

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Teunissen v. Hulstra*,
2017 BCSC 1569

Date: 20170905
Docket: M147802
Registry: Vancouver

Between:

Andrew Teunissen

Plaintiff

And

Beeuwke Hulstra

Defendant

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial:

Vancouver, B.C.
February 6-10,14-17,21-24, 2017

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Vancouver, B.C.
September 5, 2017

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INTRODUCTION

[1] On December 1, 2012 at around 6:15 p.m., Mr. Andrew Teunissen, presently 42 years old, was involved in a motor vehicle accident in the city of Maple Ridge, British Columbia. At the time, he was 38 years old and he had not been involved in a motor vehicle collision prior to that date.

[2] The defendant has admitted liability. She does not, however, concede that the plaintiff was injured. She says the plaintiff's symptoms are attributable to a chronic pre-existing injury to his shoulder. If injured, the defendant disputes the amount claimed; and maintains the plaintiff failed to mitigate his loss and his overall damages should be reduced.

ISSUES

[3] The issues for determination are:

1. What are the nature, extent, and duration of the injuries Mr. Teunissen suffered in the accident?
2. What is the appropriate award of non-pecuniary damages for pain and suffering?
3. What amount, if any, should be awarded for cost of future care?
4. What amount, if any, should be awarded for past wage loss?
5. What is the appropriate award for future loss of earnings or income-earning capacity?

[4] The facts in this case are quite detailed. I have considered them all but will refer only to the most pertinent in an endeavour to achieve some efficiency in this matter.

BACKGROUND

[5] Mr. Teunissen was born and raised in Maple Ridge. He did not graduate from high school but obtained his GED some time later. Mr. Teunissen also commenced a youth justice worker course at Douglas College and completed a practicum. He has not completed any other education. While in high school, Mr. Teunissen participated in high school sports including baseball, basketball, and football.

[6] Mr. Teunissen was married in September 2004 to Ms. Samantha Richardson and has two daughters; Tianna presently age 21 and Alyssa age 15. The couple separated in 2010 and ultimately divorced. Mr. Teunissen and Ms. Richardson maintain an amicable relationship and still engage in family events together.

[7] Mr. Teunissen met Ms. Maegan McKay, his present fiancée, in the spring of 2011. The couple have been living together since the fall of 2011. Originally, they had a very full social life and included the children in family activities with both Ms. McKay's family and his own. These activities consisted of dinners, pool parties and other such activities.

[8] Mr. Teunissen described a very social life with the family which included barbecues, family get-togethers, baseball games, pool parties and camping — a favourite of his daughters. Ms. Richardson described him as a “fun dad” to the children. He was a lighthearted social individual who was always joking.

[9] This description was confirmed by Ms. McKay, his fiancée, and her mother, Ms. Dawna McKay. She said the couple attended McKay family events regularly, along with Mr. Teunissen's two daughters. Family events included barbeque and pool parties, at which Ms. McKay described him as being playful in the water with his daughters and participating in other physical activities including throwing a football, playing badminton and lawn darts.

[10] Mr. Teunissen also coached one of his daughter's softball team and attempted to coach a soccer team. His activities included pickup basketball, football

games and paintball a couple of times a year. He regularly attended concerts and played billiards, “a passion since his early 20s”.

[11] In order to support the family Mr. Teunissen had a variety of physical jobs including building a retaining wall, being a shelving installer for warehouses and working as an armoured guard at Churchill Armoured Car Service from 2006 to 2009. Mr. Teunissen ultimately obtained a job with Service Corporation International (“SCI”) as a funeral attendant. His job duties included attending at services where he would greet guests, hand out service cards, take care of guests, and act as a pallbearer. In addition he would drive the hearse and limousines as required. He usually worked at two services a day, each lasting three to four hours. The driving role would vary depending on where it was necessary for him to pick up the guests. Mr. Teunissen worked 40 hours a week being paid just under \$18 an hour.

[12] While his job was quite physically demanding, Mr. Teunissen loved it. With his affable personality, he was able to work with families and help them in difficult times. He obtained good performance appraisals and while unsuccessful in attempting to complete a challenging course to enable him to progress and become a funeral director, he saw working at SCI as a career. The company was large and provided other lateral opportunities.

[13] In 2011 Mr. Teunissen suffered a workplace injury affecting his left shoulder when attempting to right a casket that was in danger of falling after one pallbearer lost his grip. He pulled his left shoulder and left side back. He received treatment for this injury from a shoulder specialist, Dr. Gilbert. While his duties were modified, he was still able to complete the job. If he was asked to be a pallbearer after the incident he would use his right arm. While initially treated, within six or seven months, he describes very little impact from the shoulder injury. Occasionally he would suffer twinges but ultimately was able to use his shoulder without difficulty.

[14] In October 2012 Mr. Teunissen suffered a brief sciatica incident but reports that it resolved and it has never bothered him since. He suffered no back problems

prior to the motor vehicle accident at issue here, and was an active person participating in physical activities, such as hiking, camping and playing with his children without pain or limitation.

THE ACCIDENT - DECEMBER 1, 2012

[15] Mr. Teunissen described December 1, 2012 as a dark evening with light rain. He was traveling eastbound in a 2008 Ford Focus on Lougheed Highway and attempting to turn left at 220th Street. The defendant, Ms. Beeuwke Hulstra was coming home from work. Mr. Teunissen was in the central lane, with his seatbelt on and traveling approximately 10 km an hour when a large SUV “came out of nowhere” and collided with the right passenger side of the Ford Focus he was driving. He described being slammed against the left side door, glass shattering everywhere, the passenger airbag deploying and the vehicle being pushed into the opposite line of traffic. There was no power in the vehicle and he was scared of being hit head on.

[16] First responders attended at the scene including an ambulance. A paramedic advised him to go to hospital but at the time he felt okay and “just wanted to get out of there.” Ms. McKay picked him up and took him home. He did not want to go to a hospital but agreed to call the nurse’s helpline for advice.

[17] Ultimately, the Ford Focus was written off as a result of the collision at a cost of over \$10,000. The damage to the defendant’s vehicle was approximately \$7,400.

- 1. Mr. Teunissen’s Injuries – What are the nature, extent, and duration of the injuries Mr. Teunissen suffered in the accident?**

Legal Principles

[18] Mr. Teunissen must prove on a balance of probabilities that “but for” the accident, he would not have suffered the injuries he now complains of. The defendant’s negligence need not be the sole cause of the injury as long as it is part of the cause beyond the range of de minimis. Causation need not be determined

with precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[19] A basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the so-called thin skull rule). The defendant, however, need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the so-called crumbling skull rule): see *Athey* at paras. 34-36.

After the Accident

[20] The night of the accident Mr. Teunissen had very little sleep. His back was seizing up and very sore. He attended a clinic the next day and was prescribed painkillers. By the following day he was in a lot more pain and attended at his family physician's office, Dr. Fernandez (now deceased).

[21] Dr. Fernandez recommended receiving physiotherapy at Haney Physiotherapy Clinic, which he attended on December 5, 2012.

[22] He experienced back spasms the first week, where his back would convulse and lock. He described excruciating pain when the back spasm hit mid to lower back, and mid-shoulder to the small of the back. He had never previously experienced anything like these spasms prior to the accident.

[23] Mr. Teunissen described a number of difficulties associated with back pain and back spasms in the weeks and months after the accident. He rated his back pain as between six to eight without a spasm and eight to ten with a spasm. As part of his treatment, Dr. Fernandez prescribed opioids and anti-inflammatory medication, including Cyclobenzaprine, Naproxen, Tramadol, Butrans and Tramacet. Mr. Teunissen was still off work and experiencing episodes of extreme back pain by the end of 2012.

[24] Mr. Teunissen described social events beginning with a Christmas dinner in 2012 at his fiancée's parents' home, where he could not participate fully as he would need to lie down, sit on the floor or crouch against the wall to deal with his back pain. He could not walk for more than 20 minutes without pain building; and his fiancée and daughters took over most if not all of the household chores.

[25] This continued into 2013 with more difficult episodes. Mr. Teunissen described specific instances of back spasm pain such as a January 2013 birthday event at his fiancée's parent's home, where he experienced a spasm in the elevator to their home and had to crawl out of the elevator on his hands and knees. He then laid on their bedroom floor, until finally attending Burnaby Hospital that evening where he was provided with a painkiller injection.

[26] From January to May 2013, Mr. Teunissen remained off work from SCI. By this time, ICBC advanced him an amount of \$4,155 in partial compensation for lost wages. As of March 31, 2013, he began receiving long-term disability ("LTD") benefits from Manulife in the amount of \$1,840 a month.

[27] Mr. Teunissen experienced a major back spasm at a Mother's Day dinner in 2013, and had to leave the restaurant to lie in the SUV until the spasm or dinner was over.

[28] In 2013, Mr. Teunissen relied upon motorized carts in Walmarts and Real Canadian Superstores to assist with grocery shopping. He eventually obtained a wheelchair from the local Red Cross. Mr. Teunissen used the wheelchair from May 2013 to May 2014 when he thought he might need it due to travel or extended standing or walking, including a trip to Victoria with his daughter and ex-wife.

[29] Mr. Teunissen attended a variety of concerts in 2013 and 2014, such as Motley Crue, Kiss, and REO Speedwagon in a wheelchair, sitting in the wheelchair section. He found the use of the wheelchair embarrassing and difficult throughout this period of time. He was uncomfortable and noted "dirty looks" from strangers when he was seated in the wheelchair.

[30] In 2013 and 2014, Mr. Teunissen's enjoyment of camping suffered. A wheelchair accessible camping location was required and he spent a lot of time in the cabin, unable to participate in the usual family activities.

[31] Throughout this time, many activities bothered his back such as walking, sitting, standing, or a large sneeze or cough. He also had difficulty sleeping which added to his discomfort.

[32] Mr. Teunissen said he experienced a lot of pain and back spasms in 2013 and 2014. He described these as "horrible" with a pain level of eight to ten and lasting from 45 minutes to three-four hours. These could be triggered if he did too much activity, like standing and household chores. He had to take a lot of breaks to accomplish those tasks. He described one spasm in the spring of 2014 where he was trapped in bed for three-four hours immobile with pain until his fiancée came home. She then called his ex-wife for assistance and they took him to his hospital.

[33] In May of 2014, he again experienced a back spasm at a family dinner at the Keg Steakhouse, and needed to lie flat in the car while the family ate dinner.

[34] Mr. Teunissen could not participate in a family event at Hastings Park in June 2014, other than sitting and watching due to back pain. While he attended the Richmond Night Market in September 2014, he was not able to walk and participate with the family group, but rather needed to find a place to sit and wait. He essentially missed these events.

[35] During this time he described his left shoulder as occasionally acting up, with twinges but manageable pain and not interfering with his daily activities.

[36] He was, however, able to participate in a billiard league in 2013 and 2014 at a reduced level. The billiard team would travel with an extra player in case his back seized up as it did in a 2014 tournament.

[37] The description of his reduced activities and visible pain episodes were confirmed by both Ms. McKay and Ms. Dawna McKay and Ms. Richardson, who all testified in this matter.

[38] Ms. Richardson also described the adverse impact on her daughters as they tried to assist their father through these difficult times. The change in his physical abilities impacted his ability to be active with his daughters, attend school events and generally help them out. Ms. Richardson took on many of the children's school matters as he was unable physically to attend events without difficulty and pain. It is fair to say the family members' roles essentially reversed with Mr. Teunissen's daughters spending time assisting him since the time of the accident in December 2012.

[39] Mr. Teunissen tried both physiotherapy and a variety of drug prescriptions to deal with his pain and limitations. In 2013 he attended over 56 physiotherapy sessions and went to aqua therapy and acupuncture sessions. Near the end of 2013, Ms. Jacqueline Penner was assigned as his occupational therapist by ICBC. She encouraged him to go on more walks, do more things and "push through the pain".

[40] In April 2014, Mr. Teunissen commenced treatment by Dr. Lisa Caillier, a physiatrist and pain specialist, and began to see a gradual improvement. He commenced Botox injections in late 2014 which greatly assisted. He is presently on a successful combination of Cymbalta and Baclofen, with occasional Botox injections for his back pain. While he still has constant back pain, he has weaned himself off many of the medications he took for it; has a number of coping strategies and found the combination of Cymbalta and Baclofen along with the occasional Botox injection helped him cope with the pain. By the end of 2014, he had attended physiotherapy on 69 occasions.

[41] Mr. Teunissen attended physiotherapy sessions regularly with Mr. David Lee at Pitt Meadows Physiotherapy Clinic from March 6, 2013 until December 12, 2014.

Mr. Lee confirmed his notes indicated that Mr. Teunissen has a problem throughout with his back, specifically noting when Mr. Teunissen reported a spasm and also recording when a spasm occurred in a physiotherapy session. He provided treatment in a variety of ways, including muscle palpation, ultrasound, electrical stimulation and exercises. He was unable to say if there was a decrease in spasms in 2014. Mr. Lee saw Mr. Teunissen twice in 2015 on May 26 and 28. He did not report a spasm in either of those sessions.

[42] When Mr. Teunissen was questioned as to why he stopped his physiotherapy in March 2015, he said he could not afford the sessions once he was cut off from LTD benefits.

[43] Both Ms. Richardson and Ms. McKay confirmed that at no time prior to the collision did Mr. Teunissen demonstrate any back issues or physical limitations including chronic pain.

[44] Today, Mr. Teunissen says his back situation is still frustrating. He does as much as he can but it takes its toll emotionally. He worries about the future and his ability to take care of his family. Both Ms. McKay and Ms. Dawna McKay noted Mr. Teunissen feels emasculated by not being able to provide for his family.

[45] The McKays are very supportive, both emotionally and financially. The couple have supported Mr. Teunissen and Ms. McKay by providing a credit card for essentials such as food, rent and prescriptions which the McKays pay off monthly. The McKays have ultimately provided up to \$80,000 to support the couple from 2014 - 2016.

The Medical Evidence

(a) Causation

[46] The defendant says on the evidence it appears clear that the motor vehicle accident caused Mr. Teunissen's back symptoms, whether this was caused by

simple soft tissue injury of longstanding duration or revealed by the accident. It did not, however, cause an underlying facet joint problem as suggested by Dr. Robin Rickards, an orthopedic surgeon and pain specialist.

[47] On this point, I conclude an underlying facet joint problem was not established as a contributing factor to the chronic pain of Mr. Teunissen.

[48] Dr. Caillier, the physiatrist, was qualified in this case as an expert in physical medicine and rehabilitation with the ability to provide a diagnosis and prognosis to spine related injuries, soft tissue injuries, chronic pain, and how those injuries can impact a person's functionality.

[49] Dr. Caillier commenced treating Mr. Teunissen on June 21, 2013 with follow-up appointments on December 6, 2013, March 3, 2014, April 14, 2014, July 14, 2014, October 28, 2014, March 10, 2015 and August 25, 2016. Her review confirmed back spasms and pain, and she recommended treatment including Cymbalta, Baclofen and Botox injections. Dr. Caillier assisted Mr. Teunissen through his return to work process in 2013 and 2014 by discussing matters with the occupational therapist throughout.

[50] Dr. Caillier also noted in Mr. Teunissen's visit of August 25, 2016, that he had constant pain through the spine from the upper to lower back region. At that time, she treated Mr. Teunissen with Botox injections.

[51] Dr. Caillier provided her medical opinion and said at page 9:

20 Despite his participation in various therapies as well as involvement in an occupational therapy program, trying different medications at undergoing injections (myofascial trigger point injections/lidocaine, as well as Botox injections) Mr. Teunissen has not become pain-free nor has he become muscle spasm free and he continues to have ongoing symptomatic complaints involving the mid to lower back regions.

21 Mr. Teunissen has not been able to return to work successfully as a funeral attendant and more recently and since June 2016 has been working as a tow truck driver for Maple Ridge Towing albeit having difficulties with this position.

22 When seen on August 25, 2016, I expressed concern that his ability to continue forward with his current job given the ongoing aggravation, not only of pain but also provocation of muscle spasms. There was also the concern that if he missed out on work this would have a negative impact upon his mood, as well as this position does not appear to be having a good impact on his sleep, nor was it allowing him to exercise in order to manage his pain.

[52] Dr. Caillier diagnosed Mr. Teunissen with chronic pain, mainly soft tissue in nature involving the upper and mid back as well as through to the lower back regions. She noted it is possible that there is an underlying mechanical component involving the thoracolumbar junction but, in her opinion, the majority of his pain is soft tissue in nature.

[53] She opines further at page 11 that:

26 In my opinion, Mr. Teunissen's physical symptoms (pain and spasms) are residual to and a direct result of the motor vehicle accident of December 1, 2012.

27 In my opinion, there has likely been central sensitization of pain or a central pain process that has occurred and his pain can also be amplified further by issues with mood and even that of poor sleep.

[54] In cross-examination, she said she did not believe Mr. Teunissen was suffering from a facet joint injury and none of the pre- or post-collision events changed her opinion.

[55] Dr. Rickards, the orthopedic surgeon and pain specialist, testified in this matter. He prepared two reports the first dated October 27, 2016 and the second, December 8, 2016. As noted by the defendant, he referred to a possible underlying facet joint problem as possibly creating the symptoms.

[56] I prefer the opinion of Dr. Caillier in this matter. Her qualifications in chronic pain are indisputably sound. She has seen Mr. Teunissen at least eight times since 2013 and had some success in treating his pain.

[57] On the other hand, Dr. Rickards saw Mr. Teunissen for one hour on September 14, 2016 for an "Independent Medical Examination". His qualifications on

chronic pain are minimal. He has only completed a mini fellowship and has limited practise in this area since he stopped being a surgeon in 2011. Despite the fact he is not experienced in the impact of obesity on recovery, he opines at page 10 of his first report with respect to causation that:

Of most significant importance is the high BMI; the extreme excess weight which Mr. Teunissen carries. Several studies have noted a relationship between low back pain and obesity [see - Scientific references 2, 3 – Appendix D]. Several mechanisms/contribute factors have been proposed as to the production of the low back symptoms [see Low Back Pain and Obesity Detailed Explanations – Appendix E].

...

The motor vehicle accident of December 1, 2012 may be a minor factor in relation to the ongoing difficulties in the low back area, possibly aggravating symptoms in an overloaded spine.

[Emphasis removed.]

[58] He also notes at page 9 that Mr. Teunissen presents with symptoms and clinical signs in the low back area suggestive of irritation of the facet joints.

[59] There is, however, no assessment of the nature of the pain in the low back and very minimal to no reference to pertinent clinical documents concerning the back pain - of which there are many.

[60] In addition, Dr. Rickards's second report disregards the factual evidence. With respect to Mr. Teunissen's work abilities he says at page five in his report dated December 8, 2016 that:

It is obvious from the history provided by Mr. Teunissen that he is indeed capable of working as a tow truck driver and indeed has been working at this job since the late spring of 2016.

It is my opinion that Mr. Teunissen is fully capable of continuing this job routine as a tow truck driver as he already has the past three months or more.

[61] By December 8, 2016, Mr. Teunissen was no longer working as a tow truck driver due to back issues and had at least one very serious back spasm while he was driving to work.

[62] Furthermore, Dr. Rickards repeatedly notes in his report that if Mr. Teunissen loses weight, this will alleviate symptoms, without any real authority for that proposition.

[63] There are numerous objective reports by various clinicians of Mr. Teunissen's back spasms and back pain since the time of the motor vehicle accident and continuing thereafter, although to a lesser degree. At the end of the day, Dr. Rickards agreed in cross-examination that regardless of all of the above, the motor vehicle accident was a material cause of the pain experienced by Mr. Teunissen.

[64] I note further there is no real evidence that Mr. Teunissen's symptoms are attributable to a chronic pre-existing injury to his shoulder.

[65] Dr. Daniel Gouws, a physician with expertise in determining a person's medical fitness to work testified in this matter. He saw Mr. Teunissen on September 13, 2016 for a four hour assessment and provided an expert report dated October 28, 2016.

[66] As set out in his report at page 26, regarding the cause of Mr. Teunissen's symptoms and limitations:

74 It is my opinion that Mr. Teunissen's current complaints related to his thoracic spine have resulted in significant functional limitations, and are a consequence of the motor vehicle accident of December 1, 2012.

[67] I conclude the medical evidence clearly establishes Mr. Teunissen suffered a soft tissue injury in the accident and continues to suffer from chronic back pain. It also establishes the accident is a material contributing cause to Mr. Teunissen's back injury, pain and resulting disability.

(b) Return to Work

[68] Dr. Gouws also opined on Mr. Teunissen's medical fitness to return to work. With respect to his barriers to rehabilitation and occupational obstacles, Dr. Gouws concluded at page 28:

79. Mr. Teunissen's most significant barrier for successful and durable return to work continues to be his intolerance for sustained activity. His ongoing tendency to develop incapacitating muscle spasms and high levels of pain with a variety of activities makes it difficult to provide specific parameters for his work tolerance. In spite of appropriate and very intensive medical interventions, he continues to have back spasms and pain that have not had any durable response to treatment. In addition to his acute bouts of pain and spasm, his chronic pain also affects his mobility and flexibility. Mr. Teunissen noted that he thought he was getting better and that his back spasms had stopped for a while until recently. He said he thought that the Cymbalta with Botox had almost resolved the spasms but that his symptoms then recurred in the last month when he had two or three spasms.

[69] He also noted the degree of impairment and prognosis at page 30 as follows:

87. It is my opinion that the length of time since Mr. Teunissen's injury (which is now approaching almost four years), his persistent pain, is associated physical impairment, and his lack of response to intensive and appropriate medical care (including ongoing care by consultant physiatrist Dr. Lisa Caillier since June 2013) are poor prognostic factors for recovery in significant improvement in function. Mr. Teunissen did have left shoulder symptomology before he was involved in the motor vehicle accident on December 1, 2012, but by all accounts had continued working by focusing on using his right arm more than his left. It is my opinion that his shoulder symptoms by itself would not have disabled him from working as a funeral director by that this condition may have required some degree of accommodation in the workplace.

[70] With respect to Ms. Penner, the occupational therapist's suggestion that Mr. Teunissen needs to "push through the pain" to get back to work, Dr. Gouws noted Mr. Teunissen had tried to do that. His last job as a tow truck driver was against medical advice. He said Mr. Teunissen needs durable work which provides him with a reasonable degree of symptom control. He noted, however, Mr. Teunissen would be "setting himself up for failure" if he tried to work full-time in a physically demanding position.

[71] Despite being referred to numerous post-collision incidents such as slip and fall accidents, falling off a log while camping and chronic coughing, Dr. Gouws did not resile from his opinion that Mr. Teunissen's work place barrier is his back pain. When shown Facebook postings of Mr. Teunissen being social, such as going to concerts, Dr. Gouws was very clear continuing to have some enjoyment in life as reflected on Facebook is not inconsistent with also dealing with chronic pain.

[72] Dr. Paul Sidhu, Mr. Teunissen's family doctor also testified. Due to the untimely demise of Dr. Fernandez, he has been treating Mr. Teunissen since January 2014. In his medical report of November 7, 2016, Dr. Sidhu concludes at page 4:

28 In my opinion Andrew suffers from myofascial type pain and back spasms that were caused by the motor vehicle accident which occurred on December 1, 2012. Despite the efforts of physiotherapy, occupational therapy, kinesiology and Botox injections, Andrew continues to suffer from back pain and back spasms. He is limited to the amount he can lift, stand, sit, walk and stoop/bend. I believe that Andrew will not be able to return to a physical demanding job, or sustain a job that requires him to sit/stand for prolonged periods of time such as a tow truck driver. It is possible that Andrew aims towards office-based job where he can periodically move and change positions as needed to prevent exacerbations of pain. The prognosis for Andrew to return back to doing his physical demanding work and back pain/spasm is essentially poor.

[73] Ms. Louise Craig, a certified functional capacity evaluator, was accepted as an expert in physiotherapy with the ability to perform functional capacity evaluations identifying physical limitations as well as a person's abilities and restrictions.

[74] Ms. Craig assessed Mr. Teunissen on August 16, 2016 and produced a report dated August 18, 2016. In that report, she concluded at page 4 that:

1. In summary, during this functional capacity evaluation (FCE) Mr. Teunissen did not demonstrate the capacity to meet the full physical demands of his job as a Funeral Home Attendant (National Occupational Classification Number 6683.3) due to the very heavy lifting demands, the demands for sustained static standing, positional demands for sitting and the demands for sustained or repetitive stooping. Without significant improvement to his upper and mid to low back condition, including improvement to his pain and muscle spasms, physical conditioning, strength

(core and back muscles) and postural tolerance (sitting, standing stooping), it is unlikely that he will return to physically demanding work of this nature.

[75] She also concluded at page 4 that:

2. Mr. Teunissen did not demonstrate the capacity to meet the full physical demands of his job as a Tow Truck Driver (National Occupational Classification Number 7411.1). In keeping with his reports of increasing frequency of muscle spasms since starting at this job two months ago, Mr. Teunissen shows limitations to essential work tasks of sustained sitting, lifting, pulling or pushing. Mr. Teunissen was incredibly stiff after longer periods of sitting, being slow to rise and showing difficulty straightening up, remaining in a flexed posture for a few minutes while mobilizing in order to loosen up after sitting. Mr. Teunissen also reports lifting of equipment that is beyond his current strength capacity, which reportedly increases pain on the jobsite. Mr. Teunissen demonstrates how he uses his body to maneuver the heavy equipment required to set up to tow some types of vehicles. He states that he is upright in his seat and that this helps manage his back pain. He reports that he is in and out of the truck, which permits postural changes from sitting to standing or walking. With these accommodations Mr. Teunissen is managing at his job, albeit with pain aggravation that is limiting on the job and that also persists in non-work hours, restricting his activities outside of work. Mr. Teunissen would not tolerate the demands for a long-haul truck driver due to the sustained sitting demands in the demands for repetitive heavy material handling when loading and offloading the truck.

[76] She continued at page 4:

3. Mr. Teunissen demonstrates limitations that reduce his ability to work at more physically demanding jobs. Occupations with low heavy physical demands (although more in keeping with his current physical capacity) will require accommodation, allowing for frequent positional and task changes, regular stretching, avoidance of strenuous or repetitive heavy to very heavy lifting and proper ergonomics to best manage symptom aggravation. As such, the scope of occupations once viable from a physical perspective for Mr. Teunissen is reduced, leaving him with reduced competitive employability.

[77] She then specified his limitations as follows:

5. ... He demonstrates the capacity for low end of heavy physical strength demands (lifting, carrying, pushing, pulling 52 to 70lbs). He is able to reach at all levels and a competitive pace for short intervals and is limited by positional tolerance rather than dexterity or reaching capacity. He demonstrates normal range handgrip strength bilaterally compared to population norms for his age group. He demonstrates above average media manual dexterity. He demonstrates satisfactory balance and is able to safely negotiate stairs. He shows limited sitting tolerance. He demonstrates reduced tolerance to

sustained walking after longer periods of sitting or standing, with an analgic gait pattern of limited hip extension and a flexed posture. He is limited for static standing, necessitating postural changes and rests from stationary positioning. He is able to crouch and finds that this posture eases his pain when aggravated. He is able to kneel and to assume a crawl position with some stiffness and occasional support of the wall or equipment. He demonstrates substantial difficulty with repetitive and sustained stoop.

[78] Throughout her testimony and in cross-examination Ms. Craig was clear that during a full day of testing Mr. Teunissen demonstrated full effort leading to an accurate assessment of his abilities.

[79] Ms. Penner, Mr. Teunissen's treating occupational therapist also testified in this matter. She was assigned to Mr. Teunissen by ICBC, and her job was to facilitate Mr. Teunissen's return to work at SCI. Ms. Penner dealt with Mr. Teunissen from October 31, 2013 until his discharge on June 28, 2016. The notes she kept in the course of treatment were referred to extensively by both parties. She confirmed that after his return to work at SCI, Ms. Claire Boyle, Mr. Teunissen's manager, indicated he was only able to do 20% of his duties. She also confirmed he was motivated throughout to get better, return to work and worked hard to do so.

[80] With respect to this and other evidence I note the defendant referred to a detailed index of comments from the testimony and in particular that of Ms. Penner and Mr. Lee, the physiotherapist to argue that Mr. Teunissen experienced unrelated injuries and events. These references, however, provide a distorted view of the medical evidence and do not take into account comments in chief of both these individuals. The references are unduly selective and include no entries or comments from Dr. Caillier; and none of the physiotherapy records of the Haney and Pitt Meadows clinics. Generally, I conclude the defendant stated the evidence in a selective way.

[81] Furthermore, the events referred to by the defendant to argue unrelated injuries and events impacted on Mr. Teunissen's disability, do not affect the conclusion that Mr. Teunissen's disability can be materially attributed to the motor vehicle accident. I will deal with them as they arise under the pertinent issues.

2. Non-Pecuniary Damages – What is the appropriate award of non-pecuniary damages for pain and suffering?

Legal Principles

[82] As I have found Mr. Teunissen was injured in the accident, he is entitled to reasonable damages for pain and suffering. The jurisprudence establishes, to the extent a monetary award can accomplish it, he should be placed in the same position he would have been if the accident had not occurred, but not in a better position: *Parypa v. Wickware*, 1999 BCCA 88 at para. 29.

[83] The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-89.

[84] The leading case on assessment of non-pecuniary damages is *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100. The Court of Appeal at para. 46 outlined the factors to be considered in making such an award:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[85] Mr. Teunissen seeks an award of \$125,000 in non-pecuniary damages and relies upon *Carroll v. Hunter*, 2014 BCSC 2193, *Harvey v. Yanko et al.*, 2007 BCSC 216, *Odian v. Carriere*, 2016 BCSC 112 and *Trites*.

Application of Legal Principles

[86] The defendant relies upon *Deol v. Sheikh*, 2016 BCSC 2404, *Wiebe v. Peters*, 2009 BCSC 650, *Gold v. Joe*, 2008 BCSC 865, *Strazza v. Ryder*, 2012 BCSC 1693, *Dzumhur v. Davoody*, 2015 BCSC 2316, and *Szymanski v. Morin*, 2010 BCSC 1 to argue for a substantially lower amount ranging between \$60,000 and \$85,000.

[87] The defendant argues that Mr. Teunissen's injuries fall within the scope and severity of the injuries set out in the cases above. The impact of the injuries on his lifestyle and enjoyment are similar to the impacts faced by the plaintiffs in the *Wiebe* and *Strazza* cases.

[88] Furthermore, the defendant points out while Mr. Teunissen went through a period of pain he still managed to do the things he enjoyed. He spent time with his family and had a social life. When his spasms are under control, he is able to return to his normal activities with perhaps some modification or adjustment. .

[89] The defendant also relies upon *Zajackowski v. Grauer*, 2014 BCSC 711 at para. 45 to argue the courts should be "exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery".

[90] Dealing with the latter point first, I accept Mr. Teunissen's description of the level of pain and its debilitating effects. Mr. Teunissen gave his evidence in a straightforward manner and was not prone to exaggeration. His testimony was corroborated by both the lay and medical witnesses. In contrast to the *Zajackowski* case, I accept the description as provided by Mr. Teunissen that the pain has persisted and has significantly adversely affected his life.

[91] I have reviewed the various cases provided by counsel regarding the appropriate range for non-pecuniary damages. In my view, the cases relied upon by Mr. Teunissen reflect injuries and pain that are more similar to the ones he has suffered than those relied upon by the defendant. I note in particular the level of pain, which has been episodically severe, is unlike the pain experienced by the parties in the cases relied upon by the defendant.

[92] Mr. Teunissen is a determined and stoic individual who has persisted in trying to work and support his family, despite the chronic pain. He has demonstrated this more than once, attempting work opportunities that he previously would have had no difficulties with and which he unfortunately cannot continue.

[93] The assessment of non-pecuniary damages depends on the particular circumstances of the plaintiff in each case. Having considered Mr. Teunissen's age, the nature of the injuries, the severity of his symptoms and the fact they have been ongoing for five years, the poor prognosis for recovery, and the authorities, I am of the view the appropriate award for non-pecuniary damages is \$110,000.

3. Cost of Future Care – What amount, if any, should be awarded for cost of future care?

Legal Principles

[94] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition, insofar as that is possible. When full restoration cannot be achieved, the Court must strive to assure full compensation through the provision of adequate future care.

[95] The test to establish an award for cost of future care is objective. There must be a medical justification for the claim, and the claim must be reasonable: *Simmavong v. Haddock*, 2012 BCSC 473 at para. 126. In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13, the Court noted that common sense should inform awards for future care.

[96] With regard to adjustments for contingencies, the Court in *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253, stated:

[253] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required... In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required... Each case falls to be determined on its particular facts.

[97] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

Application of Legal Principles

[98] Mr. Teunissen is advancing a cost of future care claim in the amount of \$44,139.00. This amount is for an annual gym membership; kinesiology visits six to eight times a year; physiotherapy five times a year; and certain injections/drugs for pain including Botox and Baclofen.

[99] The defendant submits only the cost of \$25,000 should be allowed. The defendant says the need for future care is speculative as Mr. Teunissen has not been incurring these costs between the accident and the trial. The defendant also points out the opinions of Dr. Caillier, Dr. Rickards and Dr. Gouws indicate that weight loss would benefit Mr. Teunissen and obviate the need for some of the future care claimed.

[100] Mr. Teunissen has testified and medical experts have confirmed that physiotherapy sessions, kinesiology services, Botox and Baclofen medications have assisted Mr. Teunissen with the debilitating pain. They enable him to enjoy some of his former activities and assist with working.

[101] There is no real disagreement with this plan, other than indicating weight loss would benefit Mr. Teunissen and obviate the need for some of the future care cost, including the gym.

[102] This latter point has been a consistent theme of the defendant in this case, the effect of which I find has not been established on the evidence. There is no real evidence on this except from Ms. Craig who had looked into this and found the opposite. Ultimately, Dr. Rickards agreed in cross-examination that there are no studies suggesting individuals with high body mass index (“BMI”) have any longer recovery from back trauma than those with average or low BMI. He also agreed the link between back pain and obesity is controversial.

[103] I conclude the cost of care in the amount of \$44,139 for the care claimed is reasonable in the circumstances. This amount was established in a report by Mr. Curtis Peever, an economist with expertise in labour economics, and includes an annual gym membership at \$513 to age 65, kinesiology visits six to eight times per year for three years at \$58 a session, physiotherapy five times per year to age 65 at \$65 per session, 400 mg of Botox per year to age 65 at \$382 for 100 units, and six pills of Baclofen daily to age 65 at \$1.20 per day.

4. Past Wage Loss - What amount, if any, should be awarded for past wage loss?

[104] At the time of the accident on December 1, 2012, Mr. Teunissen was working as a funeral attendant for SCI earning \$18/hour.

[105] While ICBC advanced Mr. Teunissen the amount of \$4,155 in 2013, as of March 31, 2013, Mr. Teunissen was receiving LTD from Manulife, in the amount of \$1,840 a month.

[106] Mr. Peever, the economist, provided a report and testified about the past and future losses of earnings pertinent to Mr. Teunissen and cost of care multipliers.

Return to Work Program

[107] By September 2014, Mr. Teunissen’s occupational therapist, Ms. Penner, recommended a return to work program. He commenced his return to work with SCI

as a funeral attendant, starting at two hours a day for two days a week up to four hours a day for four days a week. This program was paid for by Manulife.

[108] Mr. Teunissen undertook light duties such as housekeeping, sweeping floors and making cardboard caskets. In the course of his return to work he experienced two separate back spasms which led him to find an empty office space and lie down on the floor. He experienced one slip while washing the floor - being required to wear dress shoes with poor traction and a suit at his job. The slip did aggravate his back injury but it appeared to resolve to the previous level.

[109] In October 2014, however, and despite Mr. Teunissen's optimism about his capacity to complete his duties at work and having some improvement in his condition, his immediate supervisor Ms. Boyle had serious concerns about his ability to do any more than 20% of his job duties. By December 2014 Mr. Teunissen was working four hours a day, four days a week. While this was difficult for Mr. Teunissen, he was trying to "push through" as recommended by his occupational therapist.

[110] Unfortunately, at the end of 2014, Mr. Teunissen contracted bronchitis that ultimately lasted two to three months. The coughing fits aggravated his back pain. As a result he was unable to undertake the duties associated with the return to work protocol. He advised SCI and obtained a doctor's note that he was not able to work because of the bronchitis. Ms. Penner confirmed he missed time after his return to work due to bronchitis from December 19, 2014 to January 26, 2015 and March 17, 2015 to March 31, 2015.

[111] In March 2015, his Manulife LTD benefits ended. While Mr. Teunissen was not able to undertake his funeral attendant job, Manulife considered him able to do other jobs. By this time, Ms. Boyle indicated Mr. Teunissen was only completing approximately 20% of his work duties and was unable to fulfill them all. As a result, SCI terminated his position.

[112] Ms. Boyle testified she observed Mr. Teunissen unable to undertake the duties before his bronchitis and he seemed in pain with the simple sweeping of the floor. She said: “It was painful to watch”. On April 16, 2015, she sent a letter to Mr. Teunissen terminating his employment. That letter confirmed these observations and noted:

April 16, 2015

Jaclyn Penner

OT works

Dear Jaclyn,

Due to the broad restrictions of Mr. Teunissen’s duties, we are unable reasonably accommodate him in his return to work program. Manulife discontinued coverage because; although he is disabled from his own occupation, he is not disabled from other occupations. The Personal Care Centre has participated in his therapy program since October, 2014. The restrictions you have identified suggest he is unable to do the work required for our business or for the position of funeral attendant.

Throughout the attempted return to work period, there was no evidence of improvement that suggested he was anywhere near ready to return to work. Within that time frame he had two periods of sick time that lasted five weeks and another at four weeks. During the most recent leave it was brought to my attention that he attended a camping excursion with friends.

Given the extensive restrictions, we are unable to facilitate a reasonable accommodation and suggest that you consider a retraining program for him in an occupation that he would be physically able to perform.

Any further inquiries can be directed to the company’s Human Resources Department.

Yours truly,

Claire Boyle

Manager

Vancouver Personal Care Centre

Subsequent Jobs - Nu-Brite Industries and Others

[113] Mr. Teunissen has undertaken a number of jobs since his termination. Initially he worked for a friend from August 2015 to December 2015 as a flatbed truck driver. He found this work too intermittent to provide a reliable income. From June 2016 until September 2016 he worked for Maple Ridge Towing and made \$8,808.41. He

ultimately found the physical demands too difficult, returning home exhausted. Mr. Teunissen also once suffered a major back spasm driving to work and had to pull off the highway. He was immobilized and could not shut off the engine or get out of the car. He called his boss, Mr. Rob Cook, the assistant manager who ultimately assisted him, and who observed him in pain and immobilized. Mr. Cook and another driver moved Mr. Teunissen from the vehicle so he could lie flat on the ground.

[114] Meanwhile ambulance workers and firefighters had discovered him and took him to Ridge Meadows Hospital. Ultimately Dr. Caillier strongly advised him not to continue the job.

[115] Mr. Teunissen advised Mr. Cook he could not do aspects of the job and his doctor had advised him this was not the right job for him. Mr. Cook said this was not a surprise. While Mr. Teunissen was a good dependable employee, he had noticed him having to sit down, lean against a wall or crouch down to relieve back issues.

[116] On September 22, 2016, Mr. Teunissen was then hired as a delivery driver for Nu-Brite Industries. The company repairs wheels damaged in accidents and returns them to various body shops. A delivery driver both picks up and drops off the wheels and can make 10 to 25 stops daily. Ms. Chantal Husak, the office manager, testified the job was “pretty physical” as it involved the lifting of 15 to 40 lb wheels.

[117] Ms. Husak said Mr. Teunissen’s work performance was good in September and he got along well with co-workers. By the end of October 2016, however, Mr. Teunissen complained of back pain and would seek respite in the first aid room. He would lie on the cot and stretch out his back. He was absent twice from work, calling in to indicate that due to back pain, he could not attend work that day.

[118] Nu-Brite Industries became concerned about his ability to do the job. His three month probation period was ending and the company decided to terminate him “because he could not do the job”. As his probation period ended on December 22, however, the company did not want to terminate him during the holiday season. They decided to do so on the first day back to work, January 3, 2017.

[119] Within a half hour of arriving at work on January 3, 2017, Mr. Teunissen slipped on ice and fell, landing on concrete on his back. He suffered a major spasm both at work and in the ambulance on the way to the hospital. Mr. Teunissen was off work for the rest of the week. The Workers' Compensation Board became involved as it was a workplace accident. Mr. Teunissen returned to work the next week on January 9, 2017 but after four hours left unable to continue his duties.

[120] Ms. Husak telephoned Mr. Teunissen on January 12 to terminate him on the basis he could not fulfill his duties full-time due to the back injury incurred prior to his employment at Nu-Brite Industries. She followed this up with a letter of the same date. Nu-Brite Industries paid Mr. Teunissen one week severance and January 13, 2017 was his last day on the payroll.

Legal Principles

[121] Compensation for past loss of earning capacity is based on what the plaintiff would have earned, but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. The trial judge has the discretion to determine what period is appropriate for determining net income loss: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, leave to appeal ref'd [2009] S.C.C.A. No. 197 at paras. 181-186. In doing so, the plaintiff must be put back into the position he/she would have been in had the accident not occurred: *Lines* at paras. 185-86.

[122] As per *IBM Canada Limited v. Waterman*, 2013 SCC 70 at para. 20, collateral benefits, i.e. amounts paid by a third party to ameliorate the loss must be taken into account.

Application of Legal Principles

[123] The defendant concedes Mr. Teunissen lost wages as a result of the motor vehicle accident and it is reasonable to compensate him from December 1, 2012 through to September 30, 2014 (one year and 10 months) when Mr. Teunissen reasonably believed that he might be able to return to his chosen profession as a

funeral attendant. She maintains an amount of \$64,000 is sufficient in the circumstances.

[124] The defendant further maintains during the return to work, Mr. Teunissen did work but was not able to perform the functions required of his job. Despite this the defendant maintains he was still paid, albeit by Manulife and cannot recover from the defendant. She also says Manulife cannot recover from Mr. Teunissen as he was “working” during this period.

[125] The defendant also says time lost after November 30, 2014 was primarily due to the onset of bronchitis, until he took up the occupation of tow truck driver, and the loss due to the motor vehicle accident is therefore negligible and due to his respiratory issues. Until March 31, 2015 there would be no setoff for Manulife payments.

[126] After March 31, 2015, the defendant says the plaintiff’s cough and black-outs continued until late July 2015 when they were brought under control with steroid medication. As Mr. Teunissen would have had short term and long term disability, the loss is therefore 60% of his net expected wage during this period.

[127] The defendant says as the plaintiff was primarily employed full-time after joining Maple Ridge Towing and Nu-Brite Industries, any loss to January 3, 2017 would be non-existent.

[128] Finally, the defendant says the loss after January 3, 2017 to the time of trial was due to the intervening slip and fall incident, and is in no way due to the December 1, motor vehicle accident.

[129] As submitted by Mr. Teunissen, the evidence is clear but for the accident, Mr. Teunissen would be working at SCI as a funeral attendant throughout this period of time. He was well liked, able to do his duties and committed to the job as a career for the future.

[130] Mr. Peever, the economist testified that he calculated the total net wage loss from the accident to the date of trial as \$117, 600.

[131] Mr. Teunissen concedes as per *Larwill v. Lanham*, 2003 BCCA 629, two areas of adjustment need to be made to reflect the plaintiff's situation. First the ICBC advance of \$4,155 and the amount of \$2,090 for the 11 weeks that Mr. Teunissen would have been likely out of the workforce due to illness and/or a groin pull absent his back injury. There would also be a reduction of \$3,110 paid to Mr. Teunissen by Nu-Brite Industries. This would reduce the amount for a net result of \$108,245.

[132] I now turn to the points made by the defendant seeking further deductions. First with respect to the amounts paid by Manulife, the Supreme Court of Canada also noted in *IBM Canada Limited* at para. 24 that:

[24] ...there is no excess recovery if the party supplying the benefit is subrogated to - that is, steps into the place of - the plaintiff and recovers the value of the benefit. In those circumstances, the defendant pays the damages he or she has caused, the party who supplied the benefit is reimbursed out of the damages and the plaintiff retains compensation only to the extent that he or she has actually suffered a loss...

[133] The evidence established Manulife is subrogated to the claim and as such there is no risk of double recovery in this case. While the defendant argues in the first few months after the return to work, Mr. Teunissen was able to work, albeit at a reduced level, and Manulife could therefore not recover from him for this period, the evidence was clear his return was extremely limited. In fact, it was more in the nature of an assessment and/or work therapy program and cannot be characterized as argued by the defendant as "work". Ms. Boyle testified instead of Mr. Teunissen going to the gym, the return to work duties were designed to reflect "real world therapy." This was confirmed by Ms. Penner, his occupational therapist.

[134] Manulife paid for this return to work, not the employer, and therefore would be in a position to recover from Mr. Teunissen for this period of time. This does not run afoul of the double recovery rule and should not be deducted from his past wage loss claim.

[135] With respect to the argument concerning unrelated disability, I conclude a deduction of 11 weeks as argued by Mr. Teunissen, being December 19, 2014 - January 26, 2015 for various respiratory illnesses; March 17, 2015 to March 31, 2015 for the same; and two weeks for a groin injury in November 4, 2015, is reasonable in the circumstances. While the defendant also points to the period of April - July 2015 and says the plaintiff continued with respiratory illness such that this entire period should be discounted, I prefer the estimate of one month in that four-month period as an allowance for possible time missed from employment. Ms. Penner provided some time estimates of this from her records. The medical evidence is simply insufficient otherwise to establish an absence on the basis of a respiratory ailment during this entire time frame. To conclude otherwise would be to engage in speculation.

[136] In estimating the amount to deduct for these 11 weeks, I agree as argued by Mr. Teunissen that had Mr. Teunissen not been injured in the motor vehicle accident he would have had access to SCI's Manulife short-term disability and long-term disability plans. Those plans, which were exhausted by the effects of the motor vehicle accident would have provided benefits of \$1,840 per month. His monthly net pay was approximately \$2,600 resulting in a difference of \$760 per month. The 11 weeks or 2.75 months would therefore equal an adjustment of \$2,090.

[137] I find the time which could have been worked but when no work was available, i.e. the flatbed truck job, is minimal. Furthermore, had Mr. Teunissen not been injured in the accident. Mr. Teunissen would have been working for SCI and not subject to the vagaries of an intermittent job.

[138] Finally with respect to the unfortunate slip and fall onto the concrete while working at Nu-Brite Industries, this was a non-tortious event which has no bearing on this case and would be considered an indivisible injury.

[139] Even before the slip and fall, he was in effect fired. This event therefore has no bearing on the fact he was terminated. Nu-Brite Industries had concluded

Mr. Teunissen could not do the job by December 2016 because of his limitations. Nu-Brite Industries held off terminating him because of the Christmas season. The decision to terminate was effectively made, although not communicated to him at that time. The slip and fall therefore has no bearing on this case.

[140] I therefore agree with the evidence and calculations provided by Mr. Teunissen and would award a total of \$108,240 for past lost earnings. This includes a deduction of \$3,110 which reflects the difference between what Mr. Peever projected Mr. Teunissen would earn in 2016 and what he actually earned, taking into account his work at Nu-Brite Industries.

5. Future Loss of Earnings – What is the appropriate award for future loss of earnings or income-earning capacity?

[141] This is the area in which the parties most significantly diverge.

Legal Principles

[142] In *Hardychuk v. Johnstone*, 2012 BCSC 1359 the Court outlined the principals in dealing with a claim for loss of future earning capacity at paras. 192-196:

[192] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260; *Pett. v. Pett*, 2009 BCCA 232.

[193] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA.

[194] Insofar as is possible, the plaintiff should be put in the position he or she would have been in, from a work life perspective, but for the injuries caused by the defendant's negligence. Ongoing symptoms alone do not mandate an award for loss of earning capacity. Rather, the essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after its occurrence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106; *Moore v.*

Cabral et. al., 2006 BCSC 920; *Gregory v. Insurance Corp. of British Columbia*, 2011BCCA 144.

[195] There are two possible approaches to assessment of loss of future earning capacity: the “earnings approach” from *Pallos*; and the “capital asset approach” in *Brown*. Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: *Perren v. Lalari*, 2010 BCCA 140.

[196] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff’s remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff’s entire annual income for a year or two: *Pallos*; *Gilbert v. Bottle*, 2011 BCSC 1389.

[143] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 32-33, the Court discussed the assessment of an award for loss of future income as follows:

[32] In my view comparator cases are of limited utility in the assessment of awards for future losses, generally. It is well settled that an individual’s earning capacity is a capital asset: *Parypa v. Wickware*, 1999 BCCA 88 at para. 63. An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff’s likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. The degree of impairment to the plaintiff’s earning capacity depends upon the type and severity of the plaintiff’s injuries and the nature of the anticipated employment at issue.

[33] In valuing the award, the judge must consider the likely duration of the plaintiff’s prospective working life and must account for negative and positive contingencies which are unique to each case. The final award must be fair and reasonable in all the circumstances. This assessment requires a very fact-intensive, case-specific inquiry. I am persuaded by what Macfarlane J.A. said in *Lawin v. Jones*, 98 B.C.L.R. (2d) 126, [1994] B.C.J. No. 2107 at para. 35, about the lack of utility in comparisons to other cases:

[G]iven the fact that we cannot foresee the future, it is impossible in a case like this to find any comfort in resort to other cases where the future may be more predictable. Judges will differ, perhaps widely, in making assessments in cases which have been said to depend on what may be seen in a crystal ball. What is certain is that a trial judge who hears and observes the witnesses is in a much better position than an appellate judge to come to a conclusion as to what is fair and reasonable in the circumstances. ...

[144] In *Perren v. Lalari*, 2010 BCCA 140 at para. 11, the Court confirmed that the approach to be taken for a future loss of earning capacity in situations where the loss, though proven, is not measureable in a pecuniary way is the one set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8:

[8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

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

[145] In conducting the analysis under this head, the Court then has to consider the contingencies, both positive and negative, that are applicable in arriving at a final sum. (See also *Salvatierra v. Vancouver (City)*, 2008 BCSC 537; *White v. Bysterveld*, 2016 BCSC 1952.)

Application of Legal Principles

[146] The defendant says the evidence of Ms. Craig, called by Mr. Teunissen, concluded in her report that Mr. Teunissen could do light, medium and low heavy work. Given the broad description of Mr. Teunissen's abilities, the defendant says he is able to take advantage of a wide range of job possibilities and at most, may require a vocational assessment to determine what jobs might be available to him and some assistance in finding an appropriate job. An amount of \$3,000 would be appropriate for this assessment.

[147] The defendant argues it is highly probable that a light, medium and low heavy job once found by Mr. Teunissen would produce a similar income stream to that which he was enjoying at SCl as a funeral attendant. The defendant argues an

amount of \$20,000 - \$25,000 for future loss of income would be sufficient in the circumstances.

[148] I conclude there is a substantial possibility that Mr. Teunissen will earn less in the future than he otherwise would have without his present injuries. There is no doubt Mr. Teunissen is much less capable of the physical work for which he was most suited due to his lack of formal education and other specialized skills.

[149] The defendant seeks to paint a rosy picture which is just not sustainable for this man's life. Mr. Teunissen displays consistent effort to get better and to find a job. The reality is he suffers from Chronic Pain Syndrome ("CPS") as diagnosed by Dr. Caillier who has been successful in giving him coping mechanisms. His functional ability has been significantly impaired as reflected in the expert evidence and at most he can attain part-time work due to his limitations.

[150] Mr. Teunissen functioned well as a funeral attendant. Mr. Norm Yates and Mr. Keith Louw, location managers of funeral homes, testified about the wide range of duties of a funeral attendant and their observations of Mr. Teunissen as an employee. Those duties could include yard or vehicle maintenance such as washing and driving the vans or limousines, the transfer of the deceased to a different location, attending funerals, ushering at the funeral, transporting flowers from the service to the cemetery, assisting the funeral director, taking casket deliveries from suppliers, assembling cardboard caskets and acting as a pallbearer.

[151] The job duties are physical and involve a lot of standing. The transport of flowers can involve up to 60 pieces. The weight of the caskets ranges from 20 to 300 lbs. Once occupied that weight increases from 100 to 500 lbs. Usually six pallbearers carry an occupied casket.

[152] Both Mr. Yates and Mr. Louw rated Mr. Teunissen positively in terms of work performance, his personal interactive skills and work ethic. Mr. Yates had known him from 2009 and Mr. Louw from 2010. Each noted he was always willing to help, was a good team worker and very personable with the grieving clients. These are all very

good attributes for this position. He was a dependable employee who worked hard and appeared to enjoy his job very much. Neither noticed any physical limitations that affected his work performance prior to the December 1, 2012 accident.

[153] Each, however, noted the times they had seen him since the accident; he was visibly in pain, walked slowing and was regularly in a hunched position. They described him as “totally different” physically. Mr. Yates described him as visibly in pain and very fidgety, as he would sit and stand regularly to get comfortable. He was a different person physically.

[154] It is helpful to reiterate some of Dr. Gouws’ conclusions at this juncture on Mr. Teunissen’s present limitations:

79. Mr. Teunissen’s most significant barrier for a successful and durable return to work continues to be his intolerance for sustained activity. His ongoing tendency to develop incapacitating muscle spasms and high levels of pain with a variety of activities makes it difficult to provide specific parameters for his work tolerance. In spite of appropriate and very intensive medical interventions, he continues to have back spasms and pain that have not had any durable response to treatment. In addition to his acute bouts of pain and spasm, his chronic pain also affects his mobility and flexibility. Mr. Teunissen noted that he thought he was getting better and that his back spasms had stopped for a while until recently. He said he thought that the Cymbalta with Botox had almost resolved the spasms but that his symptoms then recurred in the last month when he had about two or three spasms.

...

87. It is my opinion that the length of time since Mr. Teunissen’s injury (which is now approaching almost four years), his persistent pain, his associated physical impairment, and his lack of response to intensive and appropriate medical care (including ongoing care by consultant physiatrist Dr. Lisa Caillier since June 2013) are poor prognostic factors for recovery and significant improvement in function. Mr. Teunissen did have left shoulder symptomology before he was involved in the motor vehicle accident on December 1, 2012, but by all accounts had continue working by focusing on using his right arm more than his left. It is my opinion that his shoulder symptoms by itself would not have disabled him from working as a funeral director but that this condition may have required some degree of accommodation in the workplace.

[155] Ms. Craig confirmed that Mr. Teunissen was not a match for a funeral attendant as part of her functional capacity evaluation. While the defendant says Mr. Teunissen is cleared to do light, medium and low heavy work, Ms. Craig said, when questioned, the reality of him finding a job that fits when taking into account his other limitations such as lack of education and skills makes the defendant's point that Mr. Teunissen can do a "wide range of job possibilities" speculation.

[156] Rather than rely on speculation, I conclude the medical and functional testing evidence establishes Mr. Teunissen's limitations due to the motor vehicle accident are such that he is not suitable for full-time physical employment. This coupled with his limited education and/or skill-set means he is likely not competitive for non-physical or sedentary administrative jobs. The evidence from his employer at SCI confirmed he did not have the logistical organizational skills to work as a dispatcher at SCI and was unable to continue on a career path of advancement at SCI due to his educational and skill-set limitations.

[157] Furthermore, the defendant's position that Mr. Teunissen could work to obtain his Class 3 driver's licence is not realistic based on Mr. Teunissen's evidence of the effect of a back spasm while he was driving. His rather graphic description of the effect and safety concerns of back spasms while driving was compelling and I accept that reality. There is no doubt such a course would raise safety issues and is not practical in the circumstances of Mr. Teunissen's injury.

[158] Prior to the accident, Mr. Teunissen was able to undertake the physical demands of his secure employment at SCI. Since then the evidence establishes he is no longer able to do so. The evidence also establishes he is unable to undertake full-time jobs such as a tow truck driver and wheel delivery person. Nu-Brite Industries concluded he was unable to fulfill these duties and terminated him on that basis. Since the time of the accident, Mr. Teunissen has continued to try and work and recover from the accident because it was important to him to care for his family.

[159] These efforts provide evidence from which a reasonable conclusion as to his future employability can be extrapolated, along with the medical and functional testing evidence. While Mr. Teunissen does retain some capacity to earn in the future and he is determined to do so, his most recent history of being unable to keep full-time jobs for which he is most likely qualified because of his chronic pain condition create a picture of employment uncertainty such that realistically only part-time employment is likely in his future.

[160] As reflected in the jurisprudence, a determination of future loss of income is an exercise in judgment, not an exact calculation. It is likely that Mr. Teunissen would have worked as a funeral attendant until age 65. It is reasonable to conclude his income would have been in the range of \$38,000 to \$40,000. This was a secure job he enjoyed but without much ability for a pay raise. SCI indicated they would have kept him on and I conclude he would have remained in that position for which he was uniquely well suited.

[161] I also conclude he is likely able to obtain part-time work at a salary of \$20,000 per year due to his perseverance and positive personality, which is well suited to a workplace. In 2016 he earned \$16,700 while working at two jobs. His losses would therefore be \$20,000 a year for some significant period of time.

[162] Mr. Teunissen is presently 42. I conclude as it is physical work for which Mr. Teunissen is best suited, he would retire at 65 as the possibility of an injury affecting that work is higher.

[163] Taking into account the expert report of Mr. Peever which sets out certain appropriate contingencies, I conclude an award of \$320,000 for future loss of income is appropriate.

6. Special Damages

[164] I note the parties have agreed to the amount of \$3,422 as special damages.

7. Mitigation

[165] Finally, there is no real argument in this case that Mr. Teunissen failed to mitigate his damages because he did not seek medical care or appropriate job opportunities. The evidence was clear he undertook numerous medical treatments and was motivated throughout to both recover physically and seek work opportunities to benefit his family.

SUMMARY OF DAMAGES

[166] In summary, Mr. Teunissen is awarded damages as follows:

Non-pecuniary damages:	\$110,000
Past loss of earning capacity:	\$108,245
Impairment of future earning capacity:	\$320,000
Cost of future care:	\$44,139
Special Damages:	\$3,422
TOTAL:	\$585,806

COSTS

[167] If the parties are unable to agree to costs, they may speak to the issue.

The Honourable Madam Justice E. Burke