IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Larsen v. Moffett,*
2015 BCSC 222

Date: 20150217
Docket: M121553
Registry: Vancouver

Between:

Kevin Larsen

Plaintiff

And

John Clive Moffett

Defendant

- and -

Docket: M132038
Registry: Vancouver

Between:

Kevin Larsen

Plaintiff

And

Karen Sherry May

Defendant

Corrected Reasons for Judgment: Counsel has been added to the first page on February 23, 2015

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Plaintiff:	K. Gourlay B. Souza, Articled Student
Counsel for the Defendants:	M.S. Dermer
Place and Date of Trial/Hearing:	Vancouver, B.C. November 17-21, 2014
Place and Date of Judgment:	Vancouver, B.C. February 17, 2015

A. Introduction

[1] The plaintiff seeks damages for soft tissue injuries to the neck, shoulder and back as well as headaches from two motor vehicle accidents on June 23, 2010 and November 21, 2012. Liability is admitted.

[2] The 2010 accident was the primary cause and the 2012 accident aggravated the injuries.

[3] The amount of non-pecuniary damages is in dispute, including the defendants' submission that the plaintiff failed to mitigate his injuries. Special damages are agreed.

[4] With respect to damages for past wage loss and future income loss there are difficulties with information about the plaintiff's income and the amount of loss justified by that information. On the issue of future care there are issues about the extent of the plaintiff's injuries and whether his subjective complaints of pain and soft tissue findings support his claim for care.

B. Background

[5] The plaintiff was 44 years old at trial. He was previously married and he has an adult daughter. He is currently single after a relationship ended in August 2014. He purchased a home in Surrey in the mid-1990s. He testified that the home is currently valued at $475,000 with a mortgage of about $275,000.

[6] The plaintiff is a skilled painter and drywaller, having been trained by his father in those trades and then inheriting his father's business. He generally works on a fixed contract price basis. From time to time he has hired others to help him with his projects. However, being an employer and managing other people has not worked well because, as the plaintiff testified, he does not have the skills to be a manager. In addition, his customers want his skill rather than the skill of one of his employees.

[7] The plaintiff has had difficulty with the Canada Revenue Agency including payment of significant back-taxes and a judgment against him. There are difficulties re-constructing his past income, as discussed below.

[8] In the 1990s the plaintiff injured his left knee at work. Since then, from time to time, he wears a knee brace especially when he is doing heavy or awkward work. He also injured his left thumb in a previous accident some years ago.

[9] The first accident occurred on June 23, 2010 when the plaintiff was driving his van in the City of Surrey. While the van was stopped at an intersection another vehicle struck it in the rear. In discovery the defendant said he struck the plaintiff's vehicle "pretty hard." The plaintiff testified that he was "stunned" by the impact and disoriented for a period of time. He was able to drive away from the accident scene but he immediately had to pull over to recover from the shock of the accident. That night he awoke with pain in his neck, shoulders and back and the next day he was very sore in those areas. These injuries have continued as have headaches that develop from the upper back and neck and into the head. There was some recovery after a period of time.

[10] On November 21, 2012 the plaintiff was driving in the City of Vancouver and he started to make a left turn onto a busy street. Another vehicle ran a red light and collided with the plaintiff's vehicle. This caused an aggravation of the injuries from the 2010 accident but they have now stabilized to about the point they were after the 2010 accident.

[11] Liability in both the 2010 and 2012 accidents is admitted by the defendants.

[12] The plaintiff continues to work as a painter and drywaller but he reports considerable pain in his neck and back, especially with overhead work. Again, there are difficulties reconstructing his income since the accidents. There is also a question whether and for how long he can continue this heavy work in light of his age, education and experience.

[13] In the spring of 2014 the plaintiff began a relationship with a woman, Ms. Briere. However, this ended in August 2014 as a result of, according to the plaintiff and Ms. Briere, the pain experienced by the plaintiff and his inability to sleep.

C. Expert Reports

[14] The plaintiff provided six expert reports from his two general physicians (Drs. J. Alan Pretty and Grant Gibbings), a physiatrist (Dr. Gillian Simonett), an occupational therapist (Rob Corcoran) and a vocational consultant (John Lawless). A report was also obtained from an economist with regards to past and future income loss (Darren Benning). The defendants provided one expert report from an orthopaedic surgeon (Dr. Thomas Goetz).

[15] Dr. Pretty is the plaintiff's general physician. He provided two reports and was cross-examined. In his first report dated February 8, 2012 his summary was:

> **SUMMARY**
>
> Kevin was in a motor vehicle accident in which he was rear ended. He had a flexion/extension injury of the neck which interfered with his ability to work. By December 21, 2011, Dr. Gibbings had commented that he was able to work, but continued to have pain. His injuries appeared to be soft tissue injuries. MRI did not show significant anatomical changes. In addition to the neck injury, he had some increase in an old injury to his right knee and some low back pain. Disability was increased by the fact that there was radiation of his pain to his right arm. He is right handed and occupied as a painter. He was financially stressed during his recovery because he had to hire people to maintain his business and required antidepressant medication. At his last visit, December 21, 2011, he was asked to follow up in approximately two months. It is believed that he will continue to have neck pain and arm pain, particularly since his occupation is demanding for full range of motion of the neck and use of his right arm. He needs to be encouraged to continue with an exercise program apart from the exercise he gets in the work place and would benefit from support from physiotherapy and any other technique which can be used to manage his pain.
>
> …

[16] In his second report, dated February 18, 2014, Dr. Pretty described treatment since his previous report. In his summary he said:

> **SUMMARY**
>
> In summary, Mr. Larsen has had 2 motor vehicle accidents. He works in a physical job and he has developed chronic pain in his neck and back which

> would be characterized as a Fibromyositis or a Complex Regional Pain Syndrome. He has received some benefit from massage therapy, physiotherapy, and an exercise program in the past. However, he seems to have stabilized with a level of chronic pain. We have managed this with relatively minimal medication (nonsteroidal anti-inflammatory drugs and muscle relaxants). He has experienced some depressive symptoms and has been treated with 2 antidepressant medications, with some relief, but he is not currently using these.
>
> Mr. Larsen is a 44 year old man with chronic pain who is working in a physically demanding job. I do not expect him to improve substantially in the years to come. He may have periods when he flares and is unable to work, and in those instances he may need additional medication or physiotherapy.

[17] Dr. Gibbings is a colleague of Dr. Pretty and they share the same practice. He was not cross-examined. Dr. Gibbings saw the plaintiff various times and his letter of May 22, 2014 includes the following:

> …
>
> I have reviewed Dr. Pretty's letter of February 18, 2014. I am in agreement with the contents of this letter. My only comment would be that although Mr. Larsen is in a very physically demanding job he has not had, or he has not tried, a physical fitness program associated with a personal trainer targeting the areas of his pain. He has, as noted, had extensive physiotherapy and massage therapy as well as a generalized exercise program in the past. As noted in Dr. Pretty's letter, Mr. Larsen's level of chronic pain has stabilized and has not significantly improved with the above mentioned modalities.
>
> …

[18] On June 4, 2014 a functional capacity evaluation was conducted by Rob Corcoran, an occupational therapist. He was cross-examined. I reproduce the following from his report of August 5, 2014:

> **EXECUTIVE SUMMARY & OPINIONS**
>
> Mr. Larsen meets the full functional demands for general contractor duties which predominantly involve managing sub-trades, budgets and material orders.
>
> Mr. Larsen does not meet the full physical demands for sub-trades of drywall installation, painting, roofing, and tile setting. He does not meet the lifting or carrying strength demands for drywall installation work. He has a limited carrying strength capacity for materials handling associated with tiling and roofing. Mr. Larsen does not possess sufficient endurance and trunk strength for roofing work. Most notably Mr. Larsen has a limited capacity for overhead activity which is a core demand for painting and dry walling, and is required for select aspects of tile setting. He benefits from adaptive approaches and/or

> short duration rests to break up prolonged periods of overhead activity and to avoid or minimize stooping. He will benefit from building scaffolding, stepladders, or ladders, for some tasks such as painting higher parts of walls, siding etc. to minimize overhead reaching and neck extension demands. He requires short duration breaks to manage low back symptom reactivity associated with mild to moderate range stooping with materials handling. Ultimately Mr. Larsen is less efficient with this type of work. He will encounter larger scale painting, drywall, tiling, and/or roofing jobs that he does not have the capacity to perform on his own. He does not have the capacity to manage and apply hands-on labour for the same number of projects and hours he did prior to the MVAs. Mr. Larsen requires increased support of a labourer than he did prior to the MVA for overhead tasks, and for longer periods of repetitive stooping activity. He will continue to require increased labourer support for heavier materials handling, lifting and carrying indefinitely.
>
> These opinions are based on job descriptions provided by Mr. Larsen and from descriptions provided by the Dictionary of Occupational Titles and the Occupational Information Network. Please refer to pages 14 to 18 for these descriptions.
>
> Mr. Larsen will benefit from professional support to manage home tree trimming and pruning tasks that he did prior to the MVA's. He will benefit from professional support for car maintenance tasks he performed prior to the MVA. He will benefit from regular participation in one passive modality such as massage therapy or physiotherapy for pain management in the event of flare-up. He will benefit from on-going education for appropriate exercises to best manage his condition. He was physically deconditioned for heavier materials handling, lifting, carrying, pushing and pulling work. He will benefit from working with a personal trainer to improve his core and lower extremity strength and endurance. These supports will enable Mr. Larsen to continue working and to expand his hours for longer shifts. A home-based assessment is recommended to accurately cost out his loss of capacity for home, yard, and car maintenance.
>
> …
>
> [Reproduced as written]

[19] Mr. Corcoran also did a cost of future care evaluation. I reproduce the following from his report of August 19, 2014:

> **EXECUTIVE SUMMARY**
>
> Prior to the MVA's Mr. Larsen was independent with all aspects of his home and yard care, and with some car maintenance tasks without difficulty. He lost the capacity and/or is less efficient with several of these duties. Specifically, Mr. Larsen has reduced capacity for tree topping and pruning, seasonal housekeeping and gardening, exterior home maintenance duties, and with home renovation and/or repair activities. Mr. Larsen was extensively involved with a wide range of home repair and home maintenance activities prior to the MVA's.

> Mr. Larsen will benefit from professional support to replace his reduced capacity and efficiency for home and yard maintenance tasks, with particular emphasis on replacement of overhead activities, and/or tasks requiring repetitive and sustained stooping. He will benefit from regular participation in one passive modality such as massage therapy or IMS for pain management in the event of myofascial flare-up he will experience intermittently while working as a general contractor. Mr. Larsen will benefit from on-going education for appropriate exercises to best manage his condition and for general physical reconditioning.
>
> The supports recommended in this report should enable Mr. Larsen to continue working his current hours as a general contractor. The recommended supports will also allow Mr. Larsen to allocate hours outside of his work towards more tolerable housekeeping, yard, and/or car maintenance activities that he can pace himself through.
>
> [Reproduced as written]

[20] Dr. Simonett is an expert in physiatry including the treatment of musculoskeletal injuries. She was cross-examined. I reproduce the following from her report of August 4, 2014:

> **RECOMMENDATIONS**
>
> I recommend the following:
>
> 1. **Medication:** Mr. Larsen reports taking Aleve, up to six tablets a day. His regular use of this medication should be reassessed as he reports taking the medication over the maximum dose (three tables in 24 hours). When taken on a regular basis for an extended period, there is a risk of side effects including gastrointestinal.
>
> 2. **Multidisciplinary pain clinic:** Mr. Larsen has developed chronic pain as a result of the MVA. This presents with ongoing pain (more than four years) rated as moderate to severe as well as documented concern regarding mood. Chronic pain is best managed in a multidisciplinary pain clinic that will focus on various treatments and coping mechanisms including physical, medication, and psychological.
>
> 3. **Active Rehabilitation:** Mr. Larsen has had previous benefit from physical therapy and continues to do the exercises at home. While he is symptomatic, he should have access to follow-up active rehabilitation to help progress his exercise regime. The goal would be to prevent further deconditioning. In addition, Mr. Larsen's recent Functional Capacity Evaluation has outlined where Mr. Larsen is limited physically. This report will help tailor which exercises should be focused on.
>
> 4. **Vocational counseling and retraining:** Mr. Larsen continues to have limitations on his ability to perform his work due to his symptoms. If he is unable to return to his previous level of work, he may have to consider an alternative type of work. This may require both vocational counseling and retraining.

> **PROGNOSIS**
>
> Mr. Larsen continues to have ongoing pain four years after the initial MVA despite appropriate interventions. He has developed chronic pain which is often recurrent, especially if one becomes deconditioned (relative weakness due to reduced/altered activity). I anticipate that Mr. Larsen will continue to have ongoing pain, at least on an intermittent basis, into the foreseeable future. It is also my opinion that he will most likely not be able to return to his full level of work (including all aspects of his sub-trade activities) pain-free.
>
> …
>
> [Reproduced as written]

[21] Mr. Lawless' report on vocational rehabilitation issues is dated August 25, 2014. He was cross-examined. Mr. Lawless reviewed the plaintiff's pre-injury vocational prospects and noted that he continued to work with painting and other small renovation and construction jobs. Looking at the earning potential of the plaintiff before his accident the range is $65,060 (Contractors & Supervisors -Other Construction Trades, Installers, Repairers & Servicers) to $39,627 (Painters & Decorators) with a third position at the mid-point of $42,439 (Construction Trades Helpers & Labourers) adjusted to 2010 dollars.

[22] Turning to the plaintiff's post injury vocational options Mr. Lawless concluded that he is not suited for his current work in construction. He has continued to work but with ongoing pain and functional limitations and he is not sure how long he will last. In his evidence Mr. Lawless said he did not think the plaintiff was unemployable but he was "close."

[23] Mr. Lawless also discussed WRAT-4 testing for achievement and TONI-3 testing for ability. As he said in his evidence, ability test results can logically be higher than the achievement results but the reverse is illogical. The plaintiff is in the latter situation.

[24] Mr. Lawless said this at the end of his report:

> … [I]t's difficult for me to say what other work Mr. Larsen could do, as my interview and testing didn't give many clues. Given his career of a skilled trade and running a small business his intellectual abilities should be at least average overall, yet results from the TONI-3 were much lower. I must assume they are underestimates, but then I still don't know what his actual abilities

> are. The WRAT-4 scores are where that they should be, but I knew before that he needed to complete his secondary education. Finally, while the SII yielded many results they were largely undifferentiated, so I'm not sure what work he would like to do more than some other. It did say he didn't care for formal education, and by his mid 40s that would be a diminishing prospect anyway. He's done labouring work nearly his whole life but if he is not suited for that now he'll have to consider more skilled occupations, since they are normally lighter. He has a preference for sociable work, but with his chronic pain and mood issues he may not be well suited for working with people. That might mean failing at jobs involving sales, supervision, and "face to face" services. I advise finishing high school or at least getting a GED, though I doubt he could pursue any studies after work now given his pain, depressed mood and poor sleep. As I explained it would be better for him to cease trying to "tough it out," sell or close his company, and get on with a new career direction, but I don't think he's ready for that. There are few available directions I can see for him for now, yet as he get older they'll probably be fewer.
>
> What I can see for Mr. Larsen is that he will continue working as is for now, but I doubt he'll be doing it by the time he's 50. From there I think he'd face marginal employment prospects among entry-level service occupations. Some sales lobs, particularly in paint and building supply centres, might be available, though as I said he might not be suited for sales with his mood. Other jobs in gas stations and with security services might he feasible, since he has no problems with being on his feet. Also there's a listing In the NOC called Other Elemental Service Occupations that includes jobs like Ticket Takers and Parking Lot Attendants. Positions are usually unsatisfying with part-time hours, poor conditions, and little future. Also these and the other jobs I mentioned would probably only pay minimum wage or little more. Usually they're the last thing I consider before concluding a client is unemployable. Unemployment will probably feature larger In Mr. Larsen's future as well. While it's impossible to accurately quantify anyone's risk for this, it's been well established in research that disabled people on a whole are less attached to the workforce, especially if they are older and less educated.
>
> To conclude, Mr. Larsen is in decline with his current work as a self-employed Painter and Contractor. Over the medium and long-term I expect he will leave his company and the construction field broadly. From there his prospects are marginal. Upgrading his education would help and he might be better able to do that if he didn't have to cope with the pain of his work every day, yet even then I think he would probably have just slender prospects among less skilled service occupations heading into the last years of his working life. I think he'll also face more unemployment. If his condition or situation changes I'd be happy to reassess him.
>
> [Reproduced as written]

[25] Dr. Goetz is an orthopaedic surgeon who provided a report for the defendants. He was cross-examined. He examined the plaintiff on November 4, 2013. I reproduce the following from his report of the same date:

...

PROGNOSIS

It is my belief that the prognosis for complete resolution of this gentleman's complaints of neck pain is poor. He has now had neck pain for well over three years. He has demonstrated an ability to continue running his business, although with decreased hours, decreased intensity, and the need for hiring help. It is likely that the overall severity of his symptoms has decreased over time and may continue to do so. However, complete resolution is unlikely at this point in time. I do not feel he is at increased risk for development of arthritis of the neck or back as a result of the MVAs.

FUTURE ABILITY TO WORK

As mentioned, this gentleman runs his own company and continues to do so. According to the patient his company seems to be doing quite well. He has had to hire more help than he normally would have, and he reports that the reason for this is that he has an inability to work at the heavy labour required in painting for long hours and at the same intensity as prior to the accident.

The patient did take approximately two weeks off work before returning to work and before hiring subcontractors. I do not think this amount of time off work was unreasonable.

RECOMMENDATIONS FOR FUTURE TREATMENT

There is no evidence of definitive musculoskeletal pathology that is measurable by physical examination or objective investigations, such as MRI or plain x-ray.

I do not think that this gentleman is nor was at any time a candidate for surgery. I do not think that he is at increased risk of progressive arthritis in the neck.

I do not have any recommendations for treatment other than normal care for longstanding soft tissue injuries, which includes regular exercise, generalized improvement in fitness, and postural training. This gentleman already has had this information and explanation and already practices the necessary care for his neck.

[26] Mr. Benning's report on past and future income loss and multipliers is dated August 22, 2014.

D. Analysis

[27] I begin by noting that where a plaintiff's injuries are indivisible as between multiple tortfeasors an award for damages should be made in a global amount rather than apportioning it between defendants (*Bradley v. Groves*, 2010 BCCA 361 at para. 32). In the instant case, as in *Bradley*, the plaintiff's injuries arising from the

two motor vehicle accidents are indivisible; therefore, awarding a global amount for damages is appropriate.

[28] With the exception of special damages, all heads of damages are in dispute. I will consider them in turn.

(a) Special damages

Special damages are agreed at $2,296.55. I accept that amount and make that order.

(b) Non-pecuniary damages

[29] The plaintiff seeks damages for non-pecuniary loss in the amount of $90,000. Cases cited to support this figure include *Westbroek v. Brizuela*, 2012 BCSC 1955, aff'd 2014 BCCA 48; *Mattice v. Kirby,* 2014 BCSC 657; *Fox v. Danis,* 2005 BCSC 102; *Trites v. Penner,* 2010 BCSC 882; and *Clark v. Kouba,* 2012 BCSC 1607.

[30] According to the defendants, damages in the amount of $60,000, less 20% for failure to mitigate, are appropriate in this case. The result would be $48,000 in total. Authorities relied on by the defendants include *Rutledge v. Jimmie,* 2014 BCSC 41; *Musgrove v. Elliott,* 2013 BCSC 1707; *Tennant v. Fariba,* 2013 ONSC 1676; and *Grudzien v. Hu,* 2013 BCSC 720.

[31] The broad framework for the assessment of non-pecuniary damages has been set out by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34:

> [46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] 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).
>
> [Emphasis omitted.]

[32] The evidence on this issue includes the plaintiff's testimony about his life before and after the accidents in 2010 and 2012. Prior to the accidents he was able to do the heavy work of drywalling and less heavy work of painting without any physical limitations. In the mid-1990s he took over the business from his father and he was able to expand it into other construction work. He had a drug problem that resulted in a loss of business but he was able to stop the use of drugs and build the business up again. He had some difficulties managing employees but he was able to keep his business going on the basis of his reputation as a skilled tradesman. Socially, the plaintiff separated from his wife in the mid-1990s and he has a daughter from that marriage. Prior to the accidents the plaintiff had an active social life including regular golf with his friends.

[33] The June 2010 accident was a significant collision between the car of the plaintiff and the defendant in that case. While the plaintiff was able to drive away he had to immediately pull over and stop because of the delayed shock. He felt nauseous and he had to call his sister to help him. That night he had pain in his neck, shoulders and back and he could "barely move." This stayed the same over the following months and then he began to experience headaches. He was able to return to work but at a reduced level and an employee he hired had to complete the project they were working on. Apart from the pain, he had to leave work for medical and physiotherapy appointments and to recover from the work.

[34] There was slow improvement and the plaintiff testified that he was 70% recovered by the time of the second accident in November 2012. Nonetheless, he continued to have neck pain and sometimes bad headaches. He still did not sleep well because he could not lie on either side and he was using Tylenol 3s for pain.

[35] The November 2012 accident happened when the plaintiff was turning his vehicle at an intersection and another vehicle hit him after running a red light. It "brought back" the original symptoms from the 2010 accident, as he put it in his evidence. He went back to physiotherapy but he had to stop because he could not afford it. Following the second accident the plaintiff has had constant pain in his neck and back and he has regular and severe headaches.

[36] The plaintiff testified that his current situation is that he always has painful shoulders and a tight and painful neck. He particularly has problems when he has to look up and down, including when he uses a computer screen. He gets headaches that start in the back and then move up his neck and into the head. He does exercises every morning, as recommended by his physiotherapist, and he gets some relief from a heated bean bag on his neck.

[37] In spring 2014 the claimant began a romantic relationship with a woman who lives and works in Salmon Arm, Tracy Briere. Ms. Briere testified that she took a leave from her work in April 2014 and moved in with the plaintiff with the idea of starting a long-term relationship. She described being "shocked" about the condition of the plaintiff's house because of the repairs that had not been done. The plaintiff had started a renovation of the basement but he could not complete it and there were serious problems with a deck, the roof and the kitchen.

[38] Ms. Briere testified that she could tell from the plaintiff's face that he was in pain all of the time. She had noticed this before she moved in with the plaintiff but she decided she could "deal with it." However, she subsequently realized that the plaintiff could not hide the full extent of the pain from her when they were living together. She testified that the person she was living with was not "the Kevin I knew" before she moved in.

[39] She also realized that the plaintiff was trying to make a home for them but he could not do it with his pain. The pain was mostly in the neck and she was not able to massage it out. It caused him to sleep poorly and his moving during the night interrupted her sleep even though they shared a king-size bed. Ms. Briere also described the plaintiff being able to work a few days and then having to take a few

days off to recover from his pain. He would try to work again but then it would be "the same thing."

[40] In August 2014 Ms. Briere decided that she had to end the relationship. She felt "awful" but she also felt she had "no choice." Returning to her good job was a factor. But she also concluded that, although she did not like being "selfish", she could not live with the plaintiff and his pain. She loved him and if it had been a 20 year relationship she would have stayed. It was a short relationship at that point and all she could see in the future was living with the plaintiff and his pain. She remains friends with the plaintiff.

[41] Turning to the expert evidence, it is consistent inasmuch as the prognosis for the plaintiff is poor, as described by Dr. Goetz, an expert for the defendants. There is chronic neck pain and complete resolution of the 2010 and 2012 injuries is unlikely. The pain affects most aspects of the plaintiff's life.

[42] The defendants submit that the plaintiff has failed his duty to mitigate his injuries and any award of damages should be reduced accordingly. Specifically, according to the defendants, the plaintiff stopped taking anti-depressant medication when there had been demonstrated improvement with that medication.

[43] It is true that the plaintiff stopped taking anti-depressant medication and there is evidence from medical professionals as well as the plaintiff himself that it had a positive effect. The reason the plaintiff stopped taking the medication was because he believed it had negative side-effects. The side-effects turned out not to be due to this medication and the plaintiff testified that he will try the medication again.

[44] I do not agree with the defendants that these circumstances support a finding that the plaintiff has failed to mitigate his injuries. He was entitled to stop taking medication to see if the side-effects were related to it.

[45] I also note that the plaintiff has a pre-existing knee injury for which he regularly wears a brace. There is no evidence that his injury affects his soft tissue injuries and pain in his neck and back or his headaches. Nor is there any basis for finding a pre-existing thumb injury of any significance for these proceedings.

[46] In summary this 44 year old man has suffered two soft tissue injuries to his neck and back and he has developed related headaches. These injuries cause ongoing and severe pain and they limit his daily activities, including his social life and work. With respect to the former, the plaintiff's pain contributed significantly to the breakup of a potentially long-term relationship he started with Ms. Briere. Prior to the 2010 and 2012 injuries the plaintiff took over his father's contracting business and, despite some personal difficulties and problems with record keeping, he was able to feel confident that he had a business that would look after him, as it did his father. That is now in significant doubt.

[47] All of this has had a negative effect on the plaintiff's sense of self-worth and emotional well-being. The experts are unanimous that this situation will continue into the future. The defendants' expert suggests that there may be future improvement but this is put in very guarded terms.

[48] Taking this into account with the authorities cited to me I assess the non-pecuniary damages in this case to be $70,000.

(c) Past loss of earning

[49] The plaintiff claims $80,000 for past loss of earning; the defendants say no damages are justified under this head.

[50] A claim for past loss of earning is for the loss of earning capacity or the loss of the value of the work that the plaintiff would have performed but was unable to perform because of the injury (*Rowe v. Bobell Express Ltd.,* 2005 BCCA 141 at para. 30). It seems clear that it is a matter of loss of earnings capacity, not the loss of actual income:

> [31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,
>
> > … The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of the value of work" is the substance of the claim – loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by

> reference to the *actual earnings* the plaintiff would have received; sometimes by a *replacement cost evaluation* of tasks which the plaintiff will now be unable to perform; sometimes by an assessment of reduced *company profits*; and sometimes by the amount of secondary income lost, such as *shared family income*.
>
> [Underscoring by the Court of Appeal; other emphasis in original]

[51] The Court of Appeal in *Rowe* also adopted the following from an Australian decision, *Arthur Robinson (Grafton) Pty Ltd. v. Carter* (1968), 122 CLR 649 at 658, [1968] HCA 9:

> The respondent is not to be compensated for loss of earnings but for loss of earning capacity. However much the valuation of the loss of earning capacity involves the consideration of what moneys could have been produced by the exercise of the respondent's former earning capacity, it is the loss of that capacity, and not the failure to receive wages for the future, which is to be the subject of fair compensation. In so saying, I realize that many statements may be found in the reported cases where loss of earnings has been the description of this element in special damages. But I do not find that in these it was necessary to consider or draw the distinction between the loss of earnings and the loss of earning capacity. But where in Australia attention has been drawn to the distinction, authoritative expressions with which I respectfully agree have indicated that it is loss of earning capacity and not loss of earnings that is to be the subject of compensation. But though this is I think the recognized position in Australia, the wages which would have been earned between the receipt of the injury and the date of trial are somewhat illogically, as I think, calculated and treated as special damages. In my opinion, it would be better that they should not be so treated for amongst other things, such treatment tends to plant in the mind the idea that it is the loss of the earnings which is to be compensated. On the other hand, not to so treat them would help to emphasize that it is the loss of earning capacity which is the subject of the damages. However, in most cases they may have but small practical significance; and in this case, in relative terms, none.

[52] In addition, a claim for past (or future) lost earning capacity is an assessment rather than a calculation, it requires considerations of fairness and reasonableness and all negative and positive contingencies are to be taken into account (*Abbott v. Gerges,* 2014 BCSC 1329 at para. 165).

[53] In the subject case, I accept the evidence of the plaintiff and his physicians that his ability to work following the 2010 and 2012 accidents was limited by the injuries from these accidents.

[54] Looking at the income of the plaintiff as one way to measure his loss of earning capacity up to the trial, there is considerable difficulty as a result of the admitted "disarray" of his financial records. These make an assessment particularly appropriate, compared to a calculation, although the cases point out that a calculation of actual loss of wages can inform the assessment of the loss of earnings. On this basis I will start with consideration of the plaintiff's income although, as will be seen, that is problematic.

[55] While the plaintiff was apparently a skilled drywaller and painter he did not keep adequate financial records to the point that he has been and continues to be in difficulty with the Canada Revenue Agency. He attempted to use professional advisors but he says they created more problems. He testified that his current advisor is the subject of an injunction from the Law Society of B.C. restraining him from representing himself as a tax lawyer. The evidence of the impact of these advisors on the financial situation of the plaintiff is not detailed so that, for example, there is no evidence that the injunction obtained by the Law Society of B.C. has any relation to the difficulties of the plaintiff.

[56] With this in mind, the evidence of the income of the plaintiff from 2007 to 2014 is as follows:

Year	Gross Business Income	Net Business Income	"Employment" and Other Income
2007	$61,533.00	$23,288.00	n/a (a)
2008	$130,841.00	$46,810.00	n/a (a)
2009	n/a	n/a	$51,130.00 (b)
2010	n/a	n/a	$24,000.00 (b)
[First accident on June 23, 2010]			
2011	n/a	n/a	$16,448.00 (b)
2012	n/a	n/a	$7,860.00 (b)
[Second accident on November 12, 2012			
2013	n/a	n/a	$100,992.00 (b)
2014	n/a	n/a	$47,841.00 (c), (d)

[Trial in November 2014]

(a) Recorded as net business income in T1s of each year.

(b) Listed on T1 as "other employment income." Alternatively, this may be net business income, although none is recorded on the T1.

(c) Unreported income taken from bank statements. Both parties have used this as reflective of the plaintiff's income in these years.

(d) To July 25, 2014

[57] I am urged by the plaintiff to find that his income was significantly more than these numbers. As will be seen below in the discussion of loss of future earning capacity, he says his "real" income in the years before his accident was approximately $60,000. This figure is arrived at by saying $50,000 is supported by the evidence and then adding an amount of $10,000 to reflect income missed from poor record keeping and bad advice.

[58] I disagree. First of all, as can be seen above, the figure of $50,000 is not an accurate reflection of the plaintiff's earning history prior to the accidents. In addition, while the plaintiff claims there was poor record keeping and faulty advice, the evidence stops well short of supporting those claims.

[59] I conclude that an averaging approach for the years 2007 to 2009 (using the net business income amounts from 2007 and 2008 and the "employment" income from 2009) is appropriate and that results in an average annual income of $40,409.33. Applying this to subsequent years the following is an appropriate assessment of past loss of earning capacity:

(a) <u>2010:</u> Information in evidence indicates that the plaintiff's income this year was $24,000. According to the plaintiff this is low because of his June 2010 injury. However, the evidence is that it is also low because he was not paid for a significant job that he worked. This is now in litigation. It follows that, comparing the $24,000 with the previous average of $40,409, is not a simple matter of the difference between the two numbers.

I assess $10,000 as the plaintiff's loss of earning capacity in 2010.

(b) 2011: Income was $16,448. Using the average of $40,400 the loss of capacity is $24,000.

(c) 2012: Income was $7,860 this year. The second accident occurred towards the end of the year, November 21, 2012. Loss of earning capacity is assessed at $33,000 for this year.

(d) 2013: Income was $100,992 and there was no loss of past earnings compared to the average for 2007 to 2009.

(e) 2014: Income was $47,841 and there was no loss of past earnings compared to the average for 2007 to 2009.

[60] The losses for the period from 2010 to 2014 total $67,000. Bearing in mind the difficulties of reconstructing the plaintiff's past income, I conclude that is an appropriate assessment of his lost income between the accidents in 2010 and 2012 and the November 2014 trial date.

(d) Cost of future care

[61] The plaintiff seeks damages for future care in the amount of $97,363 for pain management, vocational consulting, house repairs including tree maintenance, physiotherapy, medication (Naproxen) and household support.

[62] The defendants say a total of $22,820.30 is justifiable for future care. It questions whether the plaintiff's claim for pain management is more suited to his work and lifestyle than his injuries. Further, vocational counselling is unnecessary because the plaintiff intends to keep working and he can do his own house repairs. With respect to "active and passive rehabilitation" such as physiotherapy the defendants say that an amount of $930 per year is justified, with a present value of $15,820.30 (compared to $47,461 claimed by the plaintiff).

[63] A useful summary of the approach to be taken when considering the cost of future care is that of McLachlin, J. (as she then was) in a previous decision of this Court, *Milina v. Bartsch* (1985), 49 BCLR (2d) 33 (SC)):

[195] In *Andrews* [*Andrews v. Grand & Toy (Alta) Ltd*., [1978] 2 SCR 229], *supra*, Dickson J. (as he then was) distinguished damages for cost of future care from damages for non-pecuniary loss in the following terms at p. 603:

> The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the [plaintiff's] injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries.

[196] The physical arrangements to be used in assessing cost of future care are based on what is required to preserve and promote the plaintiff's health. In *Andrews*, *supra*, Dickson J. said at p. 586:

> . . . to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim. . . .

[197] In *Thornton* [*Thornton v. Sch. Dist. No. 57 (Prince George),* [1978] 2 SCR 267], *supra*, the court, in defining "optimal care" stated at p. 609:

> . . . it is clear from the medical evidence that the term merely connotes an ongoing practical level of orderly care in a home environment. . . .

[198] If there was any doubt as to whether the award for cost of future care must be justified on a medical basis, it was dispelled by *MacDonald v. Alderson*, [1982] 3 W.W.R. 385, leave to appeal to the Supreme Court of Canada refused. In that case it was suggested that the plaintiff, a quadriplegic, should be awarded sufficient funds to purchase and maintain his own house on the non-medical grounds that this would give him a greater sense of " 'autonomy, privacy, financial stability and pride of ownership . . . and greater opportunities for gardening, owning a pet, and more space for hobbies' ". The Manitoba Court of Appeal rejected this evidence as "subjective theorizing" and reduced the award made at trial. The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

[199] These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. On the latter point, Dickson J. stated in *Andrews* at p. 586:

> An award must be moderate, and fair to both parties . . . But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment.

[200] This then must be the basis upon which damages for costs of future care are assessed.

[201] It follows that I must reject the plaintiff's submission that damages for cost of future care should take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined.

[64] In my view the following claims for future care are justified on a medical basis and are reasonable in this case:

(i) Pain management

[65] It is not disputed among the experts that the plaintiff has chronic pain as a result of his two injuries and it likely will continue. Therefore, there is a medical basis for the pain and he is entitled to damages. Further, I disagree with the defendants that the effects of this pain can be separated into work and lifestyle versus the injuries he suffered from the accident. The plaintiff's pain affects most activities and it is related to the accidents.

[66] The plaintiff's expert evidence on chronic pain is from Dr. Simonett, a physiatrist, and Mr. Corcoran, an occupational consultant. I accept Dr. Simonett's opinion, set out above, that the plaintiff has moderate to severe chronic pain. Further, the plaintiff does not have a particularly sophisticated understanding of his pain so that, as he demonstrated in his evidence, he genuinely believes he can simply work through it. Unfortunately, the heavy work he does increases the pain, he has to stop work and any potential recovery is set back. For this reason I also accept Dr. Simonett's opinion that a multidisciplinary approach is appropriate, one that includes physical and psychological components, as well as medication.

[67] Having said that, the plaintiff has to continue working in order to support himself and maintain his self-esteem. Implicit in this is that, with his age, education and work experience, he is not a good candidate for retraining into other work. With this is mind a chronic pain program that is not full-time and permits the plaintiff to work would be the preferred approach. I emphasize "preferable" and it may be that he can manage a different approach after he is familiar with chronic pain management and obtains advice about it.

[68] Mr. Corcoran describes in his report of August 18, 2014 that the Orion Health Surrey Clinic provides the type of interdisciplinary program required. The one-time cost is $13,600 and I make that order.

(ii) Vocational counselling

[69] As above, I accept the defendants' point that the plaintiff will continue to work. This fact causes him considerable pain and difficulty but his skills to do anything different are limited. Nonetheless, I conclude that he should be given some opportunity to train into less strenuous work. In my view, that would have a positive impact on his medical situation.

[70] Dr. Simonett recommended vocational counselling to explore alternate employment. No doubt there will be problems such as the plaintiff's difficulty viewing a computer screen and his limited education.

[71] In his report Mr. Corcoran described a "typical" course for vocational counselling involving three phases. The cost is $1,700 and I make that order.

(iii) House repairs

[72] By all accounts the claimant's house is in disrepair as a result of his inability to maintain it. The back deck needs work and a basement suite he started needs to be completed. There is also maintenance required for trees on the property and the garden.

[73] I conclude that a one-time payment of $3,000 is reasonable in these circumstances.

(iv) Physiotherapy

[74] The plaintiff seeks 36 physiotherapy treatments per year, over 21 years. I disagree that passive modalities such as physiotherapy are reasonable at the rate of 1.4 sessions per week over that time. I say passive because there is no evidence that the physiotherapy used by the plaintiff to date is of the active kind. I do accept that an initial regime of physiotherapy (including education) and then some amount for any future flare-ups is justified.

[75] In my view an initial regime of two physiotherapy appointments per week over eight weeks is reasonable. This will be at $80 per session or $1,280 in total as a one-time payment. It may be appropriate to spread the total of 16 sessions over a

longer period of time or gradually reduce the frequency at the end. That would be a decision of the physiotherapist and the plaintiff.

[76] With regards to any future flare-ups I conclude that six sessions per year is a reasonable estimate. This will be at $80 per session and until age 65. Using a multiplier of 17.0112 the present value is $8,165.38, in addition to the $1,280 for the initial eight weeks.

(v) Medication

[77] The plaintiff seeks payment for his use of Naproxen, an anti-inflammatory medication. This is medically justified and reasonable at a present value of $1,871.

[78] There is also the issue of the plaintiff's depression and his use of anti-depressants. As discussed above, he used an anti-depressant that had some positive impact on his symptoms. He stopped taking it because he believed it was causing negative side effects. He testified that he now understands the problems he had when he was taking the medication were probably not related to the medication.

[79] The plaintiff testified that he was willing to try the anti-depressant again and there is a medical basis for doing so. In the event he begins this course of medication it is reasonable that it be part of his claim for future care.

(vi) Household support

[80] Some of this is included under house repairs above.

[81] The plaintiff also seeks payment for seasonal gardening, tree pruning, gutter cleaning and related expenses. I accept that he has not been able to do this work because of the pain that was caused by the 2010 and 2012 accidents.

[82] The plaintiff is entitled to $800 per year or a present value of $13,608.96 for household support.

(v) Total

[83] The total for cost of future care is $43,225.

(e) Future earning capacity

[84] According to the plaintiff, the loss of his future earning capacity justifies damages in the amount of $550,000. He relies on a number of authorities including *Mattice* and *Pallos v. Insurance Co. of British Columbia* (1995), 100 BCLR (2d) 260 (CA).

[85] The defendants submit that no damages for loss of future earning capacity are justified or, in the alternative, a modest award would be appropriate.

[86] The general approach to the assessment of future earning capacity is set out in *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 31:

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

> 7. however, the overall fairness and reasonableness of the award must be considered, taking into account all of the evidence.

[87] The cases also suggest using an approach based on a loss of earnings method for the assessment of the loss of future earning capacity. This involves the so-called "*Brown* factors" as follows (*Perren v. Lalari*, 2010 BCCA 140 at para. 11):

> ... In *Kwei* [*Kwei v. Boisclair* (1991), 60 BCLR (2d) 393 (CA)], where it was not possible to assess damages in a pecuniary way as was done in *Steenblok* [*Steenblok v. Funk* (1990), 46 BCLR (2d) 133 (CA)], Taggart J.A., speaking for the Court, held that the correct approach was to consider the factors described by Finch J., as he then was, in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353. Mr. Kwei had suffered a significant head injury with significant permanent sequelae that impaired his intellectual functioning. However, both before and after the accident, he worked at a variety of low paying jobs, thus making it difficult for him to demonstrate a pecuniary loss. Mr. Justice Taggart cited the *Brown* factors with approval:
>
> > [25] The trial judge, as I have said, referred to the judgment of Mr. Justice Finch in *Brown v. Golaiy*. Future loss of earning capacity was at issue in that case. It stemmed from quite a different type of injury than the injury sustained by the plaintiff in the case at bar. But I think the considerations referred to by Mr. Justice Finch at p. 4 of his reasons have application in cases where loss of future earning capacity is in issue. I refer to this language at p. 4 of Mr. Justice Finch's judgment:
> >
> > > 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.

[88] Turning to the evidence in the subject case, the plaintiff struggles at work now. Co-workers testified to his ability to work long hours performing heavy work before the two accidents and then not being able to work well after them. The nature

of the plaintiff's work is that he obtains it through bidding and competing with other contractors. Unfortunately, he has become known as someone who struggles with his work and only the smaller, less demanding projects are available to him. When he does work, he works through pain, he requires rest periods and days off and he requires more help. In many projects he cannot physically and economically compete with his competition.

[89] This evidence is consistent with the functional evaluation completed by the occupational therapist, Mr. Corcoran. The plaintiff had particular difficulty with overhead work and that is a large component of his work as a drywaller and painter. In a follow-up contact, nine days after the evaluation, Mr. Corcoran noted that the plaintiff did not work the two days after the evaluation, he had difficulty sleeping for several nights and he was using heat and medication. Mr. Corcoran concluded that the plaintiff was "back to normal" (as described by the plaintiff to Mr. Corcoran) two days after the evaluation. This meant he was back to work, performing ceiling work but with neck and shoulder pain that required changing work tasks to manage the symptoms.

[90] Mr. Lawless, the vocational rehabilitation consultant, testified that the plaintiff had very limited vocational options and said he was "close" to being unemployable. He did note an inconsistency in the testing of the plaintiff's ability and achievement but he assumed one of the tests was an underestimate. As with Mr. Corcoran, Mr. Lawless is not optimistic that the plaintiff will be able to work in drywalling and painting past age 50. The problem is that lighter work generally requires more education but the plaintiff is not ready for that and his pain and mood are also problems.

[91] In summary, I conclude that the approach in *Perren,* applying the "*Brown* factors" is applicable here in assessing the plaintiff's loss of future earning capacity. He is rendered less capable from earning income from all employment as a result of the 2010 and 2012 accidents, he is less marketable as an employee, he has lost job

opportunities that were available to him before the accidents and he is less valuable to himself and as a person capable of earning income in a competitive market.

[92] The alternate approach in *Tsalamandris* is fraught with difficulty because of the unreliability of the information available. The plaintiff admits to being a poor record keeper, he says he was given poor advice by people he hired and he continues to have problems with past taxes. As above, the evidence supporting these claims is not strong. The more applicable problem is the wide variation in income with no apparent explanation.

[93] There is also the fact that the plaintiff's income after the accidents was not significantly different than before the accidents. Using averages again, the average income for the period 2011 to 2014 is $39,871 (2011: $16,448; 2012: $7,860; 2013: $100,992; 2014: $47,841 (up to July 2014)). This is to be compared with his average income of $40,400 for the years 2007 to 2009. As well his incomes in 2013 and 2014 were $100,992 and $47,841, respectively. That suggests an *increase* in income in the past two years.

[94] Countering this is the evidence described above about the difficulties the plaintiff has working now. He is an honest and straightforward man and he manages to do heavy work with significant pain. There is a cost to this as evidenced by his personal life and he is not able to compete for larger projects because he is now known as someone who cannot do heavy work as efficiently as others. The plaintiff's presentation when he gave his evidence demonstrates his stoicism in the face of significant obstacles. This is not a man who has given up on working and, indeed, he works all the more to keep up to his high standards, probably adopted from his father.

[95] However, there will be a reckoning in the near future. This is clear from the plaintiff's own evidence although he does not fully realize it as yet. As Mr. Corcoran put it in his evidence the plaintiff, currently aged 44, will not be able to do heavy work much past age 50. Put another way, his current stoicism will not sustain him to his age of retirement.

[96] As a result, I conclude that the plaintiff's earnings in 2013 and 2014 do not accurately reflect the long term future he is facing. He continues to work in his pre-accident field but his security in that work is precarious, as described by Mr. Lawless and Mr. Corcoran and as reflected in the evidence. I conclude there is a real and substantial possibility he will have a loss of earnings. While perhaps not imminent, it is a fact that justifies damages.

[97] There remains the task of assessing the plaintiff's future loss of earning capacity.

[98] I have found above that his average pre-injury income was $40,400 for the years 2007 to 2009. I have discussed above that I do not agree with the submission made on behalf of the plaintiff that his annual pre-accident income was approximately $60,000. That figure cannot be justified on the available financial information and I have concluded that an averaging approach is a more reliable way to capture any differences between the years. It is true an averaging approach does not include income that is not recorded in the available documents. But, again, the information available already is problematic by virtue of its vague sources and I am not prepared to extrapolate further in order to increase the amount of income.

[99] Returning to my assessment of average pre-accident earnings of $40,400, I agree with the submission made on behalf of the plaintiff that an economic approach to income loss multipliers is appropriate in light of his age and established work history. Using the approach of Mr. Benning, the expert on this issue, annual earnings of $40,400 results in a future earning capacity of $566,085.

[100] The plaintiff has limited education having left school in grade 12 and, except for some minor work when he was young, he has worked as a drywaller and painter all his adult life. He is currently 44 years old. The future is not a good one, with the prospect of low paid, part-time and insecure work in the occupations that are generally available to disabled and older people. The market for these positions is not strong but they are the positions where the plaintiff has a real and substantial possibility of working. I accept the estimate of the plaintiff that these positions would

have annual earnings of about $20,000. Using the multiplier of 14.012, the future estimate of earnings in these positions is $280,240.

[101] Based on $566,085 as expected future earnings in his current work, the assessment of loss of future earning capacity in this case is $285,845.

E. Summary

[102] A summary of the damages awarded in this case is:

(a)	Special damages	$2,296.55
(b)	Non-pecuniary damages	$70,000.00
(c)	Past loss of earnings	$67,000.00
(d)	Cost of future care	$43,224.00
(e)	Loss of future earning capacity	$285,845.00
TOTAL:		$468,365.55

[103] Subject to any application received with 45 days of the date of this judgment (or final appeal), the plaintiff is entitled to his ordinary costs.

"Steeves, J."