

**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] c. 2**

BETWEEN:

MH

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

AWARD

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MH

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Date of Hearing:

February 18 – 21,
24 – 26, 28, 2025

Place of Hearing:

New Westminster, BC

Date of Award:

April 7, 2025

Arbitrator:

Dennis C. Quinlan, K.C.

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I. INTRODUCTION

[1] This is an underinsured motorist protection (“UMP”) arbitration arising from a motor vehicle accident that occurred July 9, 2018, in Maple Ridge, BC (the “Accident”).

[2] MH (the “Claimant”) was a passenger in a Ford F350 truck (the “Ford”) operated by his friend and business partner CV. They were travelling east bound on Lougheed Highway when a 1998 Honda Civic (“Honda”) coming in the opposite direction and driven by GV crossed the center median and collided with the Ford.

[3] The impact resulted in the front end of the Honda being ripped off such that the engine and transmission ended up some distance from the main body. The Ford flipped upon impact and ended upright in a ditch off the highway.

[4] Photographs taken at the scene show significant damage to both vehicles.

[5] The Respondent admits GV was 100% at fault for the Accident.

[6] The Claimant seeks damages for non-pecuniary loss, past and future loss of earning capacity, loss of housekeeping capacity, cost of future care and special damages.

[7] The main issues in dispute are the severity and duration of the injuries caused by the negligence of GV, and the claim for loss of earning capacity arising from the Claimant being a co-owner with CV in MCC, a civil construction company focusing on underground utilities, infrastructure and excavation.

[8] The Claimant alleges his lifestyle, ability to work and overall quality of life have been severely impacted by the physical, emotional and cognitive injuries sustained in the Accident.

[9] The Claimant asserts that because of the injuries sustained in the Accident, he will be forced to retire earlier from MCC than he otherwise would have.

[10] In support of his claim, the Claimant called five collateral witnesses and tendered opinion evidence from six experts.

[11] The Respondent submits the Claimant sustained a brief period of symptoms that resolved by January 31, 2019. Any issues after that date were not caused by the Accident.

[12] The Respondent called no collateral witnesses and tendered no opinion evidence.

II. CREDIBILITY AND RELIABILITY

[13] The Respondent asserts that the credibility and reliability of the Claimant and lay witnesses must be “queried” as the claim is premised largely on subjective representations.

[14] The Respondent submitted the testimony was “...at best...ambiguous... [and] potentially of no value at all, since ‘observations’ at *some* point during the period 2018 to 2025 are vague, not corroborative of other vague testimony, not indicative of the cause of the observed information and permit impression to replace actual observed information”.

[15] There are many decisions addressing credibility and reliability, the factors which may be relevant to their assessment, and the overall goal to be achieved.

[16] The decision of Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff’d 2012 BCCA 296 is particularly helpful:

[186] Credibility involves an assessment of the trustworthiness of a witness’ testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness’ evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness’ testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanor of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.

Emphasis added

[17] Credibility and reliability are different concepts. As described by Justice Skolrood (as he then was) in *Radacina v. Quino*, 2020 BCSC 1143 at paras 94 and

95, credibility refers to the veracity of a witness's testimony whereas reliability is concerned with the accuracy of the testimony.

[18] Credibility and reliability are not all or nothing propositions:

A trier of fact may believe all, part of or none of a witness's evidence and may attach different weight to different parts of a witness' evidence (*Radacina* at para. 96)

[19] The lay witnesses, being the Claimant's wife, sister, business partner, and two employees at MCC, came across as thoughtful, even-handed, and consistent without being scripted. Their evidence was not undermined on cross-examination.

[20] They cared for the Claimant but not to the extent of advocacy. In direct evidence if they did not know an answer they said so. On cross-examination they were prepared to agree to propositions that did not necessarily assist the Claimant's case.

[21] I found the lay witnesses to be credible and reliable. This does not mean, as pointed out in *Radacina*, that I accepted all their evidence with equal weight, nor does it mean I accepted the conclusions to be drawn from their evidence as submitted by counsel. I was, however, comfortable in being able to rely upon their testimony.

[22] I observed the Claimant to be well-spoken, engaging and outgoing, who testified without attitude, bitterness, or anger.

[23] He struck me as generally credible and reasonably reliable. I say "generally" and "reasonably" because concerns emerged as I watched and listened to him testify over the better part of three days, and then heard his wife and sister testify.

[24] He tended to argue his own case and have an answer for everything, even when an answer was not required. He showed a tendency to minimize the impact of non-accident-related events.

[25] His approach to clinical records was at times inconsistent. On one hand when being cross-examined on records where there was little or no consequence he would readily agree with the written note, but if the reference was potentially problematic his stock answer was to the effect of "...maybe but those were not my words."

[26] There was debate in the arbitration as to whether the term ‘stoic’ might be used to describe the Claimant. While the meaning of stoic is found in the eyes of the beholder, my assessment of the Claimant was that he was very confident in describing his own abilities and had no difficulty conveying in an emotional manner, the negative impact which he felt the Accident had on his life (see paras. 18, 19, 26, 28, 29, 35, 36, 62, 63, and 69 of Claimant’s Closing Submissions).

[27] Overall the factual evidence given by the Claimant did seem to be in harmony with the collective testimony of the collateral witnesses and surrounding circumstances.

[28] I was cautious however when considering the Claimant’s evidence explaining and justifying some of his actions, and his testimony as to what the future might hold, particularly in respect to his continuing role in MCC.

[29] The backdrop to my comments is that the Claimant was involved in a serious accident and the Respondent called no evidence in response to the Claimant’s narrative.

III. THE CLAIMANT’S LIFE BEFORE THE ACCIDENT

[30] The Claimant was born on September 18, 1984, and at the time of the Accident was 33 years old. He grew up in Chilliwack, BC and while going to school, worked on a chicken farm. In 2002 he graduated from Sardis Secondary.

[31] The Claimant described having a good relationship growing up with his mother. Unfortunately, after a four-year battle with breast cancer, she passed away in 2003. Her illness and loss were a challenge, but he had a good support group within the family.

[32] Although his father was a “tough love logger” they got along well and do so to the present time.

[33] The Claimant has an older sister who he is close to and a brother who has substance abuse issues such that they are no longer in contact.

[34] In 2005 he met his wife LH, and they married in 2008. They have two children, a 17-year-old daughter and a 15-year-old son.

[35] Following graduation, the Claimant worked for a landscaping company and then in the logging industry operating heavy equipment. In 2007 he joined HE as an

equipment operator and supervisor, and then in 2010 moved to KHE where he managed a fleet of equipment and supervised multiple projects.

[36] The Claimant first met CV in middle school, and they became friends in Grade 10. CV obtained his engineering degree from UBC and the two of them worked together at HE and KHE.

[37] In 2012, they started their own business as MCC which was an excavating company involved in underground utilities for roads, schools and hospitals. The Claimant described MCC as doing work from the “ground down” on new construction.

[38] The Claimant and CV were equal shareholders in MCC through their respective holding companies. They split the responsibilities with the Claimant acting as general supervisor for the day-to-day operations and CV being the project manager responsible for bids and the financial aspects of the business.

[39] The Claimant testified his responsibilities were mentally demanding in that he had to solve problems, think on his feet, and multitask to stay ahead of the general contractor who was following behind MCC’s scope of work.

[40] He described himself as a “rock star” who was known to be very good at what he did. He had endless energy in that he could work all day and then come home at night and work in the yard. The Claimant testified he had an excellent memory and prided himself on being able to juggle many issues at one time. He enjoyed the hustle and bustle of the work and the fact it was always different. He was “very confident” in what he did.

[41] The Claimant described his personality before the Accident as outgoing, social, energetic and happy go lucky who liked to be the center of attention. He was not a complainer because “there was no room for complaining”.

[42] His health was good, and he had no prior injuries to his neck, shoulder or back. There was an incident in 2012 where he was prescribed a high dose of medication for pneumonia which caused a sudden onset of suicidal thoughts. After a short hospitalization he was weaned off the medication and had no further suicidal issues or any other psychological or cognitive issues leading up to the Accident.

[43] In terms of activities he said he was working up to 80 hours a week, completing renovations and landscaping around the home, golfing 10 to 15 rounds a year, mountain biking, snowmobiling, and coaching his children in soccer.

[44] The Claimant denied on cross-examination the suggestion that he had exaggerated and overstated his level of activity

[45] He testified to a very good marriage with his wife, including their physical relationship which was “incredible”. He loved coming home to her and the children after work and as he put it, he did “not party with the guys”. He was a good dad to his children.

[46] MCC was well established by the time of the Accident. It started in 2012 with zero employees and by 2018 there were 27 to 30. The financial statements for the fiscal years 2016 to 2018 disclosed the following:

Fiscal Year Oct 31	<u>2016</u>	<u>2017</u>	<u>2018</u>
	\$	\$	\$
Revenue	5,604,556	6,598,862	10,670,656
Net Income (loss)	<u>(21,944)</u>	<u>780,852</u>	<u>675,652</u>
Add back Salaries*	206,000	228,000	260,000
Adjusted Net Income	<u>\$184,056</u>	<u>\$1,008,852</u>	<u>\$935,652</u>

* Salary amount paid to Claimant and CV (each received one-half)

[47] The Claimant testified he had a good relationship with CV both as a friend and business partner. They had known each other for 25 years and were like brothers. His plan before the Accident was to work until he was 55 or 60 and then become a snowbird and play golf. He had considered the possibility of his children stepping into the business.

IV. THE ACCIDENT AND IMMEDIATE INJURY

[48] The Claimant testified he and CV had been at a job site and were on their way to Golftown when the Accident occurred. The Claimant observed the approaching Honda coming down the hill at a very high rate of speed that he estimated to be 130 to 140 km/hour. The Honda lost control and collided with the Ford in its lane of traffic.

[49] The Claimant stated in direct evidence that upon impact he grabbed the dash and stood up, with his head hitting the sunroof and left shoulder contacting the frame of the roof. He remembered the Ford coming to rest in the ditch and then nothing until he was taken from the ambulance and wheeled into the hospital.

[50] On cross examination he clarified his testimony by agreeing he did not actually remember hitting his head on the sunroof, but he did have shards of glass in his scalp. After looking at photographs, he assumed it was his head that caused damage to the sunroof.

[51] At the hospital the Claimant complained of neck, right shoulder and back pain. His wife drove him home that night and the next morning he felt sore and groggy with pain in his shoulders, upper back and neck. He went into the office later that day and recalled experiencing brain fog when looking at the computer.

[52] The Claimant went to his family doctor's office on July 12, 2018, and was advised to attend physio, chiropractic and massage therapy. A possible diagnosis of concussion was raised.

V. PHYSICAL, COGNITIVE AND EMOTIONAL INJURY

[53] The Claimant alleges that immediately after the Accident, he experienced headaches and pain in both shoulders, neck and upper back, and then over time, cognitive and psychological issues began to surface.

Physical Injury

[54] The Claimant started his recommended treatment at Intuitive Rehabilitation Services ("Intuitive") on July 11, 2018.

[55] One of the issues in dispute was whether an alleged injury to the left shoulder which ultimately led to surgery on September 3, 2021, was caused by the Accident.

[56] The Respondent submitted that because the Claimant did not immediately complain of left shoulder pain, any left shoulder condition which later arose was not caused by the Accident.

[57] In support of that hypothesis, the Respondent relied on the Intuitive clinical records.

[58] It is important to recognize that the Intuitive records were marked for identification but not entered as exhibits, and therefore without agreement by the Claimant as to their content, or further proof of which there was none, the records were of limited value: *Edmondson v. Payer*, 2011 BCSC 118, paras. 31 to 35.

[59] I agree the Intuitive records indicate the Claimant initially focused his complaints on the right shoulder as opposed to the left. However, as pointed out by the Claimant in his cross examination, there were entries consistent or at least suggestive of left sided shoulder complaints soon after the Accident (see July 11, 17, August 1, 7, and October 2, 16, 2018 entries).

[60] I will reference later the evidence given by the expert witnesses Dr. Sangha, physiatrist and Dr. Goel, orthopedic surgeon on the issue of causation where there was an apparent delay in the onset of symptoms.

[61] The Claimant was cross-examined on certain Intuitive clinical notes suggestive of recovery.

[62] The Claimant agreed with an August 10, 2018, note indicating he had been golfing the previous week and his right shoulder did not restrict him in any way.

[63] He also agreed with a note of August 31, 2018, stating he was feeling good and had played in a nine-hole golf tournament the day before. His right shoulder bothered him when using the driver and he was only able to drive 60 to 70% of what he did previously.

[64] Finally the Claimant testified that a note of September 18, 2018, indicating he had thrown his back out while working outside and picking up a salt block “sounded like him”.

[65] It was suggested to the Claimant that he stopped going for treatment after January 31, 2019, because he had no symptoms. The Claimant disagreed, saying he had further treatment but there were no records. He agreed that the next record of treatment was February 11, 2020.

[66] The Claimant testified his right shoulder improved over time, but the left shoulder became progressively worse. He had an MRI of the left shoulder joint on March 7, 2019, and with no improvement, he underwent arthroscopic surgery on September 3, 2021.

[67] The surgery went well as most of the pain went away. Some shoulder activities still hurt, such as lifting, shoveling, throwing a football, and swinging a golf club. He has learned to live with the remaining pain.

[68] The headaches occur at the base of the skull. They have improved but when they occur, they are intense and last for a day.

[69] His back pain extends from the latissimus dorsi muscle up to the shoulder on the left side. The Claimant described it as uncomfortable and occurs every other day. It is aggravated by shoulder activities, golfing and fishing.

Cognitive and Emotional Injury

[70] The Claimant testified at some length about his cognitive and psychological issues.

[71] He noticed brain fog almost immediately which he described as a “heavy brain feeling”. Light bothered him, he was forgetful, and he had difficulty concentrating, focusing and multi-tasking.

[72] Anxiety and depression started soon after the Accident, together with nightmares which lasted for about six months. The Claimant testified suicidal thoughts began six months after the Accident and became worse in 2020.

[73] He described himself as a different person, a “stranger to himself” and not the strong, outgoing person he was before the Accident. People commented he was not as engaged. He felt disconnected and prone to rumination and panic. He became impulsive as evidenced by purchasing an expensive boat and car.

[74] His relationship with his wife began to suffer. He would snap at her and was agitated with the children. He did not have the capacity to do the things he wanted and felt he was having a conversation with “another version of himself”.

[75] In January 2019, the Claimant posted bail for his brother and moved him into a local detox/rehabilitation facility.

[76] In March 2020 the Claimant’s wife contacted the family doctor Dr. L expressing concern about her husband’s mental and physical state.

[77] Dr. L spoke with the Claimant by telehealth appointment at which time he told her he was struggling, sleeping poorly and having panic attacks. She suggested counselling which he agreed to attend.

[78] The Claimant testified that before the Accident he had always been able to deal with stressors in his life which included the death of his mother, his sister losing a child, his brother's drug addiction and a friend committing suicide in 2010 by hanging.

[79] The Claimant agreed this was the first time after the Accident that he had spoken about emotional issues.

[80] In the spring of 2020, the Claimant testified he had an emotional affair with an old girlfriend. He told his wife which created stress in their marriage, and they separated for several weeks.

[81] The printout (Exhibit 21) for the Claimant's health care provider Group Health indicates there were two counselling sessions in April 2020.

[82] The Claimant agreed he saw Dr. L in July 2020 at which time they discussed the passing of his mother, his dad kicking him out of the house after her death, his struggle with supporting his brother and marital discord.

[83] At the same visit, the Claimant accepted he was complaining about chronic right knee pain which related to an injury he suffered when he was 15 years old.

[84] On September 21, 2020, CV sent an email to the Claimant raising concerns about his lack of involvement and level of commitment to MCC.

[85] The Claimant continued to work essentially full-time but not as efficiently and not without difficulty. He joked with CV about leaving the business but there were no serious discussions as in his words "I do not want to scare my business partner".

[86] His responsibilities shifted to business development.

[87] The Claimant agreed he contracted Covid 19 in November 2020.

[88] He also agreed that in February 2021 he saw a doctor for arthritis-like pain in his elbow.

[89] On December 31, 2021, he was involved in a snowmobile accident where he was going up a slope and turned to re-enter to go back down the way he came.

[90] The Claimant's evidence was unclear as to whether the snowmobile landed on top or beside him.

[91] Whatever the exact mechanism, the Claimant struggled for several minutes and then lost consciousness under the snow. He was rescued by friends and then rode his snowmobile twelve kilometers to the parking lot where he was taken by ambulance to Chilliwack airport and airlifted to Abbotsford Hospital.

[92] He sustained a chest injury and coughed up blood for 24 hours. He remained in ICU for two days and was then discharged.

[93] The Claimant maintained the snowmobile accident caused no long-term effects because he was back snowmobiling in two weeks.

[94] He recalled seeing a rheumatologist in June 2022 for investigation of long-standing psoriasis and a possible diagnosis of psoriatic arthritis.

[95] In November 2022 the Claimant saw Dr. L to discuss a possible diagnosis of attention deficit disorder ("ADD"). He had taken some of his son's medication Vyvanse for ADD and it seemed to help.

[96] In November 2023 the Claimant agreed he had physiotherapy for a dislocated finger which occurred when he smacked a bobcat.

[97] In 2024 the Claimant became president of the local Chamber of Commerce. He found those responsibilities exhausting but was able to put on his "big boy pants" and show a smile. He claimed not to go out as much as he did before the Accident.

[98] In March 2024 while on a hunting trip to New Zealand, the Claimant fell and broke his leg requiring surgery. After two months on crutches, he testified he was back walking and fully recovered.

[99] Following his return from New Zealand, he went on a business trip to Calgary and had a physical relationship with a work colleague.

[100] Upon his wife finding out, she required him to leave and since May of 2024 they have lived separate and apart. He now resides in a row house, and she remains living in the family home.

[101] Following the separation and after realizing what he had done, the Claimant testified he went out behind a field with the plan to hang himself with a rope. As he stated, “thankfully” he thought about his children and did not go through with the act.

[102] In late August 2024 he was brought by his wife and sister to the emergency department at Chilliwack General Hospital where he saw a psychiatrist who prescribed an anti-depressant. On cross examination he denied telling the doctor he had been suicidal since he was a teenager.

[103] In mid-September 2024, the Claimant travelled to Mexico for a ten-day health retreat where the participants are given Ibogaine which is a psychedelic drug. He said he really enjoyed the retreat and felt much better, although the feeling only lasted two months.

VI. LAY EVIDENCE

(CC)

[104] CC began working at MCC in April 2018. As the controller, she oversees the full accounting cycle, government reporting, payroll, day-to-day transactions and more recently she is involved in marketing.

[105] In the three months she knew him before the Accident, CC described the Claimant as a young, strong, healthy person who had no physical or cognitive symptoms. In her words, he had a mind like a “steel trap” and was very engaged.

[106] After the Accident CC could see the Claimant was in physical pain by the way he grimaced and moved about. Cognitively the biggest change was his inability to focus and poor memory. If she wanted to speak with him, she had to do it quickly because it was difficult to hold his attention for more than a couple of minutes.

[107] Prior to the Accident the Claimant was warm, energetic and had a big personality. He dealt with the staff on human resource issues and showed he really cared by talking to them. He became known as the “office psychologist”.

[108] After the Accident the Claimant was quick to anger, showed frustration, was not engaged and would often be off by himself sitting in his truck. It seemed his energy was affected.

[109] CC agreed that the Claimant's role in MCC did not impact her duties. Over time the Claimant's focus changed to business development.

[110] Prior to the Accident, she described the Claimant and CV as being like one person where two halves made a whole. CC said their relationship has changed in that there appears to be tension and "a disconnect". They operate separately and sometimes seem to be working against each other.

[111] In her role as controller, CC observed that the revenues of MCC have increased, but the profit has stayed the same or even dropped off. Several jobs had issues including Kelowna where oversight appeared to be lacking.

(JH)

[112] JH is 41 years old and married with two children. He has known the Claimant since 1997.

[113] JH started at MCC as a labourer and advanced to the position of supervisor. In the spring of 2019, he was promoted to superintendent to take on some of the roles previously performed by the Claimant. In 2022 he became the general superintendent and since 2024 he has been the operations manager.

[114] JH described the Claimant before the Accident as the type of person who would draw people to him by holding court and telling a story which was bigger than everyone else's story.

[115] The Claimant had no physical limitations and would work in the trenches digging if necessary. JH went on a paddle trip with the Claimant, and he was able to go upstream with no difficulty.

[116] At work the Claimant had a good memory for detail and benchmarks. He knew everything that was going on. The Claimant acted as a mentor to JH in the early days and helped him through a mistake in circumstances where JH might well have been fired.

[117] Since the Accident, JH has observed the Claimant to be forgetful, unable to focus, disengaged and talking on his phone a lot in the parking lot. He is not as easy to get ahold of and does not show the same level of compassion to the other employees.

[118] JH understands he was brought along faster than would have been the case had the Claimant not been injured in the Accident. JH believes he is a valued person who brings value to MCC.

[119] Since 2021 JH has been responsible for the projects in Kelowna. The difficulties in Kelowna are staffing but MCC continues to have projects in the area. JH is not involved in Terrace because there is a good superintendent there.

(LH)

[120] LH is the Claimant's wife although they separated last summer. She is 38 years old, lived her whole life in Chilliwack and presently works as a realtor. She and the Claimant have two children who are 17 and 15.

[121] LH and the Claimant met when she was 18 and they married in 2008. Before the Accident the Claimant came home tired after work but he would play with the children and do the yardwork.

[122] LH said they had a great relationship where they would go out on date nights and weekends away. She said they were a good team. The Claimant planned a surprise party for her 30th birthday. He was happy go lucky, would talk to everyone, was the life of the party, and wise beyond his years.

[123] The Claimant was active with the family hiking, fishing and camping. He also hunted, golfed, biked, snowmobiled and even participated in a tough mudder. He would do jobs around the house such as yard work and renovations.

[124] After the Accident she observed the Claimant groaning and rubbing his shoulder. He had difficulty sleeping.

[125] She described him as disengaged, cranky, agitated and spending a lot of time on the couch with his phone. They stopped spending time together and he always had an excuse to avoid going on trips or for leaving a party early.

[126] LH tried to initiate activities such as when she planned a trip to Kelowna and Sparkling Hill. However, he booked a trip with a friend and LH had to cancel the Okanagan trip.

[127] After the Accident the Claimant became involved in community boards and would come home late. She described an incident where he became very angry with her and said some terrible things. On the advice of her doctor, she removed

the guns from the home. However, he came back and said, “he knew where there was one more”.

[128] LH testified that the Claimant is completely different, has a different temperament and she no longer knows who he is. The act of infidelity in 2020 opened a can of worms and then last summer he had another affair. She feels “invisible”.

[129] The change in her life has been very distressing and she is working with a therapist for her own issues. As she described the situation, “I had to disengage from the Claimant”.

[130] Overall she feels “he died in the Accident and her life has been turned upside down”. She is trying to protect herself and the children.

(RG)

[131] RG is 44 years old, has lived her whole life in Chilliwack and is the older sister of the Claimant. RG is married and she and her husband have their own business. They have four children.

[132] Before the Accident RG would see the Claimant once a month depending on family events. His marriage to LH appeared to be good, they were able to communicate and playfully joke around. RG described it as a “very cohesive relationship.

[133] The Claimant was quite involved with the children outside in the back yard, in the garden or doing things with them in his shop.

[134] After the Accident the frequency of RG’s contact with the Claimant increased as there appeared to be a breakdown in his marriage and mental health.

[135] RG noticed the Claimant’s relationship with LH became more strained and challenging. He was not as involved and would remove himself from the group by disappearing to bed early.

[136] RG said the breakdown in their marriage put a strain on everyone’s relationship in the family.

[137] RG became a source of safety and comfort for the Claimant. He would show up at her door late at night and there were many text messages about his mental

health. The increased frequency of contact pulled RG away from her own family, which caused “hostility” from her husband.

[138] The Claimant became distant from his children. The family was no longer a cohesive unit. The act of infidelity in 2020 caused the Claimant and LH to grow apart as there was a breakdown in trust. There was also the affair in the summer of 2024.

[139] RG testified that August 2024 was a “really dark time”. The Claimant was distraught, angry, sad and suicidal.

[140] RG was worried the Claimant was going to take his life by hanging himself with an extension cord. As a result, she arranged an intervention to get him some professional help. In the words of RG “Thank god he listened”.

[141] RG described her brother before the Accident as grounded, rational, and life of the party. She said he has totally changed and is no longer that person. He has become very distant to his friends and family, and over the last five to six years depressed and detached.

[142] RG said both LH and the Claimant were struggling.

(CV)

[143] CV is 40 years old, married with two children ages 14 and 17. He has an engineering degree from UBC.

[144] CV and the Claimant have known each other since they were teenagers, and they then worked together before setting up their own business in 2012. They were both friends and business partners and their families socialized together.

[145] CV described the Claimant before the Accident as outgoing, social, very talkative and super engaged. He was healthy and had no limitations either physically or cognitively.

[146] The Claimant was hard-working and had no difficulty with his job. He was able to multitask, solve problems, and was good in the field. CV said he and the Claimant collaborated well together, were good at talking through issues and never got into big arguments.

[147] CV observed the Claimant to have a healthy relationship with his wife as they got along, travelled together, enjoyed hosting parties and showed public displays of affection.

[148] The Claimant was a good father involved in coaching, fishing, dirt biking and little things like building a play set and going camping.

[149] CV described the force of impact in the Accident as violent. His vehicle went airborne, landed, rolled and came to a stop in a ditch. CV did not lose consciousness or hit his head, and he was not injured other than having a sore left bicep.

[150] At the scene, the Claimant was agitated, verbal, loud, swearing and he had cuts and glass in his head. He and CV were taken to the hospital in the same ambulance.

[151] At some point not too long after the Accident, CV noticed the Claimant's left shoulder to be lower by two or three inches.

[152] As time went on, CV said short term memory issues began to emerge in that the Claimant would forget conversations and emails he had previously read, and he had a hard time doing long stretches of work. He had difficulty focusing and multitasking, he stopped going to the jobsites as frequently and he was generally less happy.

[153] Problems became apparent on certain of their projects such as Kelowna which CV attributed to the Claimant not overseeing the work as he should have.

[154] In 2019 it was decided to promote JH to Superintendent and have him take over some of the job responsibilities previously performed by the Claimant. CV indicated JH was promoted six to eighteen months earlier than he would have due to the Claimant's lack of engagement.

[155] In April 2020 the problems became more noticeable when the Claimant and his wife separated for the first time following the Claimant's involvement in his emotional affair. The Claimant was less affectionate, less engaged with his wife and children, and quicker to frustration.

[156] CV testified that his frustration reached the point where he sent the detailed email of September 21, 2020, referencing the Claimant's personal issues and detailing his own concerns:

"I know you have been going through a lot with [LH], but I don't know how long that is going to take and I need you to figure out where you are at with MCC as well; it doesn't have to be tomorrow but sometime in the near future. I have been trying to give you as much space as possible since everything with [LH] started in April, but that was over 5 months, and now I am getting to the point where I am feeling overwhelmed with handling most of the MCC responsibilities on my own...you admitted you weren't the same guy and fairly checked out for 6 – 8 months before April as well, so this has been going on at some level for over a year now.

...

If you need more time to figure out what you want/need in your personal life, I can deal with that for a little while longer, but I need to know that there is light at end (sic) of the tunnel soon. I am not able to continue to feel like I am handling 80-90% of the load of the company while we share 50% of the benefits (wages, dividends, perks). You have put a lot of time and effort into this company up until a year ago or so, so I have been giving you the benefit of that up until now, but currently, it feels like more give from me and take from you.

...

You have mentioned a lot lately about moving away, travelling around the world, enjoying life, having different jobs, selling the company, etc.... if you aren't enjoying MCC anymore, let's talk about it. I could be completely off-base with this, but if not, I need you to be honest with me

I am only writing this so that we can discuss everything constructively and get back to a much better place, hopefully with the same solid partnership that we have had for most of this journey growing the company to where it is today".

Emphasis added

[157] Following the email, CV said they met, and things improved "a bit" as the Claimant agreed to be more involved. CV acknowledged that the Claimant's

comments about travelling and enjoying life were always in passing and no real action was taken.

[158] CV stated the financial impact of the Claimant's difficulties was hard to measure. Additional people were hired in the office, but MCC was large enough that it was able to handle the overhead. Any impact was more related to direct costs on the projects.

[159] MCC was profitable although as revenues increased the profit remained relatively constant. CV said their target was to achieve 6% net profit, which was higher than the industry average of 4 to 5%.

[160] Overall CV described the situation after the Accident as the Claimant being less engaged resulting in the two of them seeing each other less so that their relationship changed, and they were not working together as they had previously.

VII. EXPERT MEDICAL EVIDENCE

Dr. Harpreet Sangha, physiatrist

[161] Dr. Sangha is a physiatrist who was qualified to give evidence in respect to physical medicine and rehabilitation.

[162] He conducted an interview and physical examination of the Claimant on April 26, 2023, and prepared a report dated July 27, 2023.

[163] Dr. Sangha testified he has researched and spoken nationally and internationally regarding the diagnosis and causation of shoulder injuries. He denied the suggestion on cross examination that he would defer to an orthopedic surgeon, unless it was a question pertaining directly to shoulder surgery.

[164] Based upon his assessment, Dr. Sangha provided the following diagnosis:

(a) Left cervicobrachial strain resulting in:

(i) Left post-traumatic impingement; now status post-subacromial with ongoing pain and crepitations.

(ii) Left cervical and periscapular regional myofascial pain

(iii) Cervicogenic headaches

(b) Disordered sleep

(c) Psychoemotional distress

[165] Dr. Sangha referenced the July 3, 2019, MRI of the left shoulder which noted a “tiny partial thickness tear in infraspinatus/supraspinatus”. He explained that the infraspinatus/supraspinatus are two of the four major ropes of the rotator cuff. The eventual shoulder surgery performed on September 3, 2021, was decompression to the rotator cuff tendon.

[166] On cross examination Dr. Sangha was asked whether delayed onset of symptoms would rule out the Accident as being the causative event. He indicated impingement could develop over time such that the traumatic event is not necessarily ruled out.

[167] Dr. Sangha in his report of July 27, 2023, opined that the Claimant sustained significant trauma to the head and neck region which left him with diminished physical and functional tolerances in the left neck and shoulder girdle.

[168] He also opined that based upon his understanding that the Claimant had anterograde amnesia as well as ‘islands of memory’, the criteria were met for the diagnosis of mild traumatic brain injury. He recommended neuropsychological testing to determine the makeup of his ongoing cognitive issues.

[169] In terms of prognosis, the Claimant could expect flareups of pain and dysfunction and further improvement was unlikely given the passage of time. The left neck and shoulder issues acting “synergistically” with post-concussive symptomatology tended to increase and extend pain and disability such that the Claimant’s impairment state was permanent.

[170] Dr. Sangha on cross examination agreed that if his understanding of the history as relayed by the Claimant was incorrect, his opinion might be impacted.

[171] Dr. Sangha was also asked whether long covid and hypoxia could explain the Claimant’s ongoing symptoms. He indicated those conditions did not seem relevant to the Claimant’s case.

Dr. Donald Cameron, neurologist

[172] Dr. Cameron was qualified as a medical doctor with a specialty in neurology.

[173] Dr. Cameron assessed the Claimant on July 25, 2023, and prepared a report dated August 5, 2023.

[174] He would begin by taking a history from the patient which he assumed was accurate. If a conflict arose between what the Claimant stated and information provided by others, this would be noted by Dr. Cameron in his report.

[175] Dr. Cameron would then go on to consider the patient's overall pattern of functioning within the work, home and recreational spheres and consider the degree of change before and after the traumatic event.

[176] Dr. Cameron opined that the Claimant fulfilled the criteria for a diagnosis of mild traumatic brain injury, which "probably" developed into a post-concussion syndrome of relatively mild severity impacting memory and concentration.

[177] He also opined that the Claimant sustained soft tissue and musculoskeletal injuries which evolved into chronic pain.

[178] In respect to employment, Dr. Cameron noted the Claimant's statement that he was able to work full time hours, but due to cognitive issues and exhaustion, was only functional 80 to 90% of the time.

[179] Dr. Cameron was cross-examined on the possibility of the Claimant having sustained a hypoxic event in the snowmobiling accident. He ruled out this possibility because the Claimant's oxygen saturation level never went below 80% and there were no worsening of symptoms following the event.

Dr. Mel Kaushansky, neuropsychologist

[180] Dr. Kaushansky was qualified as a psychologist with a specialty in neuropsychology and able to give opinion evidence as to etiology, future prognosis and recommendations for neurological disorders.

[181] He interviewed the Claimant on June 6, 2023, and a neuropsychological test battery was administered June 6 and 7, 2023. The Claimant's wife was interviewed by telephone and Dr. Kaushansky provided a report dated July 21, 2023.

[182] Validity testing showed the Claimant's effort to be valid with no appearance of magnification or exaggeration of symptoms.

[183] The results of mood and personality functioning measures indicated the Claimant presented with Major Depressive Disorder and Post-Traumatic Stress Disorder.

[184] Dr. Kaushansky testified that if the Claimant was working at a menial job, his cognitive difficulties would not be so apparent. Some patients will do well on testing but poorly in the real world.

[185] He agreed on cross-examination that as a general proposition, hypoxia can cause brain injury and a person who has attention deficit disorder should take their medication. However, he was not asked to apply these issues to the Claimant.

[186] Dr. Kaushansky also testified that the early death of the Claimant's mother and emotional abuse by his father were significant pre-morbid vulnerabilities which exacerbated the consequences of the Accident. Without the Accident, these pre-morbid issues would likely not have arisen.

[187] Dr. Kaushansky summarized the Claimant's situation as follows:

The [Accident] initiated a cascade of physical, cognitive and psychological problems that persist to date. As is often written of this patient group, a self-reinforcing "chronic loop" of physical, cognitive and psychological factors have likely become intertwined and enmeshed. In my opinion, the psychological consequences of the [Accident], in addition to issues of co-morbid pain and a disturbed sleep cycle, are probably the primary factors influencing the [Claimant's] cognitive functioning rather than the remnant problems of an unresolved traumatic brain injury. At this time, the prognosis remains guarded for an eventual resolution of all these issues.

In my opinion, there has been a diminishment in the [Claimant's] overall quality of life manifesting as difficulties in his primary relationship with his wife and children with potential of the dissolution of this primary relationship. Moreover, there has been decreased enjoyment of recreational/leisure activities and a diminished ability to lead as a principal in his construction company.

Emphasis added

[188] From a vocational perspective, Dr. Kaushansky did not believe the Claimant's position in MCC was in jeopardy, although he thought it might be prudent to reduce the demands being placed upon him.

[189] Dr. Kaushansky referenced the Claimant's self-report that the cognitive difficulties he was having at work affected his own performance but did not impact on the financial health of MCC.

Dr. Danny Goel, orthopedic surgeon

[190] Dr. Goel was qualified as an orthopedic surgeon with a specialty in shoulder surgery.

[191] He assessed the Claimant on July 31, 2023, and prepared a report dated August 17, 2023, with the focus directed to the left shoulder.

[192] Dr. Goel testified his procedure was to first examine the patient, review the records and then prepare his report. He relied on the patient to be accurate with the objective of ensuring the history given was consistent with the documents.

[193] Based upon the history, physical examination and documentation reviewed, it was Dr. Goel's opinion the Claimant suffered traumatic left shoulder impingement (trauma to the shoulder) and superomedial scapulothoracic bursitis (inflammation of the bursa) which were directly related to the Accident.

[194] Dr. Goel explained that these conditions can develop in a delayed fashion because the inflammation in the bursa takes time to develop.

[195] The Claimant underwent shoulder surgery from which he had a good recovery, although he was left with pain to the posterior (towards the back) aspect of the shoulder. The prognosis was guarded as future treatment was being considered.

[196] Dr. Goel agreed on cross examination that if the left shoulder hit the inner frame so hard as to bend it, one would expect the Claimant to experience pain and bruising, although the pain might depend on whether there were other distracting injuries.

[197] A series of hypotheticals including sporting activities, psoriatic arthritis, overuse of the arm, use of a rifle, lifting weights, and being stomped by a horse at

the age of five were suggested to Dr. Goel as explanations for the development of left shoulder pain.

[198] While Dr. Goel agreed that hypothetically such examples could explain pain, his specific opinion concerning the Claimant was not challenged.

Dr. Mitchell Spivak, consulting psychiatrist

[199] Dr. Spivak was qualified as a medical doctor with a specialty in psychiatry.

[200] He interviewed the Claimant virtually on May 25, 2023, and prepared a report dated May 26, 2023.

[201] The history taken by Dr. Spivak indicated the Claimant had experienced changes in his psychological functioning since the Accident as evidenced by no longer seeing himself as the same person, irritable with his wife, and difficulty maintaining interest in his homelife and other activities he previously enjoyed.

[202] The Claimant described significant changes in his cognitive functioning for about one year following the Accident where he was struggling with word finding difficulties and an inability to focus.

[203] Those issues dissipated after the first year, but ongoing difficulties with short-term memory and organization continued. He trialed an antidepressant that he did not like and was taking Vyvanse which made him feel more alert and focused. He was involved in psychotherapy.

[204] Dr. Spivak opined that the Claimant's description of the Accident was compatible with having sustained a mild traumatic brain injury. For approximately one year following the Accident he showed signs suggestive of post-concussion symptoms which manifested into cognitive issues and a change in temperament and emotional health.

[205] The Claimant presented with symptoms consistent with a diagnosis of major depressive disorder arguably due to his post-concussive symptomatology precipitated by the Accident.

[206] Dr. Spivak described the Claimant's level of impairment as follows:

The [Claimant's] symptoms have been in the realm of mild to moderate. On a positive note, he has been able to maintain himself in his employment, albeit with the support of his

employees and his partner. He has cognitive challenges that limit him at work and he notes that he has had difficulties with his organization, but he has found ways to accommodate around the same. However, he has seen a dramatic change in his functioning in his personal life with his (sic) no longer feeling as engaged with his spouse and he notes that there has been marital discord. He has lost his sexual drive and no longer takes pleasure from activities he previously enjoyed. His symptoms are substantial enough that he has had passive suicidal ideation.

Emphasis added

[207] Dr. Spivak thought the prognosis was guarded given there was some room for improvement with appropriately targeted interventions.

[208] The theme of Mr. Fergusson's cross examination was that the Claimant's psychological issues were caused not by the Accident, but by the confluence of a possible diagnosis of attention deficit disorder, psoriatic arthritis, a mid-life crisis, the snowmobile accident, long covid, and pre-Accident psychological trauma.

[209] Dr. Spivak disagreed.

[210] He testified he was not aware of there being a diagnosis of attention deficit disorder (which there was not). Further, the ability to multitask before the Accident and then have difficulties after, was inconsistent with such a diagnosis.

[211] There was no evidence that the Claimant had long covid.

[212] A mid-life crisis is not a medical condition and therefore not something he could comment on.

[213] Dr. Spivak said he would be surprised if a diagnosis of psoriatic arthritis resulted in an abrupt change in the Claimant's personality following the Accident.

[214] He agreed the pre-Accident events were a contributing factor, but from his understanding, the Claimant was not having difficulties in his personal or work life prior to the Accident.

[215] Finally, there was no change in the Claimant's psychological status after the snowmobile accident.

[216] In conclusion Dr Spivak testified the above events were an interesting “rabbit hole” to explore but not reflective of the narrative as he understood it.

VIII. LEGAL FRAMEWORK AND FINDINGS OF FACT

[217] 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 that the injury would not have occurred but for the negligence of the tortfeasor: *Athey v. Leonati*, [1996] 3 SCR 458 at paras. 13 – 17.

[218] In other words, the tortfeasor is not liable for injuries which were not caused by his negligence: *Athey*, at para 24.

[219] A claimant need not establish that the tortfeasor’s negligence was the sole cause of the injury. If the tortfeasor is part of the cause of an injury, he is liable, notwithstanding there may be other causal factors for which he is not responsible that also helped produce the harm: *Athey*, para. 17, 19

[220] Once causation is established, the role of damages is to place the Claimant in the same position he would have been had the Accident not occurred – no better, but no worse.

[221] The Court of Appeal in *Murphy v. Snippa*, 2024 BCCA 30 recently summarized this objective:

[53] A tortfeasor need not compensate a plaintiff for injuries they would have suffered in any event (*Athey*, paras 32–35). This flows from the most basic principle of tort law. . . that the plaintiff must be placed in the position he or she would have been in absent the defendant’s negligence”, i.e., the plaintiff’s “original position” (*Athey*, at para 32). If a plaintiff has a pre-existing condition, the judge must ensure the damage award does not put the plaintiff in a better position than they would otherwise have been in, thereby overcompensating the plaintiff.

[222] The existence of a pre-existing condition may have significant implications for a plaintiff’s original position. A tortfeasor is liable for the additional damage but not the pre-existing damage: *Athey* at para. 35.

[223] The impact of the pre-existing condition, be it an existing condition that may become worse (*Murphy* at para 56), or a future hypothetical event (*Murphy* at para 59) must be “tethered” to the evidence. A finding or inference of fact that is not supported by evidence is merely speculation or conjecture and the method of inference fails: *Lee v. Bolduc*, 2024 BCCA 7 at para. 21 (Newbury J.A. dissenting as to result).

[224] It is this framework which I will now follow.

[225] The Accident was a violent one that took place at high speed. The consequences could have been far worse than they were.

[226] In addition to relying upon his own evidence, the Claimant bases his claim on collateral witnesses and expert testimony.

[227] The collateral witnesses certainly identified significant changes in the behavior of the Claimant following the Accident. I was impressed with each of them and as already mentioned, their evidence was not undermined on cross examination.

[228] Similarly the expert witnesses adhered to their duty to assist the arbitration process as opposed to acting as an advocate for the Claimant. Their oral evidence did not detract from their written opinion.

[229] I note that the experts each assessed the Claimant in the summer of 2023, which was somewhat unfortunate because there were several significant events in the Claimant’s life that occurred in 2024. In making this comment, I am in no way being critical as I appreciate the reason for the timing. In the result however I must rely upon the evidence that was before me.

[230] The Respondent’s position in this arbitration was a simple one, namely that the Claimant sustained minor injuries which had resolved by January 2019 and any difficulties thereafter were because of a pre-existing condition or not caused by the Accident. No alternative position was advanced, and no evidence was tendered.

[231] I agree with the Respondent that the Claimant carries the burden of proof to establish causation and resulting loss.

[232] However I have no difficulty in concluding the Claimant put forward a prima facie case showing injuries and effect that went well beyond January 2019. Finding

otherwise would require me to completely ignore collateral evidence and medical opinion.

[233] I agree the Respondent raised issues that might cast doubt on the theory of the Claimant's case. However, without "tethering" those issues to this Claimant, and in the absence of expert opinion, the theory of the Respondent's case did not in my view go beyond speculation. As previously commented, speculation without evidence does not allow me to draw valid inferences or conclusions.

[234] Given this finding it is not necessary to address the argument raised by Mr. Zacharias in respect to the rule in *Browne v. Dunn*.

[235] In reaching my conclusions, I am cognizant of the need for caution when inferring causation from a temporal connection as expressed by Ehrke, J in *White v Stonestreet*, 2006 BCSC 801 at para. 74.

[236] In summary I make the following findings of fact:

- the Claimant was a healthy man with no physical, cognitive, or emotional issues at the time of the Accident;
- there was no measurable risk of a pre-Accident condition, either existing or latent that would have detrimentally impacted the Claimant in the future absent the Accident;
- the Claimant sustained an impingement type injury to his left shoulder which resulted in successful surgery on September 3, 2021;
- the Claimant suffered soft tissue injuries to his neck, shoulder and back which developed into chronic pain that continues but not to the extent of preventing him from hunting, snowmobiling and periodic golfing;
- the Claimant sustained a mild traumatic brain injury which evolved into a post-concussion syndrome of mild to moderate severity;
- cognitive difficulties associated with word finding and focus had largely resolved within a year following the Accident, leaving short-term memory and organization issues;

- the Claimant developed a depressive disorder due to a combination of physical, cognitive and psychological problems that became a re-inforcing chronic loop;
- the Claimant’s prognosis is guarded with room for improvement through recommended treatment.

[237] Before leaving my findings of fact, I wish to address the acts of infidelity which took place in 2020 and 2024.

[238] The evidence from the Claimant was that he attended some 40 to 60 counselling sessions which included marriage counselling. Other than the two entries from April 2020, no counselling records were introduced, and no claim is made for the cost of the counselling. There was no evidence as to what was discussed, other than the Claimant testified he was “processing his thoughts”.

[239] The experts shied away from commenting on issues of marital discord, and particularly the acts of infidelity. There was no evidence linking causation for the infidelity to the Accident.

[240] The evidence of LH and RG was that those events opened a “can of worms” and caused a “breakdown in trust” between the Claimant and LH.

[241] In my view the acts of infidelity and resulting marital discord are a private matter as between the Claimant, his conscience and his wife. They were not acts caused by any negligence of GV.

IX. ASSESSMENT OF DAMAGES

Non-Pecuniary

[242] Non-pecuniary damages compensate for pain, suffering, and loss of enjoyment of life and amenities. Comparison to other cases of similar injury can be helpful but the award in each case will depend on its own facts: *Debruyn v. Kim*, 2021 BCSC 620 at paras 120, 121.

[243] In assessing the Claimant’s loss, I have considered the factors set out in *Stapeley v Hejslet*, 2006 BCCA 34 at paras. 45-46, leave to appeal to SCC ref’d [2006] S.C.C. A. No. 100.

[244] I have concluded the Claimant sustained injuries of some significance which have had a disruptive impact on all aspects of his life. He is left with ongoing symptoms that I have characterized as mild to moderate, albeit within a chronic loop which has a guarded prognosis for further improvement.

[245] To some extent the evidence of the Claimant and collateral witnesses appeared to describe a more serious level of impairment than reflected in the opinions of the expert witnesses.

[246] In final argument Mr. Zacharias agreed with this observation and offered the explanation that the Claimant was a stoic individual who lacked insight and as a result may not have fully described his difficulties when assessed.

[247] Reference was made to the comment of Dr. Sangha in his July 27, 2023, report that the Claimant presented “as a rather stoic individual” and Dr. Spivak who in cross examination referenced CV’s detailed email of September 21, 2020, and the fact that it did not match up to the Claimant’s narrative.

[248] Certainly in his presentation before me, the Claimant had no difficulty describing what he saw as his level of impairment. He also testified he was truthful and accurate when being interviewed by the various assessors. I can only assume therefore that he presented to the experts in the same way as he was before me, and they then arrived at their conclusions.

[249] The Claimant seeks non-pecuniary damages in the range of \$250,000 to \$300,000, whereas the Respondent submitted an award of between \$30,000 and \$50,000.

[250] Given my findings of fact as previously outlined, I do not accept the range proposed by the Respondent.

[251] I have reviewed the decisions provided by the Claimant, most notably *Lewis v Gibeau*, 2023 BCSC 784, *Timms v Lucaben*, 2023 BCSC 1119, *Moen v Grantham*, 2024 BCSC 937, and *Matwijec v. Goodridge*, 2024 BCSC 2030.

[252] *Moen* was a more serious case where the plaintiff suffered neck and back injury in three accidents that led to chronic pain, major depression, and severe emotional stress that prevented him from continuing to work in physically demanding employment. The award for non-pecuniary damages was \$300,000.

[253] In *Matwijec*, the 49 year old male plaintiff suffered soft tissue injuries to his neck, back and shoulders which caused constant pain, headaches, psychological injuries, and sleep difficulties, all of which resulted in him being unable to work or engage in social activities. The award for non-pecuniary damages was \$235,000.

[254] In *Lewis* the 59 year old plaintiff suffered a concussion, mild traumatic brain injury syndrome, headaches, and sleep dysfunction together with persistent pain to her neck, shoulder and back. Her personality was altered and career plans changed. The award for non-pecuniary damages was \$220,000.

[255] Finally the plaintiff in *Timms* was a 47 year old finishing carpenter who sustained a mild traumatic brain injury, back pain, neck pain, chronic migraines, vestibular and vision difficulties and significant sleep disturbance and fatigue. The plaintiff was not competitively employable and his income earning ability was described as greatly impacted. The award for non-pecuniary damages was \$235,000.

[256] After considering the above noted cases and the additional decisions of *Sebaa v. Ricci*, 2015 BCSC 1492 and *Gill v. Dhaliwal*, 2021 BCSC 1562 which involved similarly aged plaintiffs, I am of the view that an award of \$220,000 for non-pecuniary damages is appropriate in the circumstances. This award has been augmented to reflect a modest claim for loss of housekeeping capacity as will be discussed later and takes into account the Claimant's ability to return to hunting, golfing and snowmobiling at some level.

Past Loss of Earning Capacity

[257] Compensation for past loss of earning capacity is based upon what the Claimant would have, not could have earned, but for the injuries sustained in the Accident: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[258] The burden of proof for past loss of earning capacity is proof on a balance of probabilities. It is a different burden of proof than that required to show a future loss of earning capacity: *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2015 BCCA 232 at para. 15.

[259] The standard of proof for past hypothetical events is whether there is a "real and substantial possibility" that the events would occur: *Grewal v Naumann*, 2017BCCA 158 at para. 48.

[260] The evidence supporting an award for a past loss of earning capacity can take different forms: *Lamarque v. Rouse*, 2023 BCCA 392 at para. 30.

[261] The Claimant to his credit advances a modest claim of \$1,352 to \$2,560 for past loss of earning capacity based upon the evidence of CV that JH was promoted into the position of superintendent at a higher salary six to eighteen months sooner than he would have had the Claimant not been injured in the Accident.

[262] Recognizing the Claimant was compensated through MCC as an equal shareholder with CV, reliance was placed upon the November 20, 2024, report of Stephen Graff, forensic accountant, wherein he calculated the additional cost to MCC based upon the assumed early promotion of CV (Schedule 7).

[263] I accept the overall premise as advanced by the Claimant might well in appropriate circumstances support a means of determining a loss of past earning capacity.

[264] However Mr. Graff agreed there were many “moving parts” to take into account in assessing a pecuniary loss to MCC (and ultimately the Claimant) as a result of the injuries of the Claimant, including changes in operating systems and management roles as MCC grew, reasons for variability in revenues and costs over any given time period, and how to determine the added value brought to MCC by JH (if any).

[265] I would add accounting for the added value (if any) provided by the Claimant in taking on a different role, and the fundamental question as to when JH may have been promoted had the Claimant not been involved in the Accident.

[266] Given the Claimant received the same annual compensation from MCC as did CV from the time of the Accident to present (most recently \$180,000), the small amount of additional compensation that may have been paid to JH over that period as a result of the Accident caused injuries of the Claimant, the uncertainties associated with the operations of MCC, and the Claimant’s own statement to Dr. Kaushansky that his difficulties did not impact the financial performance of MCC, I find the Claimant has not established on the balance of probabilities, a loss of past earning capacity.

Future Loss of Earning Capacity

[267] The central task in assessing a claim for loss of earning capacity is to compare the Claimant's likely working life with and without the Accident. The degree of impairment depends on the type and severity of the injuries and nature of the anticipated employment at issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.

[268] In *Brown v Golaiy*, (1985) 26 B.C.L.R. (3d) 353 the Court set out a list of factors to be considered in addressing the impairment of the capital asset:

- (a) the claimant has been rendered less capable overall from earning income from all types of employment;
- (b) the claimant is less marketable or attractive as an employee to potential employers;
- (c) the claimant has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured;
- (d) the claimant is less valuable to himself as a person capable of earning an income in a competitive labour market.

[269] The decision of *Rab v. Prescott*, 2021 BCCA 345 at para. 47 sets out the three-step framework for considering such claims:

- (a) assess whether the evidence discloses a potential future event (e.g. chronic injury giving rise to the considerations in *Brown*) that could lead to a loss of capacity;
- (b) if so, assess whether on the evidence there is a real and substantial possibility that the future event in question will cause a pecuniary loss;
- (c) if so, assess the value of that possible future loss, including the relative likelihood of the possibility occurring.

[270] The Claimant's evidence was that prior to the Accident he planned on working until 55 or 60 and then retire to become a snowbird and possibly turn the business over to his children.

[271] He now worries about how long he can work and is concerned about his future at MCC. He feels he “...may only have five years left in him [and] would be hard pressed to go ten more years.” He testified he has considered running an excavator for someone else and earning \$90,000 to \$110,000 in the Fraser Valley.

[272] The Respondent submits that the Claimant failed to establish a future loss of earning capacity. It asserts the Claimant has not established a real and substantial possibility of a future event leading to an income loss and there is no basis for a capital asset approach award.

[273] It relies upon *Kim v. Moirier*, 2014 BCCA 63 for the principle that one’s perception of a loss without more is insufficient proof of a future event resulting in a pecuniary loss:

[8] In my view the trial judge here did err in equating the loss of capital asset with the plaintiff’s own perception. As the cases demonstrate, that is not enough. The plaintiff must show that it is a realistic possibility she will be less able to compete in the marketplace with economic consequences, not merely psychological ones...as we suggested to counsel this morning, the word “may” is essentially speculative and does not equate to a finding of a real possibility.

Emphasis added

[274] I agree that standing alone the Claimant’s evidence as to the number of years which he feels he may be able to continue working, is at best indicative of a possibility and more likely speculation on his part, neither of which are sufficient to establish a loss of future earning capacity.

[275] However in addressing steps 1 and 2 of the *Rab* framework, the Claimant relies on the evidence of Dr. Sandhu, psychiatrist who in his July 27, 2023, report stated the following with respect to employment:

[The Claimant] has continued to work since the [Accident] but struggles mostly from a cognitive perspective. . . It is the convergence of his problems with chronic pain and the functional limitations caused by soft tissue injuries in conjunction with his cognitive issues that impact on his capacities in this regard. I consider [the Claimant] to be at a competitive disadvantage. He is fortunate that as the owner he is able to implement his own accommodations. Were he to

have to work for an external employer, his capacities from a physical and cognitive perspective are such that he would be less likely to be able to maintain roles such as he does now. He is unable to work to the same capacity as he did prior to the [A]ccident or in comparison to his age-matched cohort who have not suffered such injuries. As such there has likely been a significant curtailment in the spectrum of jobs he can reasonably take on. . . I do not see this situation as changing and he should be considered to have permanent employment limitations in this regard.

Emphasis added

[276] Dr. Sangha was not cross-examined on his opinion, nor was it addressed in final submissions. Drs. Cameron, Spivak, and Kaushansky in a similar vein spoke of the accommodations the Claimant was receiving, the possibility his cognitive problems could increase over time due to Accident-related factors, and the fact he was required to work longer hours to achieve less output.

[277] Given this unchallenged evidence, I accept that the Claimant has met steps 1 and 2 in *Rab* by establishing a potential future event that could lead to a loss of capacity resulting in a real and substantial possibility of a pecuniary loss.

[278] The loss may be quantified using either an earnings or capital asset approach: *Perren v. Lalani*, 2010 BCCA 140 at para. 32. The earning approach is typically used in cases where there is an identifiable loss of income. The capital asset approach is followed where there is little or no loss of income at the time of assessment, but an impairment has been suffered which could impact on the Claimant's ability to work in the future: *Ploskon- Ciela v. Brophy*, 2022 BCCA 217 at paras. 16, 17.

[279] The Claimant submitted that the earnings approach should be employed, or in the alternative, the capital asset approach.

[280] Using the earnings approach, the Claimant sought an award for future loss of earning capacity of between \$700,000 and \$1,200,000.

[281] The underlying premise of the Claimant's earnings approach was that he was likely to stop working within the next five to ten years and thereafter work as a heavy equipment operator after retirement, earning an average of \$100,000 (as compared to his assumed income at MCC of \$180,000. The present value of the annual loss

going forward was calculated and a percentage likelihood of each scenario occurring was applied.

[282] The most likely scenario as submitted by the Claimant (Scenario no. 2) was that he would continue working at MCC until age 50 and then transition to operating heavy equipment until age 60. Using the numbers taken from the Claimant's Closing Submissions, the mathematical loss was \$737,776 which the Claimant asserted had a likelihood of 85%, for an adjusted loss of \$627,109.

[283] I found the approach taken by the Claimant to be helpful. It is one way of determining the Claimant's with and without Accident earning capacity.

[284] However, if I were to follow that approach, I would apply a significantly reduced percentage likelihood factor. While I accept that the possibility of the Claimant having to retire early from MCC because of the Accident is greater than mere speculation, I view it as significantly less than 85% and more likely in the magnitude of 30% to 35%. Applying those factors the mathematical loss would be in the range of \$220,000 to \$260,000.

[285] Nearly five years have gone by since CV's email of September 21, 2020. The Claimant remains at MCC and CV has taken no steps to have him leave. It was apparent from CV's evidence that he wants the Claimant and he to remain business partners for the foreseeable future. Further there is no expert evidence opining that there is a real possibility of the Claimant having to leave MCC because of his injuries. In fact, the evidence of Dr. Kaushansky was that the Claimant's role as an owner in MCC was not in jeopardy. Finally, the consensus of the experts was that the Claimant's prognosis for recovery was guarded with room for improvement through recommended treatment.

[286] The Claimant's alternative submission was that if it is found appropriate to assess the loss using the capital asset approach given the Claimant's income had not been impacted to date, then the appropriate award should be between \$720,000 and \$900,000, based upon 4 to 5 years of annual income of \$180,000.

[287] The Claimant relies upon comments made by the Court in *Moen v. Grantham*, 2024 BCSC 937 at para. 301 in connection with impairment of "moderate disruption".

[288] At the same time as the *Moen* decision, the Court of Appeal in *Fatia v. McCarthy*, 2024 BCCA 311 at para 39 and *Dong v Li*, 2024 BCCA 404 at para. 27, clarified that there is no “rule of thumb” mandating or justifying an arbitrary number of years of annual income under the *Pallos* approach and that in each case, there must be a full consideration of the evidence to arrive at a fair assessment of the loss.

[289] My task is to assess damages and not to calculate them on some mathematical formula: *Mulholland v. Riley Estate* (1995), 12 BCLR (3d) 248 at para. 43. Having said that the assessment of damages for loss of earning capacity is not intended to be “wholly arbitrary” and if mathematical aids are available, they should be considered. The award is to be a reasonable one based upon the evidence: *Dong* at para [29].

[290] In my view the injuries sustained by the Claimant and his ongoing mild to moderate disability justify an award of \$250,000 for loss of future earning capacity. In arriving at my assessment, I considered the earnings approach proposed by the Claimant utilizing a 30% to 35% likelihood of early retirement factor (\$221,000 and \$258,000), and the “rough and ready” *Pallos* approach employing an “early retirement” of 18 months at \$180,000 annual income (\$270,000).

[291] The average of those three scenarios is \$250,000 and I view that amount as a fair and reasonable award in accordance with the evidence.

[292] I did consider the issue of contingencies, general and specific, and concluded that the positive (improvement with treatment) and negative (regression of emotional and cognitive issues) cancelled each other out such that no further adjustment was required.

Loss of Housekeeping Capacity

[293] The Claimant seeks a pecuniary award of \$5,000 to \$20,000 for loss of past housekeeping capacity and \$75,000 to \$125,000 for loss of future housekeeping capacity, on the basis that he is physically incapable of performing many of the tasks required to maintain the home and yard. Alternatively, it is suggested that the non-pecuniary award should be increased to properly reflect the physical difficulties the Claimant has in performing housekeeping duties.

[294] The Respondent's position was that a separate pecuniary award for loss of housekeeping capacity was not appropriate as the Claimant was able to perform his housekeeping tasks and any diminishment in capacity was akin to a brief loss of amenities. If an award was appropriate, it should be considered within non-pecuniary damages.

[295] LH testified she and her husband shared the household duties prior to the Accident. Her estimate was that the Claimant would do approximately five hours per week in the winter and twenty hours in the summer and spring.

[296] Following the Accident, LH said the Claimant struggled with raking, shoveling, fixing fences, moving heavier items and overhead movements due to his shoulder injury. She had to take over some of the duties, sometimes with her father, and help was also hired. Over time the Claimant's assistance around the home became non-existent.

[297] I note the Claimant had a good recovery from shoulder surgery in September 2021 (see Dr. Goel report), and he was gone from the family home in May 2024 due to marital issues.

[298] In *McKee v. Hicks*, 2023 BCCA 109, the Court commented on the previous debate on whether such loss of housekeeping support should be compensated as a non-pecuniary loss or as a segregated pecuniary head of damage:

[112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

Emphasis added

[299] The medical assessments conducted in the summer of 2023 provide some insight into the Claimant's level of impairment when it came to housekeeping tasks.

[300] Dr. Sangha in his report of July 27, 2023, commented that the Claimant was left with diminished physical and functional tolerances, but by his own admission

he was able to complete most tasks within the home albeit with pacing and modification strategies.

[301] Dr. Cameron in his report of August 5, 2023, recorded the Claimant stated he was able to do the household and outdoor chores, but was indifferent as to how his house was looking.

[302] In considering the evidence I find that up until the time of the Claimant's surgery in September 2021, he was largely "unable to perform" overhead tasks and move heavier items due to his shoulder pain. Following the surgery and the improvement that ensued, he was as indicated in the reports of Dr. Sangha and Dr. Cameron, "capable of performing the necessary tasks" albeit with some difficulty or frustration.

[303] Indeed following his surgery the Claimant had no treatment until April 4, 2022, when he had one physiotherapy treatment, and then nothing again until April 25, 2023.

[304] I conclude that up until the shoulder surgery and recovery in September 2021, the Claimant is entitled to a pecuniary award of \$10,000. This amount is arrived at by assuming a loss of housekeeping capacity of 2 hours per week to perform overhead and heavier work, for three plus years at an hourly rate of \$30, being a rate endorsed in *Thiessen v. Kepfer*, 2023 BCSC 1593 at paras. 178 and 179.

[305] In arriving at the loss of 2 hours per week, I am influenced by the Claimant's evidence that before the Accident, he was in addition to household duties, working 80 hours per week, golfing 10 to 15 rounds a year, mountain biking, snowmobiling and coaching his children in soccer. Given that level of activity there were only so many hours available for housekeeping.

[306] For any loss of housekeeping capacity after the September 2021 surgery including a future loss, I have considered it within my award for non-pecuniary damages.

Cost of Future Care

[307] Costs awarded for future care should encompass treatment or items that are linked to accident-related injuries, medically justified, reasonable and that the Claimant will likely use and benefit from: *Malakoe v. Harris*, 2024 BCSC 1178 at para. 149.

[308] The assessment is an objective one, based on the evidence, and must be fair to both parties. There should be no significant overlap in the care items awarded: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58.

[309] Contingencies are applicable to cost of care awards, including the real and substantial possibility that the estimated care expenses will not be incurred, and the possibility that the care expenses may be more (or less) than contemplated by the assessment: *Meckic v. Chan*, 2022 BCSC 182 at paras 184 and 185.

[310] Drs. Sangha, Spivak, Goel and Kaushansky have each provided a shopping list of future care recommendations, but those recommendations are all independent of each other and there is no comprehensive document incorporating the recommendations into one plan to avoid overlap.

[311] It is true the Claimant in seeking a future care award of between \$40,000 and \$75,000 has condensed the recommendations into counselling, chiropractic treatment, physiotherapy, massage therapy and a TENS Unit. However there remains limited evidence as to the cost for each treatment modality and no expert evidence as to the frequency of treatments or how long the treatments should continue.

[312] The Respondent consistent with its approach throughout, submitted that the Claimant's accident-related injuries were resolved by January 31, 2019 at the latest and therefore no future care award was justified.

[313] The Respondent also noted the care recommendations were dated and if the Claimant intended on following the recommendations he would have done so already. As stated in the Closing Submissions of the Respondent, "...piecemeal treatment is not indicative of a clear intention to treat." I agree with that statement.

[314] I can glean some information as to cost and frequency of physio, massage and chiropractic therapy from the Schedule of Special Damages (Exhibit 8), Group Health Claims History (Exhibit 21) and Canada Life Summary of Medical Benefits (Exhibit 22) respectively. The Claimant's pattern of treatment from the date of the Accident until the present time is as follows:

Year	Number of Visits
2018	22
2019	3
2020	9 (including two counselling sessions)
2021	16 (including three trigger point injections)
2022	1
2023	17 (including two treatments for bobcat injury)
<u>2024</u>	<u>8</u>
TOTAL	76

[315] Since the Claimant's surgery in September 2021, he has had 24 passive treatments (excluding the two physiotherapy treatments for the bobcat incident in November 2023) equating to approximately seven a year.

[316] As stated earlier the only counselling noted in Exhibits 8, 21 and 22, are the two visits in April 2020.

[317] Doing the best I can on limited information and employing an assumed cost of \$100 per passive treatment visit and \$150 per counselling session, I award \$16,600 for future care, comprised of \$14,000 collectively for chiropractic, physiotherapy, and massage therapy representing the present value of seven treatments per year to age 65 to deal with flareups as opined by Dr. Sangha, \$2,500 for counselling and \$100 for a tens machine.

[318] In respect to the counselling, I acknowledge the Claimant's evidence that he attended 40 to 60 sessions including marriage counselling. However, in the absence of direct evidence from the counsellor or indirectly through the counselling records, I am not prepared to draw inferences as to the purpose of the counselling or what was discussed at the various sessions. As found earlier, I do not accept that the acts of infidelity were caused by the negligence of GV.

[319] However as an acknowledgment that some counselling is necessary to deal with issues caused by the injuries sustained in the Accident, I have allowed \$2,500.

Special Damages

[320] The Claimant seeks special damages of \$3,627.75.

[321] The Respondent's only opposition to the special damage claim was its submission that any expenses incurred after January 31, 2019, were not Accident caused.

[322] I have already rejected the Respondent's position in that regard and therefore I award \$3,627.75 for special damages.

X. CONCLUSION

[323] I award the Claimant the following damages:

Non-Pecuniary	\$220,000
Past Loss of Earning Capacity	0
Future Loss of Earning Capacity	\$250,000
Loss of Housekeeping Capacity	\$10,000
Future Care	\$16,600
Special Damages	<u>\$3,627.75</u>
<u>TOTAL</u>	<u>\$500,227.75</u>

[324] The Claimant is presumptively entitled to his costs unless there are considerations which I am not aware of.

[325] If the parties are unable to reach agreement on deductible amounts and/or costs, a telephone call can be scheduled to arrange the necessary steps going forward.

Dated: April 7, 2025

Dennis Quinlan

Arbitrator—Dennis C. Quinlan, KC

