

**IN THE MATTER OF AN ARBITRATION PURSUANT
TO S. 148.2 OF THE INSURANCE (VEHICLE) REGULATION, B.C. Reg. 447/83
and the
ARBITRATION ACT, [SBC 2020] Chapter 2**

BETWEEN:

JSS

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

Counsel for the Claimant, JSS

Valmon J. LeBlanc

Counsel for the Respondent,
Insurance Corporation of British Columbia

Joseph P. Cahan

Dates of Hearing:

June 6 – 10, 13, 14, 16, 17, 21, 2022

Place of Hearing:

Vancouver, BC

Arbitrator:

Dennis C. Quinlan, QC

Date of Award:

August 8, 2022

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I. INTRODUCTION

1. This is an Underinsured Motorist Protection (“UMP”) Arbitration conducted pursuant to the *Arbitration Act* [SBC 2020] Chapter 2 and section 148.2 of Part 10 of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 (the “Regulation”).
2. On September 28, 2017, the claimant JSS (the “Claimant”) was a front seat passenger in a 2016 McLaren motor vehicle that was travelling at high speed on Highway 3 near Osoyoos, B.C. The driver lost control resulting in the McLaren leaving the highway and rolling over several times through a ditch before coming to rest some distance away in a field (the “Accident”).
3. The Claimant sustained serious injuries including severe trauma to his dominant right hand that required three surgeries and left him with permanent impairment and disfigurement, multiple fractures to the right knee and lower spine, a concussion and various psychological injuries.
4. The Claimant was an insured for the purpose of UMP as defined in section 148.1 of the Regulation. The policy limits in the underlying tort claim were tendered on behalf of the driver, and on March 12, 2021, the Respondent Insurance Corporation of British Columbia (the “Respondent”) agreed the Claimant could pursue the balance of his claim through arbitration in accordance with Part 10 of the Regulation.
5. The physical injuries of the Claimant are not in serious debate. There are however two issues where the parties differ significantly.
6. First did the Claimant sustain a permanent neurocognitive disorder as a result of his injuries, and if so, to what extent?
7. Second how is the Claimant’s claim for past and future earning capacity to be assessed given he had negligible earnings for the thirteen year period 2001 to 2014,

but then for the period January, 2015 until the September, 2017 Accident, earned upwards of \$500,000 annually as a Financial Manager for a high end pre-owned car dealership?

8. These two issues are to be considered within the backdrop of the assertion by the Respondent that the Claimant “cannot be trusted” as he showed a “clear willingness to lie” in earlier unrelated court proceedings, and validity testing conducted within this proceeding placed in doubt whether the Claimant’s low test scores could be relied upon as showing serious disability.

II. THE CLAIMANT’S LIFE PRE-ACCIDENT

9. The Claimant was born in British Columbia on May 6, 1967 and at the time of the Accident was fifty years old. He grew up on a farm in the Fraser Valley and was the third eldest of six children. He dropped out of school part way through grade 11 and went to work in a saw mill and then in the auto sales business starting in or about 1986.

10. Indications were that the Claimant achieved some success, first as a top selling salesperson and then as a lease manager. He testified he earned as much as \$200,000 to \$250,000, although no documentation was produced to support this statement or otherwise indicate what the pattern of income was over the years 1986 to 2001.

11. In 2001 the Claimant for reasons that were not explained, left the auto business and branched out on his own into a fantasy golf venture, which was an online golf pool. Due to the economic downfall in 2008, the business fell on hard times and closed in 2014. The Claimant’s earnings from 2008 to 2014 were virtually nothing and he used lines of credit to live on.

12. Reassessed income tax summaries for the years 2011 to 2014 showed gross business income for each year of less than \$5,000. However as early as 2011, the

summaries indicated the Claimant owed Canada Revenue Agency in excess of \$275,000. There was no evidence as to how or why this debt arose.

13. The Claimant married in 1995 and he and his wife had two daughters. Their marriage came to an end in 2010 when they grew apart and separated.

14. A contributing factor to the breakdown of the marriage was acrimonious real estate litigation the Claimant's wife was involved in between 2008 and 2013, which the Claimant described as the "...stake that ended the marriage..." He testified their separation was devastating because he had to pay all the expenses of the litigation, which included an unsuccessful appeal.

15. Although not named as a party in the litigation, the Claimant figured prominently as a witness.

16. Following the failure of the fantasy golf venture, the Claimant was forced to start over because he had been wiped out financially and his marriage had ended. He gave evidence that as the auto sales business was always his passion, he decided to return to that line of work.

17. In 2014 he learned of an opportunity at BJBMW which involved the dealership's plans to soon open a certified pre-owned BMW store. By agreement dated December 10, 2014 (the "Contract"), the Claimant through his holding company (the "Agency") was hired as the Financial Services Manager for BJBMW Pre-Owned, wherein his duties included being in charge of the Credit Centre, supporting and meeting the Sales Department's targets and customer needs, upselling and cross selling company products including warrantees, and funding of sales contracts.

18. The Agency was to be compensated on the basis of 25% of gross profit sales achieved by the Agency. Either party could terminate the agreement by providing thirty days written notice.

19. The Claimant achieved immediate success in his new position. He played a role in changing the BJBMW website so that a customer could apply from home for a credit application and pre-approval was done on line. Financing contracts increased quickly and the Claimant signed up a number of financial institutions which he said catered to the customer as it gave them greater choice as to who they could obtain their financing through.

20. The trajectory of pre-owned auto sales in 2015 was rising and by the middle of the year, the Claimant hired an assistant to help with the increased volume of sales transactions. A letter agreement dated August 6, 2015 amended his compensation package to provide that the commissions achieved by the Claimant and his assistant would be pooled and he would receive 70% of their 25% pooled share.

21. By the end of 2015, expectations were exceeded and BJBMW was the number one pre-owned BMW store in Canada. There were four or five Financial Sales Managers at BJBMW in 2017 and the Claimant was ranked number one.

22. At the same time, he had purchased an NSX 2017 Acura and leased a McLaren with plans to become involved in the "Super Car" market, which he felt was a growth area. According to the Claimant, Vancouver subsequently became the Super Car capital of North America.

23. The Claimant had T4 earnings of \$330,000 in 2015, \$515,000 in 2016 and as of September 30, 2017, his gross earnings were \$405,672.65.

24. The Claimant's reassessed 2016 income tax summary showed that his debt to Canada Revenue Agency had increased to \$867,314. There was no evidence as to the reason for the increase or any plans to repay the debt.

25. The Claimant received a Progressive Discipline Warning Form dated June 14, 2016 (the "Warning") for opening, while under the influence of alcohol, a \$4,000 bottle of champagne intended as a 30th anniversary gift for the owner. The Warning provided that he would no longer be permitted to consume alcoholic beverages at any

BJBMW events or outside events where he was representing BJBMW, and non-compliance could result in further disciplinary action including termination.

26. In 2016 the Claimant was convicted of two charges of impaired driving which lead to the suspension and loss of his driver's license. As at the time of the Arbitration, the Claimant had not taken steps to re-instate his license, although on occasion and as recently as three days before the start of the Arbitration, he had continued to drive, knowing he was taking a chance by doing so. The reason given for not obtaining his license was that he had too many other issues to deal with.

27. The Claimant was also involved in litigation arising from a March, 2017 after work incident at a local hotel.

28. Leading up to the Accident, the Claimant was in relatively good health, although he was a long time heavy smoker. He was in a new relationship.

III. THE ACCIDENT

29. On the day of the Accident, the Claimant was travelling with colleagues from Langley in a group of four supercars to a racetrack in Osoyoos. After leaving Keremeos, the driver of the McClaren in which the Claimant was a belted right front passenger, lost control while attempting to pass at high speed the three super cars and a Caravan that were in front.

30. The Claimant testified he remembered most of what occurred up to the time of the impact, following which his memory went blank until he was wheeled into an operating room for orthopedic surgery which the records show occurred on October 2, 2017.

31. NK was a witness to the Accident who took video of the Claimant while at the scene. He testified in the Arbitration.

32. NK described the Accident scene as the most gruesome he had ever seen. In his words the video showed the carnage and how far off the highway the McClaren ended up.

33. NK's observations of the Claimant were that he was completely cold, could not speak, and looked like death. He described him as being "lifeless". One of his fingers on the right hand was partially severed. The video shows the Claimant bleeding in the forehead area.

IV. PHYSICAL INJURIES, PSYCHIATRIC SYMPTOMS AND TREATMENT

34. Following the Accident, the Claimant was taken by ambulance to Oliver Hospital where he was noted as being alert with a Glasgow Coma Scale ("GCS") of 15. Bystanders had indicated the Claimant was unconscious at the scene, but the duration was unknown. He was later transported that evening to Kelowna General Hospital where he appeared confused with a GCS of 14.

35. As noted earlier, there is little dispute between the parties as to the physical injuries sustained by the Claimant. No clinical records were introduced as evidence in the Arbitration, although many such records were relied upon by the respective experts, all without objection. There was no document agreement. However given the apparent consensus between the parties, I am prepared to rely on the summaries of observations and treatment as set out in the expert reports, albeit cautiously, as being reflective of the underlying clinical records.

36. The Claimant was diagnosed with multiple right-hand open fractures, partial amputation of the right 4th finger, a left tibial plateau fracture, and a L2 and L3 compression fracture. A CT head scan was normal.

37. On September 29, 2017, the Claimant underwent extensive hand surgery:

- Open reduction, internal fixation of the transcarpal dislocations to the thumb, trapezial and hamate fractures

- Open reduction K-wire fixation right 3rd/4th proximal phalanx
- Open reduction K-wire fixation right 5th thumb fracture
- Repair right 2nd FOP tendon and right 4th FDS tendon
- Repair right 3rd and 4th extensor tendon
- Vascular repair palmer arch right hand
- Repair right D4 digital nerve, digital artery plus right D#/D4 common digital nerve
- Revision amputation D4
- Repair complex lacerations palmer and dorsal right hand.
- The Claimant did not recall the hand surgeries.

38. On October 2, 2017, open reduction, internal fixation surgery was performed to the left tibial fracture. It was this surgery that the Claimant later reported as being his first recollection following the Accident.

39. The Claimant was transferred to Surrey Memorial Hospital by ambulance on October 19, 2017 and then discharged home on October 26, 2017 to stay with his brother in law. A ramp was installed for his wheel chair and care aides attended regularly throughout the day.

40. On November 17, 2017, the Claimant returned to Kelowna for hardware removal from his right hand. Further right hand surgical revision was done on March 26, 2018 and January 23, 2020.

41. A clinical note of December 2, 2019 indicated the Claimant was optimistic about his future, his life was going well and he was feeling energized in most activities.

42. On October 6, 2020, the Claimant underwent an initial team assessment at Change Pain Clinic. This program consisted of a multidisciplinary team approach to treat cognitive and physical function. Over a twelve week period, the Claimant had

access to 120 hours of personalized therapy by a pain psychologist, occupational therapist, kinesiologist, movement specialist, pain specialist and pain navigator. Ketamine infusions reduced his pain and brought back feeling in his hand.

43. The Claimant's major issues at the Change Pain Clinic included headaches, neck pain, right upper arm dysesthesia, weakness of the right hand, low back pain that referred to the buttock, and left leg and abdominal discomfort. Improvement ranging between 20% and 75% was noted after the twelve week treatment.

44. Following completion of the initial program on January 5, 2021, the Claimant was enrolled in a second three month program at Change Pain Clinic which ended on May 17, 2021. The Claimant made significant improvement in his physical function, capacity and tolerance. The pain in his right hand had reduced and his strength doubled.

45. In addition to the specific treatment and surgeries referred to above, the Claimant had extensive rehabilitation following the Accident including massage therapy, physiotherapy, occupational therapy, hand therapy, acupuncture, and personal training. Such treatments were limited by Covid.

46. As to present issues, the Claimant testified he cannot open or close his right wrist because it is fused, and the fourth finger which does not have a knuckle, has on several occasions become infected. The neck and back still cause problems and he experiences headaches, dizziness and trouble coordinating his eyes.

47. The Claimant did not focus in his evidence on psychiatric symptoms. He did testify to a lack of confidence when driving and anxiety while a passenger, together with experiencing ongoing dreams of his "mangled" hand. These complaints combined with pain and frustration lead to some depression and irritability.

48. The Claimant agreed the comprehensive rehabilitation program at Change Pain Clinic achieved significant improvement in his mental health. The depression and

anxiety greatly improved and while he continues to have nightmares, they are on a less frequent basis.

49. Much of the debate in this Arbitration centered on cognitive symptoms. The expert reports on behalf of the Claimant speak of his alleged difficulties with memory, word finding, multi-tasking, losing train of thought, impaired decision making and dizziness. To the extent the Claimant's own evidence addressed such issues, it was only in a very general fashion and framed in terms of difficulty doing paper work and fatigue.

V. TERMINATION AND EMPLOYMENT FOLLOWING THE ACCIDENT

50. The Claimant testified that after the Accident he planned on returning to work at BJBMW as soon as his condition would allow. He attended the company Christmas party and was lead to believe his job was still available as was his office.

51. However pursuant to a letter January 17, 2018 and signed by JM, Managing Partner of BJBMW, the Claimant's employment was terminated. The letter read, *inter alia*, as follows:

"This letter serves to advise you that pursuant to the termination provisions of the Contract, [BJBMW] hereby provides you with 30 days notice in writing of the termination of the Contract. As a result, the Contract will come to an end on **February 15, 2018**.

The basis for the termination of this Contract is that 696601 B.C Ltd. through its principal, [JSS], breached its obligations pursuant to the Contract *inter alia* on the basis of the breach of its obligations re "*funding of contracts*".

52. The Claimant testified he had no warning his employment was about to be terminated and he did not know what the reference to being in breach of his obligations re "funding of contracts" meant. He claimed he asked for answers multiple times but no one would talk to him or explain what the issues were.

53. The Claimant was provided a letter from BJBMW dated March 15, 2018 that offered clarification as to the funding concerns which lead to the termination. The Claimant disagreed with the contents of the letter.

54. A dispute arose as to the amount of back pay the Claimant was owed, resulting in him bringing what he described as a “human rights action”. Eventually he recovered his proper compensation and the claim was settled. The Claimant also filed a wrongful dismissal action, but the pleading was never served and ultimately it was dismissed by consent.

55. It was the Claimant’s view that BJBMW was looking for an excuse to justify his termination. While he did not think the position of BJBMW was contrived, he testified it was not reasonable.

56. The Managing Partner JM and Senior Sales Manager SG each testified in the Arbitration at the request of the Respondent. Both gentlemen stated that the BJBMW letter of March 15, 2018 elaborated on the funding concerns, and the termination of the Claimant was not related in any way to his Accident or the injuries sustained. Neither witness was cross-examined on this evidence.

57. Beginning in April 2018, the Claimant took steps to return to employment. His first position was at his brother in law’s business Surrey Truck/Driveco. He only stayed at that job for three months, stating he and his brother in law had issues over whether the Claimant was pulling his weight.

58. His next position was at TMT in Langley where he worked for nine months from June, 2018 to February, 2019. During that period he earned self employed commissions of \$70,500.

59. The Claimant testified he left TMT because there were complaints from customers about his timeliness in returning calls, resulting in him and the owner B deciding to end their relationship. B did not testify in the Arbitration to confirm this.

60. It is noteworthy that the Claimant's own resume prepared in early 2022 stated that under his leadership, TMT's gross monthly profit in 2019 had increased from \$200,000 prior to his arrival, to \$800,000.

61. The Claimant then moved in March, 2019 to VAC which is a car dealership but on the model of Amazon rather than a drive in store. The sale transactions, including the choosing of the car and arranging of financing, are all done on line. The Claimant worked at VAC as a team lead for six months and earned \$95,000 net of lead expenses. He left that position because it was a long drive from Port Moody where he was living to the Langley head office. The Claimant did not have a driver's license during this period and had to rely upon others for travel to and from work.

62. In September 2019, the Claimant was hired to work as a team lead at Applewood which was another dealership. He stayed there for six months and in that period earned gross commissions of \$135,000 from which he had to pay expenses including lead expenses, of \$60,000, resulting in net commissions of \$75,000. Expressed as a percentage, his expenses were 44% of his gross commissions.

63. In February 2020, the Claimant was contacted by the owner of TMT (B) who wanted him to return to TMT. There was some delay associated with an office not being ready and then Covid started which impacted auto sales across the industry. TMT laid off salaried employees and came very close to shutting down completely.

64. The Claimant earned \$34,597 at TMT in 2020 and \$50,000 in 2021, although there was no supporting documentation for the 2021 earnings.

65. The Claimant left TMT in December, 2021. After a period of unemployment, the Claimant returned to VAC and entered into a written agreement dated April 15, 2022 (the "Retainer Agreement") whereby he was hired effective May 1, 2022 as Finance Director to mentor Client Managers and work with third party credit leads.

66. The Retainer Agreement specified that VAC would provide special accommodation to the Claimant in the form of administration, logistics and funding staff

to assist him in his paperwork as may be needed "...for any impairment". The Claimant was initially placed on probation for a period of ninety days, during which time he was to be paid a monthly salary of \$10,000, and then have his compensation reviewed.

67. The Claimant testified there had not been any discussion with the CEO of VAC, BB, about changing his compensation. However it is to be noted that BB who testified in the Arbitration after the Claimant, stated the Claimant was presently compensated at 70% commission which was the second highest commission percentage in VAC. BB partially retracted that statement and indicated the Claimant could possibly make 70% commission once the probationary period was over.

68. At present, the Claimant is working eight hours per day after which he has a headache and feels fatigued. He spoke of requiring support in the form of reminders for funding and having his paperwork reviewed.

69. The Claimant compared his present situation at VAC to BJBMW where he would come into the dealership around 11:00 and sometimes not leave until midnight or even later. He did not require any support at BJBMW and could multi-task in a very busy store.

VI. LAY WITNESSES ON BEHALF OF CLAIMANT

VTS

70. VTS is the brother of the Claimant and the eldest of six children. After graduating from college, he became an investment adviser in Vancouver for thirty years before moving to San Francisco for four years. He has resided in Vancouver for the last eighteen months.

71. VTS learned about the Accident two days after it occurred. He immediately flew to Kelowna to visit the Claimant in the hospital. When he first saw his brother, he

looked beaten up, appeared in pain, was not making sense and was somewhat incoherent.

72. He described the Claimant before the Accident as gregarious, energized, athletic, smart and innovative. He was always a salesman and people loved him.

73. Since the Accident his brother is not the same and VTS worries about his ability to hold a job. He feels his brother's attention span is shorter, his mathematical skills are not as good and he is more irritable. VTS gave as an example an argument the two of them recently had which was out of character for the Claimant. Overall he thought his brother was getting worse rather than better.

74. VTS was not aware his brother had little income during the period 2001 to 2014, nor did he know about the lawsuits his brother was involved in although he was aware there were challenges in his marriage.

AS

75. AS is the daughter of the Claimant. She is now twenty two years old and attends the University of Victoria. She described her father as being involved in all of her school and sports activities while growing up. He taught her life lessons, how to be a team player, move out of her comfort zone and achieve anything she set her mind to.

76. Following the Accident, she found her father to be more irritable, forgetful and confused. A year ago he forgot her sister's birthday which was quite unusual. AS worked with her father in the summer of 2019 when he was at VAC and saw that he was forgetful in his work. The relationship with her father has changed since the Accident, in that he is hard to talk to and strays off topic.

77. AS agreed she has seen less of her father since moving to Victoria four years ago for university. She has not lived with him since she was fifteen.

PG

78. PG is twenty nine years old and the girlfriend of the Claimant. She met him in 2019 and they started dating in the summer of 2020 after she moved to Vancouver from Edmonton. They live together in a two bedroom condo in Burnaby. PG is obtaining her Bachelor of Psychology and presently works at VAC with the Claimant on his team.

79. She described the Claimant as a positive person, very caring, sincere and fun loving, who she sees a good future with.

80. PG said the Claimant has good days and then days where he is irritable, flustered and overwhelmed. He tosses and turns in his sleep and experiences nightmares where he wakes up and looks at his hands. The sleep issues have improved since he started going to Change Pain Clinic as they were proactive in scheduling his sleep patterns.

81. The Claimant is forgetful. PG keeps track of what he has to do and helps him with his day to day life. In social situations he has trouble concentrating on conversations and experiences word finding difficulties. She described the Claimant as being agitated and panicky when in a vehicle.

82. At work the Claimant does well and is able to articulate as long as he is only dealing with one person at a time. He lacks focus when reading a document and has trouble reasoning his way through different concepts. Her responsibilities at VAC are to do the Claimant's paperwork and organize him. He teaches the other members of the team, as he has been in the business for thirty years and has a lot of knowledge. She described him as the "closer" who is well loved at work but prone to making mistakes.

83. PG said she drives the two of them to work each day. They arrive at noon and leave between 6:00 p.m. and 10:00 pm. She agreed they have to be at work more and she thinks that will improve.

KA AND RR

84. KA is an employee at BJBMW, having started there in January 2015 in sales. He was the number one salesperson in 2015 and 2016 and number two in 2018 and 2019.

85. In the period 2015 to the date of the Accident, BJBMW was breaking records and selling more cars. Once Covid started, KA's income dropped by 25%, but it has returned to normal over the last six to twelve months. The volume of sales is not what it once was, but more money is made per sale because pre-owned cars are in high demand.

86. He described the Claimant as a hard worker, sometimes being in the office from 11:00 a.m. to midnight or 1:00 a.m. KA said he referred most of his sales to the Claimant because he could be relied upon.

87. The Claimant is not the same now as he was before. He does not like getting into a car, his confidence is shaken, he is not as happy as he was and he always talks about the old days. KA said he is aware the Claimant was terminated from BJBMW for a change of policy related to down payments which affected all finance managers.

88. KA testified sales people and finance managers come and go, either because they are not good enough or find another opportunity. Only one finance manager remains at BJBMW who was there in 2017. KA himself has stayed because he has a lot of repeat customers.

89. KA was a witness to the Accident. He observed the Claimant at the scene and could see his right hand was in bad shape. While waiting for the ambulance, the Claimant kept talking about deals at work.

90. RR purchased a number of cars through the Claimant while he was at BJBmw. The transactions all went smoothly and RR was impressed by his professionalism.

91. In late November, 2017 following the Accident, RR drove the Claimant back and forth to Kelowna. He described the Claimant as not being all there, scattered and forgetful. RR's wife subsequently bought a car through the Claimant and the transaction was problematic as the paperwork was not done properly.

NK

92. NK met the Claimant in January 2015 at BJBmw. At that time NK was the sales manager of six sales people and the Claimant had recently started as the finance manager. NK was at the front end selling the vehicles and the Claimant was at the back end arranging financing and selling warranties. They formed a good relationship.

93. The work ethic of the Claimant was described as showing up later in the morning and "burning the midnight candle". The Claimant was not the fastest at completing the necessary paperwork, and he would stay late until 9:00 p.m. or 10:00 p.m. to finish it. Everyone was expected to work long hours and the Claimant was no exception.

94. NK described the Claimant as the sharpest person he knew who would quickly build rapport with customers. He was well organized and able to juggle a number of transactions, or as NK described "twice what the normal finance manager was doing".

95. The BJBmw pre-owned store opened in January 2015. The initial target was to sell 100 cars a month or 1,000 a year. The targets were exceeded as 1,588 cars were sold in 2015 and 2,283 in 2016 resulting in BJBmw becoming the number one BMW store in British Columbia.

96. Sales volumes were \$2.4 Million in 2016 and \$3.0 Million in 2017. NK was on a 25% compensation plan and in his words, it was a good time to be there. He earned \$400,000 in 2016 and \$500,000 in 2017.

97. NK quit in April 2017 following a dispute with the sales manager SG who told him his compensation was being reduced. This change would have resulted in his compensation being cut in half. NK left with his sales team and joined a McClaren dealership but only stayed there for five months before branching into consulting work. He said he was exhausted and burned out after working sixty to seventy hours per week.

98. According to NK, BJBmw never had it as good once he and his team left. Their leaving would have negatively impacted the earnings of the Claimant because a finance manager only earns compensation based on cars that are sold and brought to him.

99. Once the Accident occurred, NK did not see the Claimant nearly as often. To the extent he did, their communications were not the same, as the Claimant was not engaged as much with people, was all over the map and a different person.

100. As to the impact of Covid, NK said the market was down for the last half of 2020, but recovered after because the pre-owned market went wild.

BB

101. BB is the CEO and dealer principal of VAC which is largely an online business acting as a delivery service to the customer's front door. The head office of VAC is in Langley and there are also three locations in Calgary plus call centres.

102. BB met the Claimant for lunch in early 2019. BB decided to hire him as a team lead responsible for a group of employees whose role was to generate leads for auto loans. The Claimant ended up working for VAC from March, 2019 to August, 2019 during which time he was on 60% to 65% commission and earned \$95,000 net of lead expenses.

103. BB described the Claimant as charismatic and someone with a lot of referrals and connections. BB said it was evident the Claimant struggled with following procedures and his paperwork was very sloppy. Scheduling in terms of showing up for meetings with clients was also an issue. This caused some butting of heads.

104. BB said the upside of income for team leaders in 2019 was \$20,000 to \$40,000 a month such that a good team lead could make upwards of \$500,000.

105. No specific evidence was given by BB as to why the Claimant left VAC in August, 2019. However the two of them stayed in touch and recently in May, 2022, BB rehired the Claimant as he was good at creating growth and attracting customers. Given the previous concerns about the Claimant's ability to follow procedures, an agreement was reached whereby VAC for ninety days would cover the costs of additional help to act as a support system and then see how things went.

106. BB said the Claimant appears tired since he has come back to work at VAC. While holding a valid driver's license is not a requirement for the position, BB felt the Claimant would do a better job if he had a license and could drive himself to work. BB did not offer any evidence as to whether the Claimant will be kept on once his probation comes to an end, other than what was implied by his statement that the Claimant was already being paid, or might be paid, on the basis of 70% commission.

107. BB stated on cross examination that the current range of monthly income for a team lead is \$35,000 to \$45,000 and a top employee could make \$480,000 to \$600,000 a year. BB noted that sales are generally down 30% in the months December to February.

108. In terms of the impact of Covid, BB testified sales decreased 50% in April, 2020 and a further 25% in May, 2020. The most difficult period lasted for about four to six months before some recovery was seen. He made the point that the nature of VAC's business is that it does well in a poor economy.

AP

109. AP was previously employed with Applewood for a decade. He was the general manager of one of their stores and also a general manager of Applewood Credit.

110. In September, 2019, AP hired the Claimant to be a team lead, which in effect was a dealership within a dealership. AP had heard of the Claimant through the industry and they were introduced by mutual friends. The Claimant brought with him a team of five or six.

111. AP was impressed with the performance and creativity of the Claimant. He showed flashes of brilliance followed by some inconsistency and forgetfulness. Overall his performance was good. There were three or four other team leaders and the Claimant was at or near the top. At times he did seem drained and worn down. The Claimant did not request or receive any accommodations at work.

112. The compensation scheme for the Claimant was based on Applewood paying him, and then he would pay his team. AP said the Claimant left in February, 2020 by mutual agreement. Applewood wanted certain things and they could not come to an agreement. He did not expand on what that meant. AP was a big fan of the Claimant and would hire him again if the right team was in place to help him.

113. Covid had a significant impact on the auto sales business. There has been some recovery but also challenging times. AP thought the Claimant could earn \$400,000 to \$500,000 per annum.

CM

114. CM was an occupational therapist of some twenty-five years experience retained by ICBC through Part 7 to provide rehabilitation services to the Claimant during the period January, 2019 to February, 2020.

115. The focus of her treatment was to improve his cognitive difficulties related to short term memory, distractibility, and word finding issues, and have him return to driving.

116. During the course of treatment by CM, some improvement was noted based upon self report and reports from others. The Claimant was working throughout 2019 and using compensatory strategies more regularly, but not consistently.

117. Funding for a driving assessment was not approved by ICBC and the services of CM were discontinued in April, 2020.

NC

118. NC is presently a team lead and partner with the Claimant at VAC. They started together on May 1, 2022. NC has worked in the finance side of selling cars for the past eight years.

119. In 2018 NC was employed at TMT and it was there he first met the Claimant. NC started as a salesperson at TMT and then was trained by the Claimant to become a team lead. The Claimant was instrumental in increasing the number of teams at TMT from one to six which increased profit for TMT.

120. NC described the Claimant as charismatic, personable, and good with clients. He was skilled at making calls to banks and turning rejections into approvals. The Claimant was quite prepared to mentor others based on the knowledge and experience he had gained over his years in the business. He was a breath of fresh air when he joined TMT.

121. NC recently followed the Claimant from TMT to VAC, saying the Claimant was like a brother, father, mentor and now business partner to him. He learns from the Claimant every day. While the Claimant makes mistakes, there are people in place on

the team such as himself and the Claimant's girlfriend PG, to ensure the situation always gets fixed. They teach each other.

122. NC testified the Claimant requires assistance with his paperwork which is sloppy. He forgets to make calls and sometimes seemed overwhelmed. NC said his own role is to assist by doing such things as following up with the bank and making sure the deal is funded.

RS

123. RS was an accountant who refiled the Claimant's 2019 income tax return to adjust his income from \$240,000 to \$80,000, taking into account lead expenses which had not previously been deducted. The Claimant's gross commissions for 2019 were \$378,751.

VII. LAY WITNESSES ON BEHALF OF THE RESPONDENT

SG AND JM

124. SG has worked at BJBMW for seventeen years and is presently the sales manager. He oversees the daily operation of the pre-owned car business and reports to the CEO JM.

125. As a result of a previous settlement agreement reached in another proceeding between the Claimant and BJBMW, SG stated he was limited in the evidence he could give in this Arbitration to the extent he was restricted from saying anything critical or disparaging about the Claimant.

126. The termination of the Claimant in January 2018 was as a result of requirements not being followed for the funding of the sales contracts, and the March 15, 2018 letter provided further details. The termination had nothing to do with the Claimant's Accident or his injuries.

127. The Claimant's earnings were about \$400,000 for the nine months in 2017. SG was not aware of there being a drop in sales after NK left.

128. SG stated sales in the auto industry had declined 40% since 2016 due to general market conditions, although used car sales have been strong since Covid. Market conditions resulted in certain employees at BJBmw having the terms of their compensation changed.

129. SG agreed the Claimant was a strong salesman and a hard worker who put in long hours. He had the ability to close deals, he helped other sales managers and he was involved in trouble shooting complaints.

130. SG was aware the Claimant had acquired a McClaren and NSX before the Accident but the Claimant did not discuss his plans with him. SG did not know whether that business would have grown because it was not what BJBmw did.

131. SG stated finance managers do not close the deal. The sales people do that and then they take the client to the finance manager. SG agreed a sales transaction does not complete until the financing goes through.

132. JM is the managing partner and CEO at BJBmw and responsible for running the new and pre-owned operations of the dealership. He started at BJBmw in 1998.

133. The termination letter of January 17, 2018 was signed by JM. Thirty days notice was given based upon the termination clause in the agreement between BJBmw and the Claimant's company. JM agreed there was no discussion about terminating the agreement prior to the Accident.

VIII. EXPERT EVIDENCE

134. The Claimant tendered expert evidence from a neuropsychologist, psychiatrist, anesthesiologist/pain specialist, occupational therapist for a functional capacity assessment, and occupational therapist outlining costs of future care.

135. The Respondent tendered expert evidence from a neurologist and neuropsychologist.

136. The expert reports were complex and lengthy, and in respect to the neuropsychology evidence, unduly so. The effectiveness and usefulness of that expert evidence was partially undermined as a result. Experts would be well advised to remember who their audience is, and adhere to their role of “....provid[ing] ready made inferences which, due to the technical nature of the facts, a trier of fact is unable to formulate....”: *Brough v Richmond*, 2003 BCSC 512 at para. 6.

137. A qualified expert will best assist the trier of fact by simplifying an issue, rather than complicating it.

138. In summarizing the expert evidence, I will focus on the issues of whether the Claimant sustained a permanent neurocognitive disorder, and the impact of any impairments on the Claimant’s earning capacity.

DR. SCHULTZ AND DR. MEAD-WESCOTT, NEUROPSYCHOLOGISTS

139. Dr. Schultz was qualified as a psychologist with the expertise to offer opinion evidence, *inter alia*, as to the extent of psychological/neuropsychological impairment, if any, arising from the Accident. There is no doubt Dr. Schultz was highly qualified in the area of neuropsychology.

140. A seventy two page report dated November, 2020 was authored by Dr. Schultz together with a single spaced eighteen page Response report dated May 31, 2022. I

note the Response report was longer than the report it was responding to. Dr. Schultz conducted a neuropsychological and psychological assessment of the Claimant with a vocational component on November 6, 7 and 8, 2020.

141. The opinion of Dr. Schultz as to diagnosis was summarized in section 6.2 of her Report:

According to the Diagnostic and Statistical Manual of Mental Disorder, Fifth Edition (DSM-5), [the Claimant's] present multiply (sic) comorbid clinical diagnosis is as follows:

- Mild Neurocognitive Disorder Due to Multiple Etiologies; with Traumatic Brain Injury as primary etiology
- Persistent Depressive Disorder, with Anxious Distress, with Intermittent Major Depressive Episodes, without current episode, mild, late onset
- Posttraumatic Stress Disorder, with dissociative features, moderate
- Somatic Symptom Disorder with Predominant Pain, moderate
- Insomnia Disorder, mild to moderate
- Erectile Disorder (from medical records)
- Tobacco Use Disorder (pre-existing), mild to moderate

142. The cognitive abilities which Dr. Schultz identified as being impaired were in the areas of attention, memory and processing speed. While the traumatic brain injury was the primary contributor to the cognitive difficulties, Dr. Schultz opined that the Claimant's chronic headaches, emotional distress, depressive symptoms, insomnia and fatigue were likely contributing factors.

143. Dr. Schultz was careful to say in her testimony that she was not diagnosing a traumatic brain injury, given there is an issue as to whether a neuropsychologist can make that diagnosis. Her opinion was that the cumulative evidence was consistent with a mild complicated or moderately severe traumatic brain injury.

144. Dr. Schultz described the impact of the neurocognitive disorder on the Claimant's work and earning capacity as follows:

In conclusion, under current circumstances, [the Claimant's] occupational impairment is moderate. It fluctuates with employment demands and available support. Although he is presently working in his familiar professional field of automotive financing, he has become much less competitive, independent and productive. He depends on his friendly and accommodating employer, supportive coworkers, overlearned work experience, and compensatory strategies to remain in the workforce. [The Claimant] is at an increased risk of occupational disability should he have to tackle new learning, high pace, time and volume pressures, and accuracy at work, without assistance.

Emphasis added

145. The prognosis for the Claimant's neuropsychological and psychological recovery was poor, with the added concern that as he ages, his cognitive difficulties could worsen.

146. Validity testing to determine whether the examinee is putting forth a reasonable effort is an important aspect of neuropsychological testing.

147. In section 6.1, Dr. Schultz discussed the validity of the Claimant's neuropsychological assessment and in particular the testing of effort and performance validity. Dr. Schultz described the results as "mixed and suboptimal effort". She observed the Claimant's responses on the Personality Assessment Inventory were indicative of a tendency towards a negative impression formation and possible over-endorsement of psychopathology. Given these possible concerns, Dr. Schultz summarized her views as to the validity of the neuropsychological test results as follows:

In conclusion, [the Claimant's] current neuropsychological and psychological assessment data were interpretable, with caution, corroboration and convergence of evidence. A

multimethod approach to the data collection, analysis and interpretation was utilized to enhance validity of his evaluation.

Emphasis added

148. The conclusions to be drawn from the validity testing were a source of some debate between Dr. Schultz and Dr. Mead-Wescott, a neuropsychologist retained by the Respondent who reviewed the report of Dr. Schultz but did not assess the Claimant or provide clinical opinions about his condition.

149. Simply put, Dr. Mead-Wescott was of the opinion that Dr. Schultz "...administered but did not heed the results of neuropsychological validity tests..." and "...went to some effort to dismiss the results of the stand-alone validity tests..."

150. Having read and reread the detailed responsive reports of Dr. Schultz and Dr. Mead-Wescott, I have concluded that the most to be taken from their evidence is that these two experienced neuropsychologists agree to disagree on what conclusions can be drawn from the validity tests.

151. Neuropsychology is not an exact science. From my vantage point as the trier of fact, I am not in a position to offer a conclusion as to which of the two experts is correct, or perhaps better put, more correct. This is particularly true given Dr. Mead-Wescott did not assess the Claimant.

152. As with other evidence in this Arbitration, I will view the neuropsychology evidence with caution and consider it within the complete body of evidence which has been given, both expert and lay.

DR. LAU, PAIN SPECIALIST, ANESTHESIOLOGIST

153. Dr. Lau was qualified as a medical doctor in anaesthesiology with a sub speciality in pain medicine. She was the co-founder in 2013 of Change Pain Clinic

which is an interdisciplinary pain clinic with the focus being on rehabilitation. Dr. Lau prepared two reports dated respectively December 10, 2020 and March 11, 2022.

154. The Claimant was enrolled at Change Pain Clinic in a three month coordinated pain management and rehabilitation program on October 6, 2020. After completing that program on January 5, 2021, he was enrolled in a second three month recovery program which ended on May 17, 2021.

155. Dr. Lau's diagnosis was the following:

- Mild traumatic brain injury with post concussive syndrome
- Cervicogenic headaches
- Non-operative L2/L3 lumbar spine fractures
- Left tibial plateau fracture
- Complex crush injury to right hand
- Central sensitization contributing to neuropathic pain, headache, abdominal pain and cognitive problems
- New onset post-traumatic stress disorder

156. Medical therapies in the first program included trigger point injection, nerve blocks, and ketamine infusion integrated with rehab therapies. The Claimant responded positively to the ketamine infusions such that his sleep and energy levels improved by 15-20% and his overall pain reduced by 30-40%. The results from the program showed significant improvement in his mental health and in particular his depression and anxiety.

157. The Claimant experienced his best overall functional recovery following completion of the second program in the spring of 2021. He was working thirty to forty hours at work, had regained function at home and was actively working on interpersonal relationships. He still required assistance for cognitive aspects of work,

ongoing help for home chores and some personal hygiene due to the inability to fully work his right hand.

158. Dr. Lau summarized the situation in her March 11, 2022 report as follows:

He has now undergone six months of intensive coordinated medical and rehab care. It is clear that when he does not have access to these on a regular basis, his physical function, cognitive function, and mood worsen. It is also clear that he will not be able to return to his overall level of productivity, physical functioning, as prior to the subject motor vehicle accident.

159. Dr. Lau made a number of recommendations for specific treatment. She agreed that after twelve to twenty four months, she would expect much less frequency of treatment.

DR. FUNG, PSYCHIATRIST

160. Dr. Fung was qualified as a medical doctor with a speciality in psychiatry. She assessed the Claimant on October 29, 2020 and prepared a report dated November 30, 2020.

161. In the course of her interview, Dr. Fung administered the Montreal Cognitive Assessment (“MOCA”) test, which is used to determine cognitive impairment and early onset dementia. The Claimant scored 21 out of 30, whereas 26 is normal. Dr. Fung stated there can be a number of explanations for an abnormal test score.

162. Dr. Fung’s psychiatric DSM-5 diagnosis was mild neurocognitive disorder due to traumatic brain injury, posttraumatic stress disorder and unspecified somatic symptoms and related disorder. She indicated that when the severity is mild, a person can still function independently but needs compensatory aids or support.

163. Dr. Fung opined that post traumatic amnesia of four days was consistent with a brain injury of moderate severity. Given the head CT Scan was normal, a complicated brain injury was ruled out.

164. In arriving at her opinion of a mild neurocognitive disorder, Dr. Fung relied on the conclusions of Dr. Schultz.

165. Dr. Fung opined that the prognosis for the Claimant's mild neurocognitive disorder due to traumatic brain injury was poor in that no significant improvement could be expected. However the prognosis for his unspecified somatic symptom and post traumatic stress disorders was guarded as maximum medical improvement had not yet been reached.

166. The Claimant was at risk for alcohol abuse given how much he was reportedly drinking. A person with mild neurocognitive symptoms is more vulnerable to the effects of alcohol and Dr. Fung recommended that he limit his alcohol intake.

RALPH CHEESMAN, OCCUPATIONAL THERAPIST

167. Mr. Cheesman was qualified as an occupational therapist and able to provide opinion evidence of the Claimant's functional and cognitive limitations applicable to his work life and housekeeping.

168. The Claimant underwent a three day assessment of his functional abilities and limitations on October 14, 15 and 20, 2020 and Mr. Cheesman provided a report dated December 10, 2020.

169. Mr. Cheesman was an excellent witness. His report was written efficiently and his evidence given even-handedly.

170. He opined that the Claimant presented with the requisite functional abilities to perform most customary housekeeping activities. If he is to continue in his current living arrangement, it is unlikely he will require any replacement services. However

should he own a home in the future, he will struggle with cleaning tasks, yard work and house maintenance activities and may require some assistance, particularly as he ages.

171. Mr. Cheesman concisely set out how the Claimant's limitations will affect his ability to take advantage of future job opportunities for which he would otherwise be qualified for:

Should [the Claimant] remain in his current occupation, I am of the opinion he physically and cognitively will be able to manage his work demands in the manner he currently does. I anticipate [the Claimant's] cognitive strengths and weaknesses will remain and he will require a degree of extra collegial or employer oversight/assistance to ensure customer service is effective and the reputation of the dealership remains intact.....It should be noted that [the Claimant's] lengthy work history with automotive sales means work processes are ingrained, highly learned, and routinized in nature. These features assist his memory and capability to successfully complete such activities, particularly in light of his residual cognitive deficits. I suggest his likely best future occupational outcome will be to remain in this line of work.

Emphasis added

172. Mr. Cheesman opined that the Claimant is able to work full time, being forty hours per week. While it was possible he could work longer hours, Mr. Cheesman thought the Claimant would likely struggle to do so because of persistent pain and disrupted sleep.

173. Mr. Cheesman performed validity testing to determine if the Claimant was putting forth a reasonable level of effort. The Claimant did well on the validity tests for physical issues but failed two out of three cognitive validity tests which indicated suspect test-taking effort. Mr. Cheesman described the cognitive validity scores as a red flag and in his word, "inexplicable". Overall however, Mr. Cheesman was of the opinion that after considering the complete picture and exercising his own expertise

and experience, the test results were “mixed or equivocal” such that he was able to provide the opinion he did.

MATTHEW GREGSON, OCCUPATIONAL THERAPIST

174. Mr. Gregson was qualified as an occupational therapist and able to provide cost of care evidence based upon the recommendations of other experts.

175. Mr. Gregson did not conduct a future care assessment. He was simply asked to review the reports of Dr. Schultz, Dr. Lau and Mr. Cheesman, and provide costing estimates of their recommendations. He offered no opinion as to specific care needs, timing, frequency or duration.

DR. FALCONER, NEUROLOGIST

176. Dr. Falconer was tendered by the Respondent and qualified as a neurologist able to offer opinion evidence as to the diagnosis and treatment of neurological injury including traumatic brain injury. He conducted an interview of the Claimant which lasted somewhere between thirty and ninety minutes.

177. The MOCA test was administered and the Claimant again scored 21 out of 30, which Dr. Falconer described as “really quite abnormal” and well below what one would have expected given the Claimant’s current level of cognitive functioning.

178. Dr. Falconer’s neurologic opinion as to diagnosis was a severe orthopedic/neurovascular traumatic injury to the right hand, a mild L2-3 vertebral compression fracture, and a mild concussion with post-traumatic headaches.

179. He opined that the Claimant was left with permanent damage and disability to his right hand, which has 25% of normal function. Neurologic damage was not associated with the compression fracture and there was no risk of future worsening.

180. Dr. Falconer opined that the mild concussion/mild traumatic brain injury was not likely to have caused any significant brain damage. He disagreed with the opinion of others that the Claimant had sustained a mild neurocognitive disorder due to a traumatic brain injury.

181. Dr. Falconer's opinion in this regard was based on his view that the period of post-traumatic amnesia was not as lengthy as reported by the Claimant, because he was receiving IV narcotics and sedatives while in hospital for his physical injuries. Dr. Falconer observed the GCS was 15 at Oliver Hospital but had dropped to 14 at Kelowna General Hospital. Dr. Falconer agreed the measure of post traumatic amnesia is indicative of severity of brain injury, but that indication is tempered by medication that can affect recall.

182. There was no indication in Dr. Falconer's report that he conducted any real analysis of the medication, timing or dosage that was prescribed during the first four days following the Accident. He was not able to answer those questions on cross examination. As such Dr. Falconer's opinion on this issue reduced to a speculative possibility that may or may not have been the case.

IX. POSITION OF THE PARTIES AND CREDIBILITY OF THE CLAIMANT

183. The Claimant's position is that he sustained significant physical injuries and a neurocognitive disorder caused by a traumatic brain injury, which have left him with permanent physical, neurological and psychological changes that have impacted all aspects of his life and in particular his past and future earning capacity.

184. It is asserted by the Claimant that his loss of earning capacity claim should be based upon the earnings approach using an annual income figure of \$500,000 extended through to age of retirement, and adjusted to reflect a modest residual earning capacity.

185. The Respondent acknowledges the Claimant sustained serious physical injuries. While accepting some psychological issues arose as a result of the physical injuries, the Respondent disputes the Claimant has ongoing cognitive symptoms due to a traumatic brain injury.

186. The Respondent agrees the Claimant is entitled to an award for past and future loss of earning capacity, but says the Claimant's inconsistent earnings history and residual earning capacity must properly be taken into account, together with recognition that the income of \$500,000 earned immediately before the Accident is not reflective of what the Claimant would reasonably have earned over the course of his working life had the Accident not occurred.

187. A primary submission by the Respondent is that the Claimant's evidence lacked credibility and as a result, must be evaluated with "extra caution", particularly as it relates to the subjective reporting of an alleged cognitive disorder.

188. The basis for the Respondent's submission is two-fold, namely that the Claimant was previously found by a Judge of the Supreme Court more than ten years ago to have lied in evidence given at trial, and results of validity testing within this proceeding were indicative of suspect test-taking effort.

189. As a starting point, the party advancing a personal injury claim is usually the most important witness in determining the outcome: *Sharma v. Bhullar*, 2020 BCSC 379 at paras. 57, 58. Necessarily that party's evidence is subject to close scrutiny.

190. Counsel for the Respondent Mr. Cahan, commenced his cross examination of the Claimant by putting to him the reasons for judgment in the previous unrelated case wherein he was found to have lied. No objection was taken to this line of questioning. The Claimant agreed he was a witness in the earlier case and the finding was made by the Court that he had lied in his testimony.

191. The Claimant did not admit he lied in the earlier case. In fact, he testified he told the truth in that case, that it was a tough assessment by the Court, and the decision was what it was.

192. I agree the Claimant's evidence in this Arbitration is subject to close scrutiny. However that would be the case even if there was not a previous finding he had lied. The issue before me is whether the evidence of the Claimant in this Arbitration is reliable and credible as it pertains to the relevant issues attaching to his claims arising from the Accident.

193. The issue of what use can be made of a credibility finding in a prior case rejecting a witness's evidence was addressed by Justice Kloegman in *Fouad v. Longman*, 2014 BCSC 785:

[58] It is trite law that a witnesses' evidence in another, unrelated trial, cannot be used to assess his or her credibility in a present trial. The most obvious reason for this is that the current judge has no effective way of determining with certainty the factual foundation for the credibility finds in the other trial by the other judge. Even if the judgment revealed the court's rationale for accepting or rejecting a witnesses' evidence, there may be compelling reasons why those considerations would not apply to the present case.

[59] In other words, I have no way of valuing what is, in essence, someone else's opinion on the credibility of unrelated testimony given by Dr. Puts in the context of another case. I can only assess his credibility in this case, which gave me no concern.

194. I agree it is a serious matter for a finding to be made that a witness has lied. Such finding could take on heightened significance when the witness is a party. I can envisage a situation where a credibility finding made in one case, could be relevant to credibility and the issues in a later case. However in this Arbitration, I find nothing to link the two. I am not prepared to conclude that because the Claimant was found to have lied in an earlier case, he must have lied before me.

195. As stated in *Fouad*, I can only assess the Claimant's credibility in this case, using the framework provided in *Bradshaw v. Stenner*, 2010 BCSC 1398.

196. Overall I found the Claimant generally credible in his sworn evidence before me. Importantly there were no instances where he changed his testimony during direct and cross-examination or examination for discovery. In fact he was not challenged in cross examination with any examination for discovery evidence, or other evidence that might be seen as inconsistent with his sworn testimony.

197. Having said that, there are aspects of his evidence which have given me pause for thought, including the results of validity testing I have already alluded to, the contents of his resume, the fact that he continues to drive without a license yet at the same time claims to have anxiety while in a vehicle both as a driver and passenger, and statements he appears to have made to experts as to his financial position, employment history and reasons for not returning to work at BJBMW following the Accident.

X. LEGAL FRAMEWORK AND FINDINGS OF FACT

198. The Claimant must establish on the balance of probabilities that the tortfeasor's negligence caused or materially contributed to his injuries. The primary test for causation is the "but for" test which requires the Claimant to show the injury would not have occurred but for the negligence of the tortfeasor: *Athey v. Leonati*, [1996] 3 SCR 458 at paras. 13-17.

199. Once causation is established, the role of damages is to place the Claimant, as best money can do, in the same position he would have been had the Accident not occurred – no better, no worse. This objective is accomplished by determining not only what the Claimant's position was after the Accident (the "injured position") but also what the Claimant's position was before the Accident (the "original position"). The difference between these two positions represents his loss: *Athey*, para. 32, *Blackwater v. Plint*, 2005 SCC 58 at para 78.

200. The Accident was a violent one as depicted by photographs taken at the scene. The real debate is not so much what the injuries were, but rather what difficulties the Claimant has experienced to date and what his situation is going forward into the future.

201. The Respondent as already discussed, has challenged the veracity of the evidence given by the Claimant himself. What the Respondent has not challenged is the evidence of the various lay witnesses who testified in the Arbitration, most of whom were not family members. Those witnesses in my view offered a reasonably consistent picture taken at different points in time, which described their observations of the Claimant, the changes in his behaviour, and the position he is in now, both in terms of what he cannot do, but equally important, what he can do.

202. I found the lay evidence lined up well with the expert evidence, and to the extent there were differences, those differences were a matter of degree and reflective of the particular words used. Given the consistency in the evidence across the spectrum of lay witnesses, I was able to accept their testimony as portraying an accurate representation of the impact of the Accident on the Claimant, whatever the medical diagnosis might be.

203. In summary the Claimant prior to the Accident was described as a hard worker, well organized, innovative, sharp, and an excellent salesman with the ability to quickly establish rapport with others. The evidence was clear that following the Accident, all of those qualities were maintained as part of his occupational reservoir, but modified by pain, fatigue, poor memory, loss of focus, and forgetfulness. He has good days and then other days where he is flustered and irritable.

204. There was debate amongst the experts as to whether the severity of the traumatic brain injury was properly characterized as mild or moderate, depending upon the length of post traumatic amnesia. In my view the answer to that question became moot, because there was consensus in the expert evidence that the degree of ongoing cognitive impairment was mild, which conclusion I accept. In arriving at that

conclusion, I am alive to the statement in Dr. Schultz's report that the level of neurocognitive disorder was moderate. However her actual DSM-5 diagnosis was Mild Neurocognitive Disorder Due to Multiple Etiologies and I did not find her explanation for the difference particularly compelling.

205. It will be apparent I am rejecting the opinion of Dr. Falconer who disagreed with the diagnosis of Mild Neurocognitive Disorder. In addition to my concern as to the reasoning of Dr. Falconer, I had the benefit of additional lay evidence which he did not.

206. In summary I make the following findings of fact:

- the Claimant sustained serious physical injuries including vertebral spinal fractures, a tibial fracture, and a complex crush injury to the right hand which has left the Claimant with impaired functionality;
- the Claimant sustained a mild neurocognitive disorder due primarily but not solely, to a traumatic brain injury, which impacts the cognitive areas of attention, memory and processing speed that will have some negative impact on his future earning capacity.
- the Claimant's residual neurocognitive symptoms have reached their maximum level of improvement;
- as a result of the Accident, the Claimant suffered PTSD and Somatic Symptom Disorder, which conditions remain but not to any significant level.
- as a result of his injuries, the Claimant experiences ongoing neuropathic pain, cervicogenic headaches, fatigue and irritability;
- the Claimant is able to function independently in all aspects of his life including employment, but requires a degree of support and compensatory aides that allow him to work full time;
- the termination of the Claimant's employment in January, 2018 was for reasons unrelated to the injuries sustained in the Accident.

XI. ASSESSMENT OF DAMAGES

NON-PECUNIARY LOSS

207. Non-pecuniary damages compensate for pain, suffering and the loss of enjoyment of life and amenities. While comparison to other cases of similar injury can be instructive, the award in each case will be fact dependent: *Debruyne v. Kim*, 2021 BCSC 620 at paras 120-121.

208. The non-exhaustive factors to be considered in awarding non-pecuniary damages are set forth in the well known decision of *Stapeley v. Hejslet*, 2006 BCCA 34.

209. The parties were close in their suggested amounts to be awarded. The Claimant provided a range of \$230,000 to \$250,000 and the Respondent submitted an amount between \$200,000 and \$225,000.

210. Given the closeness between the parties, I will not review the various cases provided by counsel, other than to note that the decision in *Geddert v Stokes*, 2021 BCSC 656, was the most helpful in providing a comparative case. In *Geddert*, the sixty-one year old plaintiff sustained a number of fractures and was in a coma for some weeks with his recovery described as “little short of miraculous”. The criteria for Mild Cognitive Disorder was met in that the Plaintiff was left with subtle residual impairment of cognitive function, modest word finding difficulties, irritability and frustration. He had ongoing pain which was described as reasonably tolerable. Following a thorough review of a number of similar cases, the Court awarded \$225,000 for non-pecuniary damages.

211. The head injury sustained by the plaintiff in *Geddert* was more serious than that of the Claimant, but the Claimant’s physical injuries and in particular his right hand crush injury were arguably more impactful. Significantly both individuals were

diagnosed with a Mild Neurocognitive Disorder wherein their cognitive issues were similar.

212. In conclusion, after reviewing the cases provided and considering the factors set forth in Stapeley, and in particular the Claimant's age, significant functional impairment of his right hand and mild ongoing cognitive symptoms, I assess non-pecuniary damages at \$235,000.

PAST LOSS OF EARNING CAPACITY

213. Compensation for past loss of income earning capacity is based on what the Claimant would have earned, not could have earned, but for the injuries sustained in the Accident: *Fletcher v Biu*, 2020 BCSC 1304 at para. 77.

214. In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30, the Court stated:

...[A] claim for what is often described as “past loss of income” is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

215. The proper framework is set out in *Grewal v Naumann*, 2017 BCCA 158:

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: Perren v. Lalari, 2010 BCCA 140 at para. 32.

Emphasis added

216. It is important to note that in *Grewal* at para. 54, the Court allowed the appeal on the basis that the trial judge did not weigh the likelihood the plaintiff would have earned what he said he would have earned but for the Accident.

217. The Claimant asserts the earnings approach is appropriate for quantification of his past earning capacity. He submits his assumed without Accident annual earnings of \$500,000 are to be extrapolated from the date of the Accident to June, 2022, and then reduced by his actual post Accident earnings, yielding a past loss of earning capacity of \$2,220,000, before taking into account income tax.

218. The Respondent's position is that the Claimant's claim is in reality, one for past loss of opportunity. The Respondent submits that the Claimant's termination from BJBMW for reasons unrelated to his Accident, the uncertainties of his employment prospects post BJBMW, and the market downturn due to supply chain issues and Covid-19, must all be taken into account, resulting in a past net loss of earning capacity of between \$200,000 and \$350,000.

219. No analysis was offered as to how that range was arrived at.

220. There was no economic or statistical evidence provided by either party.

221. In my view there are a number of difficulties with the approach of the Claimant. As already stated, a claim for past loss of earning capacity is based upon what the Claimant would have earned, not what he could have earned.

222. I have already found as a fact that the Claimant was terminated from his position at BJBMW in February, 2018 for reasons unrelated to the Claimant's Accident or the injuries sustained therein.

223. Therefore in February, 2018, he found himself in precisely the same position he would have been without the Accident, that is to say, no longer employed at BJBMW and no longer earning upwards of \$500,000 on favourable employment terms.

224. The situation of the Claimant is opposite to the circumstances of the plaintiff in *Enns v. Corbett*, 2020 BCSC 1680 at para. 143, where the Court found that were it not for the effects of the accident, the plaintiff would not have lost his job when he did.

225. Having lost his position at BJBmw for reasons unrelated to the Accident, the earnings approach becomes a much more difficult exercise, given that post February, 2018, there was no longer an established employment history or clear earnings trajectory so as to allow me to reliably assess relative earnings streams: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 16.

226. My task is to determine as best I can from the evidence, what the Claimant's likely earnings would have been had the Accident not occurred: *Ploskon-Ciesla*, at para. 25.

227. It is appropriate to review the Claimant's employment history to date:

- April 2018 joined Surrey Truck/Driveco and left after alleged disagreement with brother in law, who did not give evidence. No evidence of earnings.
- June, 2018 joined TMT and left in February, 2019 due to alleged complaints from customers. Employer did not give evidence. Self employed commissions of \$70,500.
- March, 2019 joined VAC as team lead and left in August, 2019 because it was a long drive from home to work. Employer gave evidence. Earnings of \$95,000 net of lead expenses.
- September, 2019 joined Applewood and left in February, 2020 by mutual agreement. General manager gave evidence. Gross commissions before payment of lead expenses totalled \$135,000.
- February, 2020 rejoined TMT at request of employer and left in December, 2021, no reason stated. Colleague gave evidence. Earnings of \$84,597.
- May, 2022 rejoined VAC where he presently works. Employer and colleague gave evidence. Earning \$10,000 per month with opportunity to be paid 70% commission.

228. Counsel for the Claimant Mr. LeBlanc in submissions, referred to the following evidence in support of his assertion that the Claimant would have continued to earn \$500,000 annually had the Accident not occurred.

- NK gave evidence as to the Claimant being the top financial manager at BJBMW.
- SG gave evidence as to what Claimant earned at BJBMW.
- KA gave evidence of his own earnings since the Accident at BJBMW.
- BB gave evidence that team leaders at VAC can earn \$480,000 to \$600,000.
- AP gave evidence that an annual income of \$400,000 to \$500,000 was not unusual for someone of the Claimant's experience, and he knows of several finance managers who have made more.
- The Claimant's company in 2019 earned \$378,751 but because of different employment terms, the net income was only \$80,000.

229. In my view the evidence from BJBMW representatives and employees does not assist in determining what the Claimant's income would have been following his termination from BJBMW. Likewise, evidence of colleagues as to what others were earning or might have earned is of limited assistance in establishing that the Claimant would have continued to earn \$500,000 annually had it not been for the Accident. The result might well have been different had the Claimant not been terminated from BJBMW for reasons others than his Accident.

230. There was no evidence from the Claimant that he applied for any position post Accident wherein he was rejected because of his injuries. In fact there was no evidence he applied for any positions other than the ones he obtained. Thus the best indication of what employment the Claimant would have found in the without-Accident scenario, is the very employment he succeeded in finding in the with-Accident scenario. In short, the Claimant was forced to change positions from a Financial Services Manager to a Team Lead for reasons other than the Accident.

231. There was also no evidence that the terms of his employment and in particular his compensation at any of his post-Accident positions would have provided him the opportunity of earning income in the range of \$500,000. It was evident from the evidence that one of the reasons his income decreased post Accident was that the terms of compensation as a team leader involved him paying lead expenses, whereas the terms at BJBMW as a Financial Services Manager, were straight commission with no expenses. Last the approach taken by the Claimant does not take into account the industry downturn as a result of Covid-19 and supply shortages.

232. In the result and on the evidence, I find the Claimant's without Accident assertion of continuing annual earnings of \$500,000 to be mere speculation and not reaching the level of a real and substantial possibility.

233. I therefore reject the theory of the Claimant that his loss of past earning capacity should be assessed on the earnings approach based on an annual income of \$500,000 from the date of the Accident to the present time.

234. That however is not the end of the exercise. As noted previously, the Claimant has established his injuries caused a loss of earning capacity, past and future, resulting in a pecuniary loss. Having rejected the Claimant's approach, how is that past loss to be assessed?

235. To start with, the Claimant's employment at BJBMW continued until February 15, 2018 meaning that had the Accident not occurred he would have continued earning income until that date. Based on his 2017 earnings until September 30, 2017 he was achieving income on the basis of \$45,000 a month. The evidence supports that he would have continued earning at that level subject to the slowdown during the Christmas season. Therefore for the discrete period October 1, 2017 to February 15, 2018 and making a small adjustment for Christmas, I find the Claimant's past loss of income on a gross basis before tax to be \$180,000. Given the short period, I see no need to apply any other contingencies.

236. I am left with the period from February 15, 2018 until June 6, 2022 being the first day of the Arbitration. That period of nearly four and one half years is complicated by two factors; first the Claimant's loss of employment at BJBMW where he did not have to pay lead expenses and second, the impact of Covid-19 from March, 2020 until at least March 2021 and possibly longer.

237. I am instructed by case law that the determination of loss of earning capacity is to be an assessment of real and substantial hypothetical possibilities tethered to the evidence but without venturing into the realm of speculation: *Dornan v. Silva*, 2021 BCCA 228 at para. 134. Such task is akin to walking a tightrope but I must do the best I can.

238. Exhibit 28 was a gross revenue and tax schedule prepared by the accountant RS. Putting aside for the moment the change to less favourable compensation terms following the termination from BJBMW, Exhibit 28 shows that in 2018 the Claimant's gross revenues decreased to \$110,000, increased in 2019 to \$378,000, and then once Covid-19 occurred, fell significantly to approximately \$70,000 in each of 2020 and 2021.

239. There are two points I take from Exhibit 28. First the Claimant, consistent with the medical evidence, was improving in 2019 as indicated by the uptick in his commissions. Second the drop-off of commissions in 2020 and 2021 provides indication of the significant impact of Covid-19.

240. In determining an annual income range for what the Claimant would have earned had the Accident not occurred, I gain assistance from two evidentiary anchors. There is the evidence of BB that the upside for team leaders in 2019 on a gross basis was between \$20,000 and \$40,000 per month. Second the Claimant's expenses for his six months at Applewood averaged out to 44% of his gross commissions. Applying the expense factor of 44% to the monthly income amounts of \$20,000 to \$40,000, yields a net annual income range of between \$135,000 and \$270,000.

241. Given the accepted evidence of the Claimant's expertise and skill, I find that his without Accident annual income capacity to be in the range of \$250,000, subject to the impact of Covid-19 for which I would reduce the 2020 income capacity figure by 40% to \$150,000.

242. Using the above figures, the Claimant's total earning capacity without Accident for the period February 16, 2018 to June 1, 2022, including the adjustments for Covid and partial employment years, is \$1,000,000.

243. Finally, I conclude after taking into account the expert evidence and in particular that of Mr. Cheesman, together with the lay evidence of those individuals actually working with the Claimant, that his earning capacity has been impaired by 35%.

244. Applying the 35% impairment to the total without Accident earning capacity figure post February 16, 2022 as set out above, the loss is in the range of \$350,000. In so doing, I am utilizing a capital asset approach and one of the means of assessment set forth in *Pallos v. Insurance Corporation of British Columbia*, (1995) 100 B.C.L.R (2d) 260 at para. 43.

245. To the figure of \$350,000 must be added the immediate post Accident loss of \$180,000, for a total past loss of earning capacity of \$530,000 before deduction for income tax.

246. In arriving at this assessment, and in addition to the factors noted above, I have taken into account the following:

- the overall uncertainty, cyclical nature and transient employment within the auto sales industry
- the fact that the principal source of the Claimant's earning capacity impairment is the diagnosed mild neurocognitive disorder as opposed to his more serious physical injuries
- the accepted impact of fatigue, headaches and forgetfulness on the Claimant's ability to perform at work

- the lay evidence from KA, BB, AP, and SG as to the impact of Covid-19 on the auto sales industry
- impact on the Claimant's job performance by not reinstating his driver's license.

247. I recognize that the approach I have taken reflects the use of mathematical anchors, to which must be applied an exercise of judgment, so that the measure of loss is an assessment and not a calculation: *Westbroek v. Brizuela*, 2014 BCCA 48 at paras. 64-65; *Rosvold v. Dunlop*, 2001 BCCA 1 at para.18.

248. The period of time since the date of the Accident is nearly five years. An award of \$530,000 represents a past capacity loss of approximately \$100,000 per year. After taking into account the termination of the BJBW employment, impact of Covid-19, and extent of the Claimant's ongoing occupational disability, I view this as an overall fair and reasonable result.

FUTURE LOSS OF EARNING CAPACITY

249. The Court of Appeal in *Rab v. Prescott*, 2021 BCCA 345 and more recently *Ploskon-Ciesla v. Brophy* 2022 BCCA 217 and *Dunn v. Heise*, 2022 BCCA 242 has summarized and clarified the principles to be followed in the assessment of future earning capacity. Those principles provide the following road map:

- The focus of the exercise for determining a loss of future earning capacity involves a comparison between the plaintiff's likely future had the accident not occurred, and their future after the accident.
- The exercise is an assessment rather than a mathematical exercise.
- That assessment will depend on the type and severity of the plaintiff's injuries and the nature of the anticipated employment in issue.
- A tripartite test should be undertaken:

- the first step is evidentiary, that is does the evidence disclose a future event which could lead to a loss of capacity;
 - the second step is whether there is a real and substantial possibility that the future loss will cause a pecuniary loss; and
 - the third step, if a real and substantial possibility exists, is to assess the value of that possible future loss, which must include the relative likelihood of the possibility occurring.
- Depending on the circumstances, the assessment may involve the “earnings approach” or the “capital asset” approach.
 - the earnings approach is appropriate where there is an identifiable loss of income at the time of trial and a plaintiff has an established work history and clear career trajectory.
 - the capital asset approach is helpful when the loss is not amenable to precise calculation such as where a career path is uncertain.
 - In addressing future losses, it is necessary to account for negative and positive contingencies by engaging in a fact-intensive, case-specific inquiry.
 - All possibilities are to be considered so long as they are real and substantial and not mere speculation.
 - Such possibilities are to be given weight according to the percentage chance they would have happened or will happen.
 - There are two types of contingencies, general and specific.
 - General contingencies account for the reality that things do not always work out as expected and everyone’s life has ups and downs. An adjustment based upon a general contingency should be modest.
 - Specific contingencies relate specifically to the Claimant. They may be positive or negative, but must be grounded in the evidence. There should be an assessment of their relative likelihood of occurring.
 - The overall goal of the assessment is to be fair and reasonable.

250. Consistent with the approach taken in respect to past loss of earning capacity, the Claimant submits his future earning capacity loss should be determined using the earnings approach by applying the CivJi present day multiplier to age 65 (10.0711) to an annual earnings figure of \$500,000 for a total earning capacity of \$5,035,550. From that figure the Claimant concedes a 20% negative contingency can reasonably be applied, resulting in a future earning capacity loss of \$4,028,440.

251. To some extent the Respondent takes a similar approach by submitting that assumed annual earnings of \$200,000 to \$300,000 should be extended to age 65, and a 20% impairment of earning capacity applied, so as to yield a value for the loss of capital asset of between \$400,000 to \$600,000.

252. As with my assessment of past loss of earning capacity, it is necessary I determine based upon the evidence, the general level of future earnings reasonably achievable by the Claimant, taking into account his intentions and factors that weigh for and against that achievement: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 57.

253. A key piece of evidence in answering this question is the Claimant's present employment position working as a team leader for VAC. The Claimant was still on probation at the time of the arbitration, but in my view given the evidence of NC, PG, and BB, his contract will in all likelihood be extended such that he will be compensated in the range of 70% commission before payment of lead expenses.

254. The unchallenged evidence of BB was that team leaders at VAC can presently expect to earn between \$35,000 and \$45,000 per month and as high as \$50,000, before deduction of lead expenses. While the evidence was unclear given no firm agreement has yet been reached, I accept that \$400,000 net of lead expenses is reflective of an annual income amount arising from his present employment that the Claimant might reasonably hope to achieve in the immediate future, before taking into account any other factors.

255. As set out in *Grewal*, I must weigh the likelihood that this is an amount the Claimant would have earned over the course of his remaining working life, had the Accident not occurred. I am of the view there is considerable uncertainty in that conclusion.

256. I have concluded that a negative general contingency of 20% should first be applied. The assessment of the Claimant's future loss of earning capacity will extend over the next eleven years, during which time there are the uncertainties of life associated with unemployment, part time employment, disability, economic downturns and early retirement. The use of the CivJii multiplier as submitted by the Claimant does not take into account such possibilities.

257. I am further of the view that a specific negative contingency must be taken into account in assessing the Claimant's loss of future earning capacity. Such negative contingency is reflected by the following evidence applicable to the Claimant himself showing an uncertain work history and a propensity to engage in risky behaviour:

- The Claimant's employment history prior to 2001 saw him leave what reportedly was a successful career in the auto sales business for reasons that were not explained.
- From 2001 to 2014 the Claimant was engaged in a golf fantasy business which saw him earning negligible income requiring him to live off of lines of credit.
- The Claimant for unexplained reasons has a debt to Canada Revenue Agency which exceeds \$800,000.
- The Claimant had two impaired driving convictions in 2016 that resulted in him losing his driver's license which for his own reasons, he has not reinstated.
- The Claimant has continued to drive without a license as recently as three days before the start of the Arbitration, knowing he was taking a chance by doing so.
- The Claimant was disciplined for an alcohol related incident while at BJBMW.

- Based upon his reported alcohol consumption, Dr. Fung opined that the Claimant was at risk for alcohol abuse and should be limiting his alcohol intake.
- The Claimant was terminated from BJBMJ for work related reasons.

258. In my view, the above evidence by any measure, increases the uncertainty in terms of the Claimant's without Accident earning capacity. I conclude that a specific further negative contingency factor of 25% must be applied.

259. In arriving at the above conclusions, I am cognizant of possible positive contingencies including the Claimant's assertion that he was going to develop the "super car" market. His evidence was anecdotal in describing Vancouver as the super car capital of North America. There was no evidence as to what financial impact such opportunity might have provided, or any potential business plan he might have put together. The only other evidence regarding this possibility was from SG who indicated it was not the type of business which BJBMW was involved in.

260. I conclude that the possibility of the super car business increasing the Claimant's earning capacity was mere speculation and not a factor to be taken into account.

261. I have already determined that the impairment of the Claimant's earning capacity as a result of the Accident is 35%. By applying that factor to the general level of annual earnings of \$400,000 until age 65 adjusted by the general and specific negative contingencies of 20% and 25% respectively, generates a mathematical loss of \$845,000.

262. As the determination of loss of future earning capacity is an assessment and not a mathematical calculation, I must consider whether on the evidence and after taking into account all relevant contingencies, this is a fair and reasonable result. Given the possibility that the Claimant does not in the future do as well from an occupational health perspective as I have postulated, I award the sum of \$900,000 for future loss of earning capacity.

FUTURE CARE

263. The legal principles governing an award for future care are concisely summarized in *Pang v. Nowakowski*, 2021 BCCA 478 as follows:

[56] The legal framework that is relevant to a future cost of care award is well established. Recently in *Quigley*, this Court said:

[43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred. This is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.

[44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification And be reasonable.

[57] Several additional principles are relevant:

- i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item.
- ii) The court must be satisfied that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred.
- iii) The court must be satisfied that there is no significant overlap in the various care items being sought.

(citations omitted)

264. It is necessary to break down the award and analyse each item of care to ensure there is an evidentiary link between the assessment of disability and the recommended care: *Johal v. Meyede*, 2014 BCCA 509 at para. 44.

265. The report of Mr. Gregson, an occupational therapist was only of assistance in providing costs, because he did not assess the Claimant or offer any opinion as to causation, reasonableness, frequency, or duration. To the extent any such opinions were given as examples, I disregard them as not having an evidentiary basis.

266. The Claimant in oral submission listed all the care recommendations together with the applicable costs to arrive at total care costs ranging between \$118,625 and \$887,968. The Respondent's position was that many of the recommendations were not medically justified, reasonable or would not be used and submitted a range of \$75,000 to \$125,000.

267. In arriving at my decision, an important factor which I took into account was the evidence of Dr. Lau that after twelve to twenty four months, she would expect much less frequency of treatment.

268. The particular future care items sought and my award are as follows:

- Dr. Lau recommended Case Management/Coordination. Applying Mr. Gregson's mid-point cost based upon one hour per week for two years of coordination of therapies, I award \$13,000.
- Dr. Lau recommended ongoing kinesiology, chiropractic and physio therapies based upon appointments twice per week for two months, reduced to once a week for six months and thereafter once every two weeks for the next twelve months. The goal would be to then reduce frequency of appointments to once a month or two months. Applying Mr. Gregson's mid-point costs and factoring in an additional year of maintenance, I award \$6,600 for kinesiology, \$5,000 for chiropractic therapy and \$8,000 for physiotherapy.
- Dr. Schultz recommended resumption of hand therapy. Leaving aside whether such recommendation was within the area of expertise of Dr. Schultz, there was no evidence as to duration and I therefore make no award in that regard.
- Dr. Schultz recommended psychological treatment for PTSD, anxiety, depression and sleep disorder based upon two sessions per month for one year, one session per month for the following year, and booster

sessions over the long term, no frequency specified. Applying Mr. Gregson's costs and allowing for two years of booster sessions, I award \$10,000.

- Dr. Schultz recommended a neuropsychological reassessment in two years with future follow up of cognitive concerns continue. Applying Mr. Gregson's cost and a 50% probability factor as to whether this assessment will be required, I award \$1,600.
- Dr. Schultz recommended a home assessment if he is to move into his own home in the future. Applying Mr. Gregson's cost and a 50% probability factor as to whether this assessment will be required, I award \$400.
- Mr. Cheesman recommended regular access to a community fitness facility to assist management of the deconditioning effect of persistent pain. He suggested an annual budget of \$475. Applying Mr. Cheesman's budget figure to a present value age of 65 and factoring a 20% reduction to reflect the possibility of a fitness pass being purchased notwithstanding the Accident, I award \$3,800.
- Mr. Gregson stated that as medication prescriptions were beyond the scope of his practice, he would provide the costs for all medication but leave the need for medication, dosage and contraindications to the treating physician. There was limited evidence as to medication and I therefore make a nominal award of \$5,000 for pain medication.
- Dr. Lau recommended botox injections for five years. Applying Mr. Gregson's mid-point cost to a five year present value factor, I award \$15,670.
- Dr. Lau recommended ketamine infusions of ten full day sessions every six to twelve months for five years. There is a range in cost because some ketamine infusions are covered by MSP. Applying Mr. Gregson's mid-point cost to a five year present value factor and factoring in a 20% reduction to reflect that some cost may be borne by MSP, I award \$82,000.
- Dr. Lau recommended radiofrequency lesioning. These treatments are covered by MSP but there is an upgrade fee of \$300 to cover medications and specialized equipment used. Estimated frequency is twice per year on each side for a total of four sessions per year for five years with a potential for an additional four sessions per year for lumbar spine. Taking into account the uncertainty as to whether the additional injections will be required, I award \$8,000.

269. In summary, I award \$159,070 for future care.

LOSS OF HOUSEKEEPING CAPACITY

270. The Court of Appeal in *Kim v. Lin*, 2018 BCCA 77 at para. 33, set out the following principles related to a loss of housekeeping capacity:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work – i.e., where the plaintiff has suffered a true loss of capacity – that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award.

271. Similar to the plaintiff in *Ploskon-Ciela*, the Claimant's evidence was "thin" as to how his housekeeping capacity had been affected to date. I accept that the very nature of the Claimant's physical injuries would suggest some impact on household functions but in my view that loss is more in keeping with a loss of amenities which has already been compensated for under non-pecuniary damages. As Mr. Cheesman stated "...[the Claimant] presents with requisite functional abilities to perform most customary housekeeping activities....in his current living arrangement it is unlikely [he] requires any replacement services."

272. I decline to make an award for past loss of capacity.

273. However I conclude there is a basis in the evidence to support a pecuniary award for loss of future housekeeping capacity. Mr. Cheesman stated that if the Claimant was to own a detached home in the future, and with aging has an increase in his pain and physical impairments, it is anticipated he will require replacement services to intermittently perform functional activities such as cleaning tasks, yard

work, house maintenance tasks that require low level positioning, prolonged overhead work, forceful use of implements or material handling at low levels.

274. When and if this occurs will be dependent on whether the Claimant comes to own a home requiring such upkeep. There was no evidence as to the Claimant's plans in this regard. Mr. Cheesman opined that the yearly cost of potential replacement service would be \$8,175.

275. In the result, and using the yearly cost of potential replacement service, I award \$20,000 for loss of future housekeeping capacity.

SPECIAL DAMAGES

276. The Claimant seeks an award of \$83,952.21 for special damages. The Respondent submitted that special damages should be assessed at \$75,000 but the only item challenged was the medication Cialis which totalled \$4,934.22.

277. I agree Cialis is not a special damage because there was no admissible opinion evidence linking the prescribing of Cialis to the injuries sustained in the Accident.

278. I award special damages of \$79,017.99.

INCOME TAX AND DEDUCTIBLE AMOUNTS

279. The parties agreed to leave the determination of income tax on past loss of earning capacity under section 98 of the *Insurance (Vehicle) Act*, and deductible amounts under section 148.1 of the *Regulation*, until after delivery of my award, either by way of agreement or further submissions if necessary.

XII. CONCLUSION

280. I award the Claimant the following:

Non Pecuniary Damages	\$235,000
Past Loss of Income Earning Capacity	\$530,000*
Loss of Future Earning Capacity	\$900,000
Cost of Future Care	\$159,070
Loss of Future Housekeeping Capacity	\$ 20,000
Special Damages	\$ 79,017.99
TOTAL	\$1,923,087.99

*Before deduction of income tax

281. If the parties wish to make submissions on income tax to be deducted, deductible amounts, costs or any other issue, a telephone conference can be arranged to discuss how best to proceed.

Dated: August 8, 2022

Arbitrator – Dennis C. Quinlan, QC

