applying the present value multipliers set out in Mr. Benning's report to age 65, this results in a present value of \$16,604 ($\$876 \times 18,954/\$1,000$). I thus award \$16,604 for cost of future care in respect of deep cleaning and yard maintenance.
- [168] In the result, I award \$41,920 for cost of future care, comprised of the following: \$19,369 for symptom management (massage and chiropractic treatments), \$5,947 for active exercise therapy (kinesiology and yoga), and \$16,604 for replacement services (housekeeping and yard maintenance).

Special Damages

- [169] Mr. Burnett claims \$4,488.68 in special damages, of which \$2,188.68 is uncontested. The remaining \$2,300 in disputed special expenses consists of \$475 in orthotics, \$670 in massage therapy, \$100 in physiotherapy, and \$1,055 in childcare. The defendant says that the disputed special expenses were not proven to be related to the Accident.
- [170] Out-of-pocket expenses are compensable as special damages when they are reasonable and incurred as a result of the accident: *X. v. Y.*, 2011 BCSC 944 at para. 281, citing *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 at 78, 1985 CanLII 179 (S.C.). Reasonableness is assessed with reference to the context of the injuries, including medical justification for the expenses and the plaintiff's subjective belief that the expenses were reasonably necessary: *Fryer v. Nakusp (Village)*, 2022 BCSC 497 at para. 248, citing *Redl v. Sellin*, 2013 BCSC 581 at para. 55; *MacIntosh v. Davidson*, 2013 BCSC 2264 at para. 128. As special damages are intended to restore the plaintiff to the position they would have been in but for the accident, expenses are not recoverable if they would have been incurred in any event: *Matei v. Wu*, 2022 BCSC 107 at para. 150.
- [171] Mr. Burnett testified that he required orthotics for pain relief in his back and neck, as recommended by Dr. Nell and his chiropractor. However, Mr. Burnett's evidence in that regard was not consistent with Dr. Nell's clinical records, which indicate that the orthotics were prescribed for Mr. Burnett's bunions and arches. Given my conclusion that Mr. Burnett tended to exaggerate the nature and extent of his ongoing injuries from the Accident, I prefer Dr. Nell's clinical entry to his evidence and conclude that Mr. Burnett has not established that the orthotics were prescribed for his Accident-related injuries.

- [172] With respect to the disputed massage expenses, Mr. Burnett testified that he attended Alberni Massage Therapy for his injuries related to his Accident. The defendant says that the clinical notes pertaining to these treatments are clear on their face that they were for treatment of matters unrelated to Mr. Burnett's injuries from the Accident. Again, given my conclusion that Mr. Burnett tended to exaggerate the nature and extent of his ongoing injuries from the Accident, I prefer the clinical entries over Mr. Burnett's testimony.
- [173] Mr. Burnett testified that he attended Port Alberni Physiotherapy for injuries related to the Accident. The defendant says that this expense was for treatment for the plaintiff's big toe, not his Accident-related injuries. This is consistent with Mr. Burnett's admission in cross-examination that he has not attended physiotherapy for his Accident-related injuries since 2019 or 2020. Despite Mr. Burnett denying having any issues with his toe, the receipt is clear on its face, and I find that this expense is unrelated to Mr. Burnett's injuries from the Accident.
- [174] Finally, Mr. Burnett testified that there was a period of time following the Accident during which he could not care for his son, and thus he incurred childcare expenses. His evidence in this regard was corroborated by Ms. Philpott. However, the evidence as to when the childcare reflected in the associated receipts was provided and when their son started daycare in relation to the timing of the Accident is unclear, and neither Mr. Burnett or Ms. Philpott were able to confirm the timing in that regard. As such, I find that the plaintiff has not met the onus of establishing that the \$1,055 in childcare expenses was incurred as a result of the Accident.
- [175] Mr. Burnett is awarded the undisputed special expenses of \$2,189.

Conclusion

[176] Mr. Burnett is awarded the following damages:

- a) Non-pecuniary damages
\$55,000
- b) Past loss of earning capacity
\$18,902
- c) Loss of future earning capacity
\$70,000
- d) Cost of future care
\$41,920
- e) Special damages
\$2,189

[177] Mr. Burnett is awarded damages in the amount of \$188,011 subject to the parties settling the appropriate deductions as contemplated in para. 105.

[178] As the successful party, Mr. Burnett is presumptively entitled to his costs at Scale B. If either party seeks an alternative costs order, they have leave to request a further hearing before me on the issue of costs within 30 days of the date of this judgment.

"Hughes J."

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Prepared on 26 October 2026 · Esheria