IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Clemas v. Gabrlik,*
2013 BCSC 1412

Date: 20130807
Docket: M104222
Registry: Vancouver

Between:

Michael Clemas

Plaintiff

And

Rose Gabrlik and Ronald Gabrlik

Defendants

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:	T. J. Delaney A. J. Ritchie
Counsel for the Defendants:	S. Hood L. H. Leung
Place and Date of Trial:	Vancouver, B.C. June 17 - 21, 24 & 25, 2013
Place and Date of Judgment:	Vancouver, B.C. August 7, 2013

Introduction

[1] This is a claim for damages for personal injuries suffered as a result of a motor vehicle accident that occurred on September 16, 2008 at the intersection of 176th Street and 32nd Avenue in Surrey, British Columbia (the “accident”). Liability is not in issue.

The Accident

[2] The accident occurred at approximately 4:00 p.m. The plaintiff, Michael Clemas, was heading north on 176th Street and had stopped at the traffic light at 32nd Avenue. He was driving a 1995 Pontiac Transporter minivan. His vehicle was the first in line at the traffic light and he estimated that he was stopped for approximately 15 seconds when his vehicle was struck from behind by a vehicle driven by the defendant Rose Gabrlik and owned by the defendant Ronald Gabrlik. Mr. Clemas testified that the force of the collision

compelled his vehicle six to eight feet into the intersection where it came to rest. As will be discussed below, the defendant driver testified that the force of the impact was, in fact, minimal.

[3] No police or ambulance attended the accident scene. No independent witnesses were called to give evidence about the accident.

[4] Mr. Clemas testified that he contacted the Insurance Corporation of British Columbia ("ICBC") following the accident and that ICBC paid him $1,500.00 in respect to the damage sustained to his vehicle. In cross-examination, Mr. Clemas agreed that in fact the damage to his vehicle, as identified by ICBC, totalled just over $1,000.00 ($1,046.93). Photos of the rear of Mr. Clemas' vehicle tendered in evidence did not reveal any significant damage to the vehicle. Indeed it was difficult to discern any damage in the photos.

The Parties' Positions

[5] It is the plaintiff's position that as a result of the accident, he has suffered a significant ongoing injury to his lower back that has caused him, and continues to cause him, damages which he quantifies as follows:

a) Non-Pecuniary Damages	$100,000.00
b) Past Income Loss	110,000 - 160,000.00
c) Loss of Future Earning Capacity	600,000 - 750,000
d) Cost of Future Care	23,900.00
e) Special Damages	2,903.19
f) Diminished Housekeeping Capacity	20,000.00
Total	$856,803.19 - $1,056,803.19

[6] The defendants concede that the plaintiff was injured in the accident, however they take issue with both the severity and duration of his injuries. The defendants submit that the following damages are appropriate in this case:

a) Non-Pecuniary Damages	$50,000.00
b) Past Income Loss	10,000.00
c) Loss of Future Earning Capacity	50,000.00
d) Cost of Future Care	3,000.00
e) Special Damages	2,000.00
f) Diminished Housekeeping Capacity	0
Total	$115,000.00

The Plaintiff's Evidence

[7] Mr. Clemas was 44 years old at the time of the accident and 49 years old at the time of trial. At the time of the accident, he was a single father with shared custody of his two children with his former common law spouse. Mr. Clemas has since married and currently resides with his spouse and stepson.

[8] Mr. Clemas is a plumber by trade. Following his graduation from high school in 1982, he commenced

employment with R.C. Installations, a plumbing business operated by his father, and in 1985 or 1986, he obtained his journeyman plumber's certificate. In 1988, he left R.C. Installations and moved to Montreal with the hope of making the Canadian Olympic team in the sport of judo. As a result of an injury to his wrist suffered in training, Mr. Clemas returned to British Columbia in 1990 and resumed his employment with R.C. Installations.

[9] In 1990, R.C. Installations had three employees: Mr. Clemas, his father and his brother. Mr. Clemas' mother did the books for the business. At some point after his return from Montreal, Mr. Clemas' brother left the business and it continued with Mr. Clemas and his father. In the early 2000s, Mr. Clemas' father began to work less for health reasons and he effectively retired from the business in 2006. From 2007 to the date of the accident, Mr. Clemas operated R.C. Installations on his own, albeit with ongoing bookkeeping assistance from his mother. He testified that his intention was to continue in the business until retirement and that hopefully at some point his son would join him as he had his own father.

[10] Mr. Clemas testified that as a result of the force of the accident, his right shin struck the dash board. Following the accident, he experienced pain in the back of his head, neck, left shoulder and lower back. The headaches, neck pain and shoulder pain resolved within approximately six weeks of the accident, but the back pain has persisted and is the primary basis for his claim for damages in this action. The severity and duration of his alleged back problems, and their impact on his life and his ability to earn income, are the central issues in the case.

[11] Following the accident, Mr. Clemas was away from work for approximately two weeks. During that period, his brother assisted with some service calls and he also enlisted the help of his nephew. Approximately two to three weeks after the accident, his father returned to the business to help as well. Mr. Clemas attempted to ease back into work, starting with two hours per day and then increased to four hours per day. However, when he tried to work six hours per day he says that he found it too painful and he was unable to continue. Mr. Clemas never returned to work full time at R.C. Installations.

[12] Mr. Clemas testified that in or about November or December, 2008 he had a falling out with his father over R.C. Installations. According to Mr. Clemas, his father did not appreciate the pain he was in and did not understand why he was not able to work more. From Mr. Clemas' perspective, his father was not doing enough to maintain the business while Mr. Clemas was unable to work. For example, Mr. Clemas thought that his father was favouring his historical customers and was not providing adequate service to new customers that Mr. Clemas had developed.

[13] According to Mr. Clemas, the result of this dispute was initially a threat by Mr. Clemas' father to sell the business, which Mr. Clemas supported on the expectation that he would receive money from the sale. Instead, however, his father gave Mr. Clemas what he described as a "severance payment" comprised of four cheques for $1,500.00 spread over a few months.

[14] Following his departure from R.C. Installations, Mr. Clemas testified that he applied for in excess of 30 plumbing jobs. He was eventually hired by E & P Construction which was doing plumbing installation work in

a new townhouse development. Mr. Clemas testified that while he was hired as a plumber, he essentially functioned as a foreman because he was the senior plumber on the site and had a number of apprentices under him. The foreman duties involved answering to the site supervisor and solving problems as they arose. He also did plumbing work on the site with the assistance of the apprentices. He agreed that he was able to fulfill the physical requirement of the plumbing work.

[15] Mr. Clemas' employment with E & P Construction was terminated just shy of three months after it commenced following a confrontation with another employee. Mr. Clemas thought his termination was unfair but there was little he could do to challenge it.

[16] Mr. Clemas was cross-examined at some length on his description, provided to various medical and other professionals, of his position at E & P Construction as a "foreman." It was put to him that he used that term to disguise the fact that he was doing, and was able to do, plumbing work. Mr. Clemas testified that he described himself as a foreman because that was essentially the role that he performed, even though he was hired as a plumber. I accept his evidence that while he did perform plumbing work at the job site, as the senior person on site he also performed a number of supervisory or foreman-like functions. I do not believe that his description of the job as being a foreman was intended to mislead. However, the fact that Mr. Clemas was able to function in a job that involved both plumbing and supervisory duties, and the fact that the extent of the physical requirements of that position were not fully disclosed to the medical experts, is relevant to his claim for loss of income which will be addressed below.

[17] Mr. Clemas applied for a number of other jobs and was ultimately hired in June 2009 by PRL Pacific Reconstruction Ltd. ("PRL"), a company owned and operated by a friend of his. According to Mr. Clemas, his friend was aware of Mr. Clemas' limitations and was prepared to accommodate them, primarily by hiring an assistant to work with Mr. Clemas to do most of the heavy work. PRL is engaged in the business of building envelope repair work. Mr. Clemas' particular responsibility was to cut and install Hardie board which is a form of siding.

[18] Mr. Clemas stayed employed at PRL for about three years but left in July 2012. Mr. Clemas said that he quit because his assistant had been laid off and he found the work too difficult. In May of 2012, Mr. Clemas had an incident with his back when his back "locked up" and his regular treatment regime was not working to relieve the pain. The ongoing pain, together with the loss of his assistant, led him to quit PRL. He testified, as well that, the owner of PRL wanted him to renew his Workers Compensation Board registration and that he did not want to incur approximately $1,700 cost to do so.

[19] In October 2012, Mr. Clemas obtained employment at a Home Depot store in White Rock in the plumbing department where he continued to be employed at the time of trial. While he continues to experience pain and occasional spasms, he is able to function at that job. Mr. Clemas testified that there is no heavy lifting involved in the position.

[20] Summaries of Mr. Clemas' taxable income were introduced into evidence and revealed net income in the years preceding the accident as follows:

2008	$63,875
2007	$107,854
2006	$48,458
2005	$39,902
2004	$43,366
2003	$39,712

[21] Mr. Clemas testified that the increase in income in 2007 was due to the fact that by that time he had taken over sole operation of R.C. Installations. His income in 2008 reflects the fact that he did not return to work at R.C. Installations in any meaningful way after the accident in September of that year. Mr. Clemas estimated that he had approximately $50,000.00 in work lined up for the balance of 2008 that he was unable to perform. No documents or other corroborating evidence was adduced to substantiate that figure

[22] Mr. Clemas testified that he has not filed income tax returns for the years after 2008 due to an outstanding income tax bill owing to the Canada Revenue Service as well as a significant GST debt. However, he agreed in cross-examination that his earnings from PRL were approximately $55,000 in 2010 and $60,000 in 2011.

[23] Mr. Clemas' current position at Home Depot pays $14.00 per hour. He is not classified as a full time employee but he said that he works full time hours. He would like to ultimately be promoted into the position of designated supervisor which pays $18.00 per hour.

[24] Mr. Clemas testified that the problems with his back have negatively impacted his life in a number of respects. He and his wife currently live in a house located next door to his parents that they rent from his parents. Mr. Clemas testified that he relies on his father to do much of the home maintenance. The situation has improved somewhat in recent times and he now is able to cut the lawn approximately 60% of the time. He said that his wife does the majority of the housework.

[25] Mr. Clemas testified that he is now limited in a number of recreational pursuits that he used to enjoy. Mr. Clemas' father owns a judo club and prior to the accident, Mr. Clemas used to teach judo. As part of the teaching he would demonstrate judo moves to students and would occasionally spar with students. He has recently returned to teaching judo at the club but is no longer able to demonstrate or spar. Rather, he teaches students through verbal direction.

[26] Prior to the accident, Mr. Clemas was quite involved in paintball. In the late 1990s he participated at a competitive level. Later, he played on a more recreational basis, playing every week or two when the weather permitted. After the accident, Mr. Clemas stopped playing paintball due to the physical demands and he sold his paintball equipment.

[27] Prior to the accident, Mr. Clemas also played tennis with his son a couple of times per week. He has not played tennis since the accident as he believes the motion of hitting the tennis ball would cause problems with his back. Mr. Clemas also used to play golf. He testified that he would go to the driving range once or

twice per week and would try to play once per week depending on friends' availability. Since the accident, he has gone to the driving range a few times and has played one round of golf on a par 3 course with his son.

[28] Also prior to the accident, Mr. Clemas and his wife enjoyed taking dance lessons together. As he described it, this was an attempt to develop a hobby that they could participate in together. Mr. Clemas said that they have not resumed dance lessons since the accident, although his evidence was vague as to why that is.

[29] Mr. Clemas also testified that he used to enjoy throwing a baseball or football with his son but he does not do that anymore. He also has not gone to a movie with his children since the accident for fear that he could not sit still for the duration of the film.

[30] Mr. Clemas denied that he had any pre-existing injuries of any significance. Specifically, he testified that while he had tweaked his back from time to time while engaging in judo, he had no significant prior back issues. He had orthoscopic surgery on one knee and separated both shoulders, again in relation to his judo activities, but he does not consider this material to his current complaints. He also experiences occasional problems with the wrist he injured in judo.

[31] In cross-examination Mr. Clemas admitted that he was involved in four subsequent motor vehicle accidents after the accident, all of which appear to have been very minor. He denied that he was injured in any of these subsequent accidents or that they have any bearing on his current claim. No independent evidence was adduced about these accidents. Counsel for the defendants cross-examined various expert witnesses called by Mr. Clemas about the fact that he did not disclose to them these subsequent accidents. However, in the absence of any evidence of the severity of these accidents (which might be more accurately described as incidents) I find that they are not material to my consideration of Mr. Clemas' claims in this case. For the same reason, I do not find that his failure to disclose them to the medical and other professionals undermines his credibility or in any way negatively impacts on the experts' reports.

[32] Mr. Clemas also testified that he has in the past received treatment and counselling for cocaine use. He was cross-examined on a number of entries in his family doctor's clinical notes that refer to occasional relapses. Mr. Clemas was forthright about the issue and did not attempt to hide from the fact that he once had a problem with the drug. Counsel for the defendant cross-examined a number of the witnesses on this issue, including a number of experts who were not aware or had not been told by Mr. Clemas about his past drug problem. The defendants did not lead any evidence to suggest an ongoing problem or to indicate that drug use was a factor in Mr. Clemas' job performance. Absent such evidence, I do not consider it relevant to the claims being advanced in this case.

[33] Mr. Clemas describes his current condition as experiencing a dull pain in his back every day with the intensity of the pain varying from day to day. He experiences sharp pains from time to time, sometimes twice per day and other times he will go a couple of days without such pain. He treats the pain with over the counter medication.

The Plaintiff's Lay Witnesses

Laurie Cummings

[34] Laurie Cummings is Mr. Clemas' former common law spouse and the mother of his two children. Ms. Cummings met Mr. Clemas in late 1988 or early 1989 in Montreal when he was training there in pursuit of his Olympic judo aspirations. Ms. Cummings moved to British Columbia for a period in 1990 then moved here permanently in 1991. She maintained a common law relationship with Mr. Clemas until they separated in May 2004. Their daughter was born in 1996 and their son in 1997.

[35] Ms. Cummings testified that prior to the accident Mr. Clemas was a very active father to his children. They lived near the beach and Mr. Clemas regularly took them on hikes and played on the beach. Their son was active in sports and Mr. Clemas would often throw a football or baseball with him.

[36] Pursuant to a separation agreement entered into at the time of separation, Mr. Clemas paid approximately $550 to Ms. Cummings in child support. She testified that before the accident, Mr. Clemas made the payments on time and was very generous to the children, often paying for extras over and above the required amount. Mr. Clemas did not pay spousal support.

[37] Since the date of the accident, Ms. Cummings testified that Mr. Clemas has occasionally struggled to make the child support payments and has sometimes had to borrow money from her between pay cheques.

[38] Mr. Clemas' activity level with the children has decreased, for example he no longer throws balls with their son. Since the accident, he has seen the children less frequently. Their daughter no longer regularly attends scheduled weekend visits due to medical issues she has experienced. Their son also does not see Mr. Clemas as frequently given that Mr. Clemas no longer engages in the same level of activity with him.

[39] Ms. Cummings testified that when she first met Mr. Clemas and up until the time of the accident, he was always a big, strong and athletic man who was very outgoing. Since the accident, Ms. Cummings' impression is that he has "aged beyond his years" and is more of an introvert. On occasion she has witnessed him display apparent stiffness in his back and a limp.

[40] In cross-examination, Ms. Cummings agreed that since their separation she has seen less of Mr. Clemas although she said that they would continue to see each other two to three times per week because of child exchanges, pick-ups and drop-offs etc. Her only knowledge of the accident is through Mr. Clemas and things that her children have told her. She testified that occasionally Mr. Clemas would cancel a visit with the children or would bring their son home early from a visit because he was not feeling well. She understood this to mean that he was having back problems.

[41] It was suggested to Ms. Cummings in cross-examination that she was sympathetic to Mr. Clemas and supportive of him. While Ms. Cummings agreed that she wished him well, I did not find that she in any way tailored her evidence to assist Mr. Clemas in his current claim. That said, her evidence is of minimal assistance in determining the extent and severity of Mr. Clemas' ongoing difficulties with his back.

Richard Clemas

[42] Richard Clemas is Michael Clemas' father and the founder of R.C. Installations. He is currently 73 years old and has been a plumber since the age of 21. He and his wife have two sons: Michael Clemas and his brother Steve. Both sons followed Richard Clemas into the plumbing business and both apprenticed with him.

[43] R.C. Installations has always operated as a sole proprietorship. It has never been incorporated and there are no shareholders.

[44] Both sons worked with R.C. Installations in the 1980s but at some point Steve left to pursue other opportunities. Michael continued to work at R.C. Installations through until 2008. Richard Clemas testified that he started to slow down in 2005 and then in 2006 he was diagnosed with prostate cancer. Due to his illness he was largely away from the business in 2006-2007 during which time Michael ran the business on his own. In the words of Richard Clemas, Michael kept the business going.

[45] Richard Clemas returned to the business in the fall of 2008 following Michael's accident. He wasn't looking to return to work at that time but Michael asked for his help. After a period of time, Michael came back to work and would follow him around to jobs, although Michael would direct him on what needed doing as the work at that time was all on jobs that Michael had generated. According to Richard Clemas, Michael worked until mid-November 2008 at which time he left and did not return. On December 15, 2008, Michael announced to Richard Clemas that he was quitting.

[46] There was some inconsistency between Michael and Richard Clemas' version of events surrounding Michael's departure from R.C. Installations. For example, in cross-examination, Richard Clemas denied that there was any dispute between the two or that he had threatened to sell the business. He agreed that he made payments to Michael in December 2008 but said that the money was money that Michael had earned on jobs that he had done. He did not agree with Michael's characterization of these payments as severance.

[47] Following Michael's departure from R.C. Installations, Richard Clemas kept the business going for some time. Initially, he worked on completing jobs for which Michael had signed contracts. He continued on with R.C. installations through 2011 and brought his other son Steve back on a full time basis for a year in 2010-2011. He has since slowed down again and is currently working on a reduced hourly/daily basis servicing two historical clients.

[48] Richard Clemas expects that when he steps away permanently from the business, R.C. Installations will simply be folded. He does not see hiring an apprentice or an experienced plumber as an option to continue the business. In his view, the only option would be for a family member to take it over. Steve is employed elsewhere and isn't interested and, according to Richard Clemas, Michael is not capable of doing so due to his condition.

[49] Richard Clemas testified that in his estimation the average annual income earned by R.C. Installations over the past three years is approximately $130,000. No financial statements or other documents were produced to substantiate this figure.

Julie Clemas

[50] Julie Clemas is Mr. Clemas' wife. They have been married for about seven months but have lived together for five years. They met approximately seven years ago.

[51] Ms. Clemas testified that prior to the accident she and Mr. Clemas participated in a number of recreational activities together including taking trips, walking on the beach and hiking. She said that Mr. Clemas regularly played golf and tennis and participated in judo three times per week.

[52] She described his mood and personality prior to the accident as happy, light-hearted and full of energy.

[53] Since the accident they have not been on any trips together. Financially they cannot afford it and they have to be careful not to engage in activities that cause Mr. Clemas difficulty with his back. Ms. Clemas testified that mood-wise, he is often sad and depressed. She described him as a proud man who does not like to show pain and who feels that he is not adequately providing for his family.

[54] Ms. Clemas testified that on a typical day, Mr. Clemas will wake up after a difficult sleep and take some Advil for the pain. If it is a work day, he will go to the Home Depot and she will often get texts throughout the day from him saying that he is having a bad back day. When he comes home, he will often position himself on the love seat to alleviate pressure on his back or will play some X-box in the basement.

Paul Sahota

[55] Mr. Sahota is a department supervisor in the plumbing department at the White Rock Home Depot store and is Mr. Clemas' direct supervisor. Mr. Sahota was promoted to that position in April 2013. Previously he was a sales associate in the plumbing department at Home Depot.

[56] Mr. Sahota testified that a typical sales associate position involves interacting with customers, restocking shelves with product, bringing product down from shelves and some maintenance in the department. Placing and removing product on and off shelves involves climbing ladders and using the "order picker" which is a machine to which an associate is strapped that lifts the associate in the air.

[57] According to Mr. Sahota, Mr. Clemas is not asked to use the "order picker" or to climb ladders. Mr. Sahota and other sales associates in the plumbing department are aware of Mr. Clemas' back problems and will assist him when lifting is required. Mr. Sahota is supportive of Mr. Clemas' employment at Home Depot and happy to assist him or accommodate his needs. For example, he testified that occasionally he will allow Mr. Clemas to go lie down on a cot in the first aid room or will excuse him early from a shift when his back is hurting.

[58] Mr. Sahota described Mr. Clemas as being good at customer service. He interacts well with the customers and the fact that he is knowledgeable in the plumbing field is an asset. Mr. Clemas is the only ticketed plumber employed in the plumbing department at the store.

[59] Mr. Sahota testified that Mr. Clemas is not a full time employee. He is a part time employee who splits his time between the plumbing department and the kitchen and bath department. According to Mr. Sahota, he can provide Mr. Clemas with about 8-12 hours per week in the plumbing department and he gets additional hours in the kitchen and bath department.

[60] In order for Mr. Clemas to become a full time employee, head office would have to approve more hours for the department. If that occurred, Mr. Clemas and other interested candidates would have to apply and go through an interview process. Mr. Sahota indicated that due to Mr. Clemas' knowledge and experience he has the potential to advance in the company, however his back may be an issue as department supervisors still must undertake the same physical tasks as sales associates.

The Plaintiff's Expert Evidence

Dr. Purtzki

[61] Dr. Jacqueline Purtzki is a licensed physician with a specialty in physical medicine and rehabilitation. She examined Mr. Clemas on three occasions at the request of his counsel and she prepared three reports which were entered into evidence.

[62] Her first report dated July 27, 2012 summarizes her assessment of Mr. Clemas based on an examination that took place on June 28, 2012. Based on that assessment, Dr. Purtzki found Mr. Clemas to be suffering from lower back pain "of mechanical type, compatible with recurrent flare-ups related to activity, likely from facet joint dysfunction." She also noted that:

> Mr. Clemas, likely had an increased risk of developing lower back arthritis and degenerative changes over time. He was a high level athlete in an extremely physically demanding sport (judo) before the MVA. His musculoskeletal system likely took a lot of physical strain, and small repetitive injuries that may have taken place despite the apparent absence of significant injury to his spine. This is coupled with the physical demands of being a plumber in a job that generally involves quite a bit of lifting and pulling, pushing, crouching.
>
> …
>
> Prognosis for recovery even with appropriate intervention, I believe, is still guarded. I think it is unlikely that he will be able to return to a physically demanding or moderately demanding labor job.

[63] Dr. Purtzki's second report is dated August 14, 2012 and is an addendum to her first report following a CT scan of Mr. Clemas' lumbar spine. On reviewing the CT report, Dr. Purtzki noted the presence of "bilateral spondylolysis at L5 with grade 1 anterolithesis of L5 over S1, and then stated:

> Mr. Clemas' CT report provides evidence of an anatomical defect in the low back, which corresponds to the clinical location of his pain on examination and by description. His current symptoms are, in my view, compatible with pain generation due to the instability of the spine at the L5/S1 level. Given Mr. Clemas' past history of vigorous physical activity and the possible occurrence of a pars defect related to non-traumatic causes alone, it is likely that the spondylolysis and possibly the spondylolisthesis were present at some time before the MVA. Pars defects occur often during adolescence and are often not recognized.
>
> Given the history of onset of much more severe, disabling low back pain after the MVA, it appears likely that the pars defect became clinically symptomatic related to the MVA…Given the available

> information, I think that Mr. Clemas incurred an injury to the low back as a result of the MVA, which triggered the current disabling low back pain.

[64] Dr. Purtzki's most recent report is dated January 28, 2013 and it summarizes her findings following a reassessment of Mr. Clemas on January 14, 2013. In this report, Dr. Purtzki essentially confirms her original opinion, noting as follows under the heading "Prognosis":

> Mr. Clemas has significant general degenerative changes at all lumbar spine levels, which are likely a combination of his age, his previous work and his previous recreational activities such as competitive judo. In addition, he has symptomatic grade 1 spondylolisthesis which seems to be mainly limiting him. This debilitating back pain reportedly started after the MVA in question. He continues to be limited and needed to make work and lifestyle changes as a result.
>
> The prognosis for resolution of pain and regarding further back mobility is poor. The prognosis for long-term functional employment is guarded and he likely will have flare ups of back pain, especially if he suffers any additional trauma. He is at higher risk of being laid off or having to take time off work due to back pain.

[65] In cross-examination, Dr. Purtzki agreed that much of the personal history description set out in her reports is based on what Mr. Clemas told her. For example, she agreed that he told her that he got a job for three months as a foreman and that he later got a job through an acquaintance for a window and siding company and that the company hired an assistant for him to do the heavy carrying and lifting. She also agreed that her description of the accident was based on what Mr. Clemas told her, including her reference to his vehicle being pushed into the intersection.

[66] Dr. Purtzki did not recall whether Mr. Clemas had told her what he actually did at his then current job, including shovelling rocks, lifting wood, pouring concrete and lifting siding.

[67] In response to a question from counsel for the defendants, Dr. Purtzki indicated that she did not agree that Mr. Clemas had improved significantly and consistently from the date of the accident through until early 2013. She was then questioned on Dr. Frobb's clinical notes that show a pattern of improvement over time with periodic flare-ups of his back requiring treatment over a number of days. In Dr. Purtzki's view, this pattern, that she described as "remission and relapse", does not suggest overall improvement in Mr. Clemas' condition.

Dr. Frobb

[68] Dr. Mark Frobb is a licensed physician in British Columbia with extensive experience in the treatment and management of chronic back pain and acceleration/deceleration spinal injuries. Dr. Frobb is also accredited to perform neural acupuncture and to practice osteopathic medicine which he described as the non-surgical treatment of spinal problems using manual treatments. Dr. Frobb has been a treating physician of Mr. Clemas since November 2008 when Mr. Clemas was referred to Dr. Frobb by his family doctor.

[69] Dr. Frobb prepared a report dated June 27, 2012 that was entered into evidence. In his report, Dr. Frobb noted:

> Clinical examination reveals evidence of persistent findings of a biomechanical dysfunctional

> vertebral movement disorder affecting the spinal segmental areas of the lumbar spine associated with an accompanying chronic myofascial pain syndrome in the supporting paravertebral muscles.
>
> These clinical findings are superimposed on underlying chronic degenerative changes of the lumbar spine and sacroiliac joints, a condition that likely predates the motor vehicle accident in question.
>
> …
>
> In my opinion the accident of September 16th , 2008, is a significant causative factor with respect to Mr. Clemas's ongoing chronic pain disorder, physical restrictions and diminished functional capacities as outlined in this report.

[70] Under the heading "Prognosis" Dr. Frobb states:

> It is my clinical opinion that Mr. Clemas's failure to show significant improvement in his chronic pain disorder affecting the lumbar spine following the accident in spite of multiple modalities of therapy places his complete recovery at significant risk.
>
> In my opinion, although there is the possibility that functional capacity will improve over time as it relates to physical workload and consequences of pain associated with this workload, in light of the chronic nature of the complaints this outcome is not certain, indicating that Mr. Clemas's present clinical condition on the balance of probabilities likely represents a status of maximum medical improvement.

[71] Dr. Frobb confirmed his medical opinion as set out in his initial report in a subsequent report to Mr. Clemas' counsel dated August 2, 2012 which he prepared after reviewing various additional medical records.

Timothy Winter

[72] Mr. Timothy Winter is an occupational therapist employed by Back in Motion Functional Assessments Inc. Mr. Winter conducted a functional capacity evaluation of Mr. Clemas on January 8, 2013 and the results of his evaluation are set out in a report that was entered into evidence.

[73] The functional capacity evaluation involved subjecting Mr. Clemas to a number of tests intended to measure his ability to perform activities and tasks associated with his occupation as a plumber. The testing also measured Mr. Clemas' effort in performing the various tasks in order to ensure that the results of the tests are an accurate indicator of work capacity. Mr. Winter's findings are summarized at pp. 27-28 of his report as follows:

> Evaluation findings indicate that Mr. Clemas is not physically capable of his pre-motor vehicle accident occupation at this time.
>
> Specifically, he presents as limited for the Heavy strength requirements, as well as prolonged exposure periods to non-neutral body postures (i.e. bending, twisting, outer range reaching, crouching, and kneeling). Such non-neutral work demands are further complicated by concurrent exposure to forceful handling and loading functions as are routinely encounter [sic] in this occupation. Consequently, this is a poor occupational choice for Mr. Clemas at this juncture.
>
> With respect to work positions in general, I am of the opinion that Mr. Clemas is capable of full-time employment positions, provided the physical demands of such work are within the guidelines and limitations outlined in this report.

[74] The limitations identified by Mr. Winter include some capacity for select aspects of medium strength

work and full capacity for light strength work. According to Mr. Winter, medium strength work is work in which the employee would be expected to lift up to 25 pounds frequently whereas light strength work would involve occasional lifting of up to 20 pounds and frequent lifting of 10 pounds.

[75] In his report, Mr. Winter notes, based on his interview with Mr. Clemas, that since leaving R.C. Installations, Mr. Clemas has not returned to plumbing work. He further notes that Mr. Clemas reported working as a foreman on a new townhouse construction project where he periodically engaged in aspects of plumbing work but left the physically arduous work to tradesmen and apprentices. Mr. Winter also records that Mr. Clemas told him that he subsequently moved into installing commercial siding for approximately two years but his tolerance for such work deteriorated over time.

[76] In cross-examination, Mr. Winter agreed that he was not told by Mr. Clemas about the extent of the physical demands involved in those two jobs, many of which would fall within the classification of heavy strength work.

Kevin Turnbull

[77] Kevin Turnbull is a chartered accountant and economist who prepared two reports that were entered into evidence. The first is dated August 13, 2012 and provides his opinion on the loss of earnings, both past and future, suffered by Mr. Clemas. The second report is dated August 14, 2012 and he sets out a methodology for calculating the cost of future care for Mr. Clemas.

[78] For the purpose of calculating Mr. Clemas' lost income, Mr. Turnbull assumed that but for the accident, Mr. Clemas would have continued to operate R.C. Installations through until retirement at age 65. Accordingly, Mr. Turnbull's calculation of Mr. Clemas' past income loss to the date of trial is based on the difference between what he estimates Mr. Clemas actually earned from his other employment between the date of the accident and November 7, 2012 (the anticipated trial date as of the date of his report), which employment was principally with PRL.

[79] Records provided by R.C. Installations revealed that Mr. Clemas continued to be paid through until the end of 2008 thus Mr. Turnbull assumed no income loss for 2008. I would note that this is inconsistent with Mr. Clemas' evidence that once he left R.C. he received four "severance" cheques from his father of $1500.00 each.

[80] For 2009, Mr. Turnbull calculated Mr. Clemas' actual income based on a T4 slip issued by E & P Construction for the almost three months that he worked there and invoices issued by Mr. Clemas to PRL for the period of June to December 2009. Because Mr. Clemas did not provide Mr. Turnbull with a complete set of invoices covering the entirety of his time at PRL, Mr. Turnbull estimated Mr. Clemas' "actual" income in 2010, 2011 and 2012, up to the time he left PRL in 2012, by reference to average hours worked and amounts billed to PRL as reflected in the invoices Mr. Clemas did provide.

[81] In order to calculate the income that Mr. Clemas would have otherwise earned from R.C. Installations, Mr. Turnbull used Mr. Clemas' reported income in 2007 and averaged it with his annualized pre-2008

earnings to come up with a figure for 2009. For 2010 and subsequent years, Mr. Turbull assumed that Mr. Clemas' income from R.C. Installations would be $110,548, which is the amount reported on Mr. Clemas' 2007 Income Tax return and which reflects the net income for R.C. Installations for that year as calculated by Mr. Turnbull. The figure is significantly higher than the income reported on any previous return filed by Mr. Clemas.

[82] Using this methodology, Mr. Turnbull calculated a past loss of income of $149,843 net of tax from the date of the accident to November 7, 2012 as set out in table six in his report:

Estimation of Past Loss of Earnings (assuming no loss in 2008)

Year	Projected Absent Accident Income	Estimated Actual Income	Gross Loss Estimate	Income Taxes	Annual Net Loss
(1)	(2)	(3)	(4)	(5)	(6)
2009	$78,642	$30,136	$48,506	$13,340	$35,166
2010	$110,548	$51,552	$58,996	$20,261	$38,735
2011	$110,548	$49,452	$61,096	$20,789	$40,307
2012*	$94,193	$40,447	$53,746	$18,111	$35,635
				Total	$149,843

*From January 1 to November 7 (trial date)

[83] He testified that this figure would be slightly higher, by a few thousand dollars, given that the trial in fact commenced on June 17, 2013.

[84] Mr. Turnbull calculates Mr. Clemas' future income loss based on his estimated loss in 2012, which he calculates to be $63,196 on an annualized basis, extrapolated to age 65. Applying standard discounting factors, Mr. Turnbull estimates Mr. Clemas' future income loss to age 65 as $815,102. Counsel for Mr. Clemas points out that this figure arguably understates Mr. Clemas' loss in that it is based on his earnings at PRL when, in fact, he earns considerably less at Home Depot.

[85] Mr. Turnbull notes in his report, and agreed on cross-examination, that his calculation does not account for contingencies for unemployment, early retirement or other factors, negative and positive, that might affect Mr. Clemas' future employability and earning capacity. Nor does it account for the possibility of diminished income from the plumbing business due to changes in the economic climate, decreased demand for services, reduced work load etc. Further, implicit in Mr. Turnbull's calculation is the assumption that Mr. Clemas' current earnings at the time of writing the report represent his maximum likely earning potential.

Derek Nordin

[86] Mr. Nordin is a certified vocational evaluator who conducted a vocational assessment of Mr. Clemas on January 24, 2013, the results of which are set out in a report dated February 21, 2013 which was entered into evidence.

[87] The vocational assessment consists of an interview of the client for 1.5 hours followed by a battery of tests intended to measure the subject's academic achievement, aptitude and vocational interests. In preparing his report, Mr. Nordin also reviewed a number of the medical reports for Mr. Clemas as well as Mr. Winter's functional capacity evaluation report and Mr. Clemas' income tax information for the years 2003-2008.

[88] As set out in his report, it is Mr. Nordin's opinion that Mr. Clemas "…is not currently employable as a plumber, in either a full or part-time capacity." He further opined that a "best case" scenario for Mr. Clemas is that he will be able to continue with Home Depot for the foreseeable future; but he noted that even if this occurs, Mr. Clemas will stand to earn less in such an occupation than he would have working as a plumber with his father or at another company.

[89] In cross-examination, Mr. Nordin agreed that in fact the "best case" scenario would be for Mr. Clemas to find work as a plumbing foreman. However, he qualified that answer by noting the limited availability of such positions given Mr. Clemas' minimal experience in a supervisory function and the fact that most companies will only employ one foreman who is typically the owner or a senior employee.

The Defendants' Evidence

[90] The defendant Rose Gabrlik testified about the accident. Ms. Gabrlik has since married and I will refer to her by her married name, Rose Kleinsasser. Ms. Kleinsasser is currently 25 years old and, to use her words, is a stay-at-home wife and mother.

[91] Ms. Kleinsasser was the driver of the vehicle that struck the rear of Mr. Clemas' vehicle on September 16, 2008. Ms. Kleinsasser testified that at approximately mid-day she was driving her father's Honda Civic north on 176th Street in Surrey in the curb lane. She was coming from White Rock beach and was heading home. In the rear of the vehicle there were two young girls, ages approximately three and five years old, who Ms. Kleinsasser babysat. Ms. Kleinsasser testified that she was stopped at the traffic light at the intersection of 176th Street and 32nd Avenue. The light changed to green for the vehicles to turn left onto 32nd Avenue. The vehicle in front of her started to move as well but then stopped and she ran into the rear of the vehicle.

[92] Ms. Kleinsasser estimated that she was travelling about five kilometres per hour. She does not recall hearing any screeching of tires and she said that she travelled only a short distance before striking the rear of the vehicle in front of her. She described it as a "quick start and stop."

[93] Ms. Kleinsasser testified that there was not much of an impact and she does not remember her body moving or striking any part of her car as a result of the collision. She does not recall any significant sound on impact. She was wearing a seatbelt at the time and does not recall it tightening as a result of the impact. Ms. Kleinsasser testified that she does not believe that the vehicle that she struck was pushed forward by the impact.

[94] According to Ms. Kleinsasser, after the collision, the vehicle in front of her pulled forward through the intersection and parked across the street. The driver (Mr. Clemas) then came back to her vehicle. She

indicated that she looked at the bumper of the other vehicle through her windshield before it pulled ahead and from that vantage point did not observe much of anything in terms of damage.

[95] Ms. Kleinsasser testified that the other driver appeared fine. He did not complain of any pain at that time and she does not believe that he said that he was injured. No police or ambulance was called because the collision, in her view, was so minor that it was unnecessary. Ms. Kleinsasser testified that her father's vehicle sustained about $4,700.00 in damage, principally to the front bumper and the area by the front licence plate. The vehicle was repaired and her parents continue to drive it today. Ms. Kleinsasser identified the photographs in evidence of her father's vehicle.

[96] In cross-examination, Ms. Kleinsasser said she does not recall if Mr. Clemas first got out of his vehicle after the impact and told her he was pulling forward across the street because he was blocking traffic.

[97] It was put to Ms. Kleinsasser that there was more damage to her father's vehicle than simply to the bumper and licence plate as she described. Ms. Kleinsasser was shown a copy of the ICBC damage report that indicated that the repairs undertaken on the vehicle were more extensive than she initially suggested.

[98] It was also put to Ms. Kleinsasser that when she reported the accident to ICBC, she reported experiencing a stiff neck and back. She did not recall, however she agreed that the ICBC accident report reflects those complaints.

[99] It was also put to Ms. Kleinsasser that her description of a "quick start and stop" was not accurate and that she had "squealed off" when she started to move forward. Ms. Kleinsasser denied this suggestion.

The Defendants' Lay Witness

Peter Glinnum

[100] Mr. Glinnum is the President of E & P Construction where Mr. Clemas was employed for approximately three months in January to March 2009. Mr. Glinnum testified that E & P Construction is a plumbing contractor that is engaged in all aspects of the plumbing business including service calls and new construction projects. It generally employs eight to ten people depending on the workload at any given time.

[101] Mr. Glinnum testified that Michael Clemas responded to an ad that Mr. Glinnum had put in the paper for a journeyman plumber. Mr. Glinnum interviewed Mr. Clemas about his work history, his experience, past injuries, financial issues and any other matters that might interfere with his ability to do the work. No problems were identified and Mr. Glinnum hired Mr. Clemas as a journeyman plumber.

[102] Mr. Clemas was hired in January 2009. He was hired on a full time basis with the expectation of a 40 hour work week. Mr. Clemas worked full time for E & P Construction until his termination at the end of March 2009.

[103] Mr. Glinnum testified that he was impressed with Mr. Clemas' qualifications and that he knew what he was talking about when it came to plumbing. Mr. Glinnum also testified that he does not recall Mr. Clemas

ever telling him about the accident, any injuries he had, or any pain he suffered, nor did Mr. Clemas ever say that he could not do the plumbing work. Mr. Glinnum testified that had Mr. Clemas raised those issues, he would not have hired him as he needed a full time journeyman plumber.

[104] For the entire duration of his employment at E & P Construction, Mr. Clemas worked at a new townhouse development called the Azzure. According to Mr. Glinnum, Mr. Clemas' duties at the site included all aspects of plumbing work including cutting wood, drilling holes, digging, carrying pipe and lifting up to about 50 pounds. Mr. Glinnum testified that he would attend the site every day and would observe Mr. Clemas doing physical work such as carrying pipe, drilling holes and installing pipe. In Mr. Glinnum's words, Mr. Clemas did "basically what I expected him to do as a journeyman plumber." In his view, Mr. Clemas fulfilled all of his required duties and was a good employee.

[105] Mr. Glinnum testified that Mr. Clemas was fired for apparently pushing another employee and threatening to punch him. According to Mr. Glinnum, E & P Construction does not put up with any physical abuse on a work site so they had to let him go. There was no other reason for his termination as his work was good.

[106] In response to a question from counsel. Mr. Glinnum testified that Mr. Clemas was hired as a journeyman plumber not as a foreman.

[107] In cross-examination, Mr. Glinnum indicated that in 2009, in addition to the Azzure project, E & P Construction also had a hotel project ongoing in Langley and was finishing a job in White Rock. Mr. Glinnum would move amongst the sites. He would be at the Azzure site every day, usually for an hour but sometimes he would stay longer and sometimes shorter. If he was not there in the morning, Mr. Clemas was responsible for unlocking the lock box, getting out the tools and instructing the apprentices.

[108] Mr. Glinnum was asked whether, in his absence, the on-site general contractor would speak to Mr. Clemas about issues that arose. Mr. Glinnum said that whenever issues arose, the contractor would call him directly although he agreed that the contractor might also speak to Mr. Clemas because Mr. Clemas was the lead journeyman plumber on site.

[109] With respect to the incident that led to Mr. Clemas being fired, Mr. Glinnum testified that he had a vague recollection of there being some issue about whether a water test had been completed but he could not recall the specifics. He also testified that there is no formal probation period for new employees.

The Defendants' Expert Evidence

Anthony Upton

[110] Mr. Upton is an accountant retained by the defendants to provide opinion evidence concerning the plaintiff's claim for lost earnings and to comment on the plaintiff's expert accounting report prepared by Mr. Turnbull.

[111] Counsel for Mr. Clemas challenged the admissibility of Mr. Upton's expert report on the grounds that i)

it is argument in the guise of opinion, ii) it makes conclusions of fact that are more properly within the realm of the trial judge, and iii) it includes a number of inappropriate comments that go beyond the proper scope of an expert report. While I agree that there are a number of flaws in Mr. Upton's report, I found that taken in its entirety, it did not cross the line from opinion into advocacy and I admitted it into evidence.

[112] The main thrust of Mr. Upton's report is his assertion that due to the inadequacy of the financial information available to him, he is not able to assess whether any income loss actually occurred in the years following the accident nor is he able to determine potential future income losses. He notes in particular the absence of income tax returns for Mr. Clemas in the years 2009 to 2012 and supporting business and financial records for R.C. Installations.

[113] Mr. Upton was cross-examined extensively on his report. He was asked why in several instances in his report he departed from the assumptions provided to him in the letter of instruction from the defendants' counsel. For example, despite being told by counsel for the defendants to assume that as of two years prior to the date of the accident Mr. Clemas was running R.C. Installations, Mr. Upton notes at page 5 of his report that the information he has reviewed does "not suggest that Michael Clemas was the owner of RC, in any year."

[114] Mr. Upton also noted the lack of a complete set of invoices issued by Mr. Clemas to PRL which in his view impeded his ability to assess income loss. Mr. Upton's report is dated March 19, 2013 and was written at a time when the parties did not have complete information about Mr. Clemas' earnings at PRL. Apparently, about one week before the commencement of the trial, a complete set of invoices was received from PRL. As a result, by the time Mr. Upton testified at trial, he had reviewed the invoices and done a calculation of Mr. Clemas' earnings from PRL (and one other company for which Mr. Clemas did some minor work) for the period of June 2009 to July 2012.

[115] Based on his review of the complete invoices, Mr. Upton calculated Mr. Clemas' gross income for those years as follows:

2009 (June to December)	$26,843
2010	$54,670
2011	$61,900
2012 (January to July)	$26,776

[116] Counsel for Mr. Clemas also submitted a tally of the invoices which showed slightly different figures:

2009 (June to December)	$26,658.21
2010	$56,950
2011	$61,906
2012 (January to July)	$29,040

[117] In his written submission, counsel for Mr. Clemas points out that the above figures do not include other income earned by Mr. Clemas, specifically the amount of $13,896.48 that he earned from E & P

Construction in 2009, the $1,300.00 he earned doing some small contract work in 2010 and the $1,736.00 he earned from Home Depot in 2012.

[118] Another critical opinion expressed by Mr. Upton in his report is that the 2007 reported earnings for R.C. Installations were unusually high when compared to other years, and therefore could not safely be used as the baseline for what Mr. Clemas could or would have earned in future years had he continued to operate R.C. Installations. As noted above, the 2007 figure formed the basis for Mr. Turnbull's opinion about Mr. Clemas' income loss both pre and post-trial.

Dr. Duncan McPherson

[119] Dr. McPherson is an orthopaedic surgeon who examined Mr. Clemas on July 12, 2012 at the request of counsel for the defendants. His finding are set out in a report dated July 23, 2012 that was entered into evidence. Based on his interview and examination of Mr. Clemas and his review of available records, Dr. McPherson notes in his report as follows:

> The patient has a continuing localized complaint in his low back, however, retains smooth movement ability. He has a disability in the sense of having arthritic changes in both acromioclavicular joints and he has had a significant injury to his right wrist in the past which limits the range of movement of his right wrist. Power, however, is present in his upper limbs and his hands reflect heavy manual work at this time.
>
> …
>
> The available medical records suggest that the patient had a mild low back strain which steadily improved. He has also had periodic recurrences related to doing heavy work but seems overall to have managed well and to remain physically active. One would not expect any lasting disability as a result of this motor vehicle accident.

[120] Dr. McPherson provided an addendum to his initial report dated August 13, 2012 where he states:

> We know that the patient has a flexible back within the range of what is acceptable or necessary for manual work. The patient apparently was involved full-time in plumbing work up to 2008 and the reason he stopped was because he and his father had some sort of disagreement. It perhaps can be resolved. There seems to be no reason why Mr. Clemas could not return to his plumbing occupation which is a special trade, but he may prefer to carry on in his current occupation, applying siding to homes.

[121] Dr. McPherson admitted in cross-examination that at the time he wrote both of his reports, he did not have access to either the X-Ray report dated June 13, 2012 or the CT report dated August 3, 2012. With respect to the observation in his second report that there is no reason that Mr. Clemas could not return to his plumbing occupation, Dr. McPherson agreed that pain would be a reason that Mr. Clemas may not be able to work. He suggested that pain was not a "physical" reason and he noted the absence of any restriction in movement on his examination of Mr. Clemas.

Analysis

Findings on the Accident and the Plaintiff's Condition

[122] As set out above, Mr. Clemas and Ms. Kleinsasser differ on the magnitude of the impact of the

collision and there is no independent evidence to support either version.

[123] On balance however, given the difference in size of the two vehicles, the fact that both were stopped prior to the impact, and the limited damage to Mr. Clemas' vehicle, I think that the force of the impact can only be described as minimal and that it is unlikely that it was sufficient to project Mr. Clemas' vehicle forward into the intersection to the degree that he testified.

[124] Nonetheless, there is no doubt that there was some impact and, as set out below under the discussion of causation, I find that the impact was sufficient to trigger Mr. Clemas' back problems.

[125] In terms of Mr. Clemas' condition, the evidence establishes that since the date of the accident he has suffered from low back pain of varying degrees. As noted by Dr. Purtzki, a CT scan performed in August 2012 revealed "bilateral spondylolysis at L5 with grade 1 anterolithesis of L5 over S1." Spondylolysis refers to a vertebra fracture, which can exist in many people without them being aware of it, whereas spondylolisthesis refers to slippage of one vertebra over the next. The degree of slippage is graded between 1 and 4 with 1 (which is what Mr. Clemas was diagnosed with) being the lowest level.

[126] Dr. Frobb, in his June 27, 2012 report opines that Mr. Clemas suffers from chronic myofascial pain syndrome and chronic pain disorder.

[127] Counsel for the defendants invited me to draw an adverse inference from the fact that Mr. Clemas did not call as a witness his family physician, Dr. Cheyne, who treated Mr. Clemas both before and after the accident. However, given the full disclosure of Dr. Cheyne's clinical records and the extensive medical evidence before the Court from Dr. Frobb, who assumed the role of primary treating physician, I am not prepared to draw such an inference. See *Kemle v. McRae,* 2013 BCSC 935 at paras. 87 - 89.

[128] As noted above, Dr. McPherson, the expert called by the defendants has a different view of Mr. Clemas' condition. In his opinion, Mr. Clemas suffered a mild low back strain which has steadily improved.

[129] I prefer the evidence of Dr. Purtzki and, in particular, Dr. Frobb, who has had a treating physician relationship with Mr. Clemas. Dr. McPherson's opinion is based on a relatively superficial examination of Mr. Clemas and he did not have available to him the X-Ray report dated June 13, 2012 or the CT report dated August 3, 2012 when he authored his report.

[130] That said, I have difficulty with Dr. Purtzki's assertion that Mr. Clemas has not improved over time. The evidence established that Dr. Frobb has been Mr. Clemas' primary treating physician for his back problems starting in November 2008. Following the initial consult with Dr. Frobb on November 7, 2008, Mr. Clemas underwent an intensive course of treatment involving manual therapy and neural acupuncture that continued through November, December and into early January 2009. Dr. Frobb noted steady improvement through that period.

[131] Mr. Clemas returned to see Dr. Frobb on July 2, 2009 complaining of paravertebral spasm. He received six treatments over a two week period with Dr. Frobb noting in his records that as of July 17, 2009,

Mr. Clemas had returned to his “best level”.

[132] Mr. Clemas next saw Dr. Frobb in October 2009 for four treatments, the final one on October 26, 2009 when Dr. Frobb noted that Mr. Clemas was back to his best level, that no further treatment was required and that he was discharged.

[133] Mr. Clemas returned to see Dr. Frobb on July 5, 2010 complaining of paravertebral muscle soreness. He was treated five times with Dr. Frobb again noting on July 12, 2010 that Mr. Clemas had returned to his best level.

[134] Mr. Clemas subsequently sought treatment four times in April 2011, once in August 2011 and five times in June 2012. On June 18, 2012, Dr. Frobb noted that Mr. Clemas showed an excellent response to treatment and had improved to 7-8/9 status, which Dr. Frobb testified reflects Mr. Clemas’ subjective assessment of his condition (meaning that Mr. Clemas classified himself as at a level of seven or eight out of nine, with nine representing the optimal level of pain). Thereafter, Mr. Clemas saw Dr. Frobb once in August 2012, once in September 2012 and four times in early April 2013.

[135] According to Dr. Purtzki, this treatment history does not indicate improvement over time, rather it shows a pattern of remission and relapse. With respect, I disagree. It is apparent that Mr. Clemas required extensive treatment shortly after the accident but that his condition has improved over time to the point where both the frequency and duration of treatment by Dr. Frobb has diminished.

[136] It should also be noted that during the period of early 2009 to June 2012, Mr. Clemas was employed first by E & P Construction and then by PRL and was able to function in these positions notwithstanding the fact that both involved a relatively significant amount of physical work, albeit with periodic flare-ups that required treatment.

[137] In summary, I find that Mr. Clemas suffered a low back injury that caused him considerable pain and discomfort early on. I find that his injury has improved over time but that going forward he is likely to continue to experience some ongoing back pain as well as occasional flare-ups of greater severity.

Causation

[138] The principles governing the causation analysis are well established. A helpful summary of those principles was provided by Madam Justice Martinson in *Barnes v. Richardson,* 2008 BCSC 1349 at paras. 17 - 23:

> [17] Determining the cause of loss and damage must be kept separate from the assessment of damages to compensate for that loss and damage, since different principles govern the two questions: ***A. (T. W. N.) v. Clarke***, 2003 BCCA 670, 22 B.C.L.R. (4th) 1 at para. 16. Causation concerns whether the accident caused the pre-existing condition to be activated or aggravated. The assessment of damages considers whether there was a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence: ***Hosak v. Hirst***, 2003 BCCA 42, 9 B.C.L.R. (4th) 203 at para. 10.
>
> [18] Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: ***Athey v. Leonati***, [1996] 3

S.C.R. 458 at para. 13, 140 D.L.R. (4th) 235.

[19] The Supreme Court of Canada considered the principles that apply to causation in ***Resurfice Corp. v. Hanke***, 2007 SCC 7, [2007] 1 S.C.R. 333. The “but for” test applies, except in very limited circumstances. Mr. Barnes bears the burden of showing that, but for the negligent act of the driver, the injuries of which he complains would not have occurred. In special circumstances, the law has recognized exceptions to the basic "but for" test and applied a "material contribution" test: see ***Resurfice*** at paras. 24-25 [and ***Clements v. Clements***, 2012 SCC 32 at para. 46]. Those circumstances do not apply in this case. See also ***Bohun v. Sennewald***, 2008 BCCA 23, 77 B.C.L.R. (4th) 85, a medical malpractice case.

[20] However, neither test requires that the plaintiff establish that the defendant’s negligence was the sole cause of the injury. A defendant is liable as long as he or she is part of the cause of an injury, even though his or her act alone was not enough to create the injury: ***Athey*** at para. 17.

[21] There is no reduction of liability because of the existence of other preconditions. The defendants remain liable for all injuries caused or contributed to by their negligence: ***Athey*** at para. 17. A non-tortious cause that precedes the accident but contributes to the injury, a precondition, is not relevant to causation unless symptomatic at the time of the accident: ***Larwill v. Lanham***, 2003 BCCA 629, 190 B.C.A.C. 13 at para. 22. Even if a minor impact causes the plaintiff’s symptoms, it is no answer for the defendant to say that the plaintiff was peculiarly vulnerable to injury because of a pre-existing susceptibility: ***Rai v. Wilson*** (1999), 120 B.C.A.C. 122 at para. 6, 196 W.A.C. 122.

[22] The law does not excuse a defendant from liability merely because other causal factors for which he or she is not responsible also helped produce the harm. It is sufficient that the defendant’s negligence was a cause of the harm: ***Athey*** at para. 19.

[23] The finding of a contribution outside of the *de minimis* range is a material contribution and sufficient to render the defendant fully liable for the damages: ***Athey*** at para. 44. The British Columbia Court of Appeal clarifies in ***Sam v. Wilson***, 2007 BCCA 622, 78 B.C.L.R. (4th) 199 at para. 109 that “material contribution”, as used in ***Athey***, is synonymous with “substantial connection”, as used in ***Resurfice***, and should not be confused with the “material contribution test”.

[139] Applying these principles in the context of this case, I find that while Mr. Clemas likely had a pre-existing back condition, that condition was asymptomatic at the time of the accident. I find as well that Mr. Clemas’ low back pain was triggered by the accident and that accordingly the defendants are liable for the damages suffered.

Non-Pecuniary Damages

[140] The factors that the court must consider when assessing non-pecuniary damages are well known and have been set out in a number of cases including by the Court of Appeal in *Stapley v. Hejslet,* 2006 BCCA 34 as follows (at para. 46):

a) age of the plaintiff
b) nature of the injury
c) severity and duration of pain
d) disability
e) emotional suffering
f) loss or impairment of life
g) impairment of family, marital and social relationships

h) impairment of physical and mental abilities

i) loss of lifestyle

j) the plaintiff's stoicism (a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton,* 2005 BCCA 54).

[141] In this case, Mr. Clemas relies on a number of authorities to support a claim for non-pecuniary damages in the range of $85,000-$125,000. Specifically, Mr. Clemas cites the following cases:

a) *Barnes v. Richardson et. al*, 2008 BCSC 1349

b) *Eccleston v. Dresen*, 2009 BCSC 332

c) *McKenzie v. Sidhu*, 2013 BCSC 925

d) *Slocombe v. Wowchuk*, 2009 BCSC 967.

[142] In response, the defendants rely on the following cases as supporting an award in the $40,000-65,000 range:

a) *Kailey v. Dhaliwal,* 2007 BCSC 759

b) *Lowen v. Kovacevic,* 2005 BCSC 1520

c) *Miller v. Lawlor,* 2012 BCSC 387

d) *Noon v. Lawlor,* 2012 BCSC 545

e) *Solowoniuk v. Morash,* 2000 BCSC 1840

f) *Wernicke v. Logan,* 2007 BCSC 1899.

[143] Awards of non-pecuniary damages in other cases provide a useful guide to the court, however the specific circumstances of each individual plaintiff must be considered as any award of damages is intended to compensate that individual for the pain and suffering experienced by that person (*Trites v. Penner*, 2010 BCSC 882 at para. 189). Moreover, the compensation award must be fair and reasonable to both parties (*Miller v.* Lawlor*,* 2012 BCSC 387 at para. 109 citing *Andrews v. Grand & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229).

[144] In this case, I accept that the pain associated with Mr. Clemas' lower back condition has caused a diminishment in his enjoyment of life, including his participation in various recreational pursuits. However, I do not accept that the interference is as extensive as Mr. Clemas claims so as to warrant an award of damages in the $100,000 range.

[145] In this regard, I found Mr. Clemas' evidence of his pre and post-accident activities somewhat vague and lacking in detail. Further, the claim that he has been unable to engage in any meaningful way in virtually any recreational pursuits, or activities of any kind, is inconsistent with the fact that he was able to function in a relatively physical job for almost four years after the accident.

[146] That said, the nature of Mr. Clemas' condition and its associated pain supports an award greater than the $50,000 proposed by the defendants.

[147] Taking all of the circumstances into account and bearing in mind the factors identified by the Court of Appeal in *Stapley*, *supra*, I find that a reasonable award of non-pecuniary damages in this case is $75,000.

[148] The defendants submit that the award for non-pecuniary damages should be reduced on account of the significant risk that, given Mr. Clemas' pre-existing condition, he would have become symptomatic regardless of the accident. On this point, it is useful to recall the evidence of Mr. Clemas' own medical experts. For example, Dr. Purtzki noted in her report dated August 14, 2012 that the spondylolysis and possibly the spondylolisthesis were likely present at some time before the accident. Similarly, Dr. Frobb stated in his report dated June 27, 2013 that Mr. Clemas' current condition was "superimposed on underlying chronic degenerative changes of the lumbar spine and sacroiliac joints, a condition that likely predates the motor vehicle accident in question."

[149] In *Barnes v. Richardson, supra*, Madam Justice Martinson applied a 15% reduction to the plaintiff's damages to take account of the likelihood that an unrelated event might have triggered his condition, in accordance with the "crumbling skull" principle.

[150] In my view a similar approach is warranted here given my finding that Mr. Clemas would likely have experienced similar symptoms in the future without the accident. I would accordingly reduce Mr. Clemas' damages by 15%, leaving a net award of $63,750.00.

Past Income Loss and Loss of Future Earning Capacity

[151] I will deal with Mr. Clemas' claims for past income loss and loss of future earning capacity together because both involve assumptions about what he would have earned had he not been injured in the accident.

[152] The central thrust of Mr. Clemas' claim is that he can no longer work in his chosen profession as a plumber. In support of this claim, he relies on the evidence of Drs. Frobb and Purtzki, the functional capacity evaluation of Mr. Winter and the vocational assessment of Mr. Nordin, all of which support the notion that Mr. Clemas needs to switch careers.

[153] The difficulty is that it is apparent from the evidence that Mr. Clemas was able to function as a lead journeyman plumber while at E & P Construction in 2009, albeit the position lasted only three months. Similarly, he was able to function for approximately three years at PRL, with some intermittent flare-ups with his back that required treatment from Dr. Frobb. Further, it appears that none of the experts relied on by Mr. Clemas were aware of the extent of the physical requirements of either of the E & P or PRL positions.

[154] Further, what was not adequately explained in the evidence is why Mr. Clemas could not assume a similar lead journeyman plumber role within the existing R.C. Installations business. Both Mr. Clemas and his father Richard were adamant that they would never hire a plumber from outside the family to work in the business because they could not trust the work product. As a result, Mr. Clemas is prepared to give up on the plumbing business entirely rather than adjust his expectations in a way that might enable him to continue in the business in a supervisory capacity and take advantage both of his skills and experience and the good

will of an existing business.

[155] In light of these factors, I do not accept that Mr. Clemas' current employment at Home Depot represents Mr. Clemas' maximum or optimal earning potential.

[156] Mr. Turnbull in his report assumes that beginning in 2010, Mr. Clemas would have earned $110,548 annually had he continued to operate R.C. Installations. That figure reflects the estimated net income for R.C. Installations in 2007 which is the highest net income figure by a significant margin for the years 2005-2010 as calculated by Mr. Turnbull. He then uses that figure to calculate both Mr. Clemas' past and future income loss.

[157] In my view, it is not reasonable to use the 2007 earnings as the benchmark by which to assess Mr. Clemas' potential annual income that he would have earned from R.C. Installations. Mr. Clemas' explanation for the 2007 result was that this was the first year in which he operated the business by himself and he worked extra hard to develop the business. No evidence was adduced to establish that a similar level of productivity would continue into the future.

[158] I think a better approach, keeping in mind again that the assessment of damages is not intended to be a mathematical calculation, is to average the net income for R.C. Installations over the period 2005-2008. I would note that there is some uncertainty about the accuracy of the figures used in Mr. Turnbull's report given that, as noted by Mr. Upton, Mr. Turnbull was not provided with income tax returns or other financial information for R.C. Installations. Nonetheless, Mr. Turnbull had access to the ledgers for R.C. Installations and I am satisfied that I can rely on his figures for the purposes of this assessment.

[159] Mr. Upton took issue with the attribution of R.C. Installations' net income to Mr. Clemas for the purpose of assessing Mr. Clemas' income. As Mr. Upton noted, there is no clear indication that Mr. Clemas was ever the "owner" of R.C. Installations. However, I agree with counsel for Mr. Clemas that legal ownership is largely irrelevant here where R.C. Installations was run as an unincorporated family business and where the income would flow directly to the person operating the business.

[160] Mr. Turnbull estimates the net income for R.C. Installations as follows:

2005	$84,063
2006	$73,179
2007	$110,548
2008	$46,736

[161] The 2008 figure is an annualized figure based on the income received in the pre-accident period. The average annual net income for R.C. Installations based on the above figures for the period of 2005-2008 is $78,631.50.

[162] Taking all of the above into account, I think it is reasonable to assume that Mr. Clemas would have earned on average $80,000 annually as a plumber, either self-employed at R.C. Installations or in a similar

capacity had the accident not occurred. I would note that this figure is similar to the $78,642 that Mr. Turnbull estimated that Mr. Clemas would have earned in 2009 absent the accident and the $81,988 that Mr. Turnbull projected as the net income of R.C. Installations in 2010.

[163] Turning then to Mr. Clemas' claim for past income loss, the correct approach is to compare what Mr. Clemas did earn in the period leading up to the trial, to what he would have earned as a plumber, which I have found to be $80,000 per year.

[164] Using the figures provided by Mr. Clemas' counsel, I calculate Mr. Clemas loss as follows:

Year	Total Earned	Difference (Loss)
2009	$40,551.69	$39,445.31
2010	$58,250	$21,750.00
2011	$61,906.00	$18,904.00

[165] Mr. Clemas' claim for past income loss continues through 2012 and up until the trial date of June 17, 2013. The difficulty is that Mr. Clemas quit his employment with PRL in July 2012 and, in my view, he has been under-employed ever since. Thus, it is not reasonable to use his earnings for a partial year in 2012 or his earnings from Home Depot in 2013 to calculate his loss.

[166] During the years 2010 and 2011, when he worked full time at PRL, he earned on average about $60,000, which includes some minor independent contract work. In my view, this reasonably reflects what Mr. Clemas can be expected to earn from alternate employment or in plumbing-related employment, for example in a supervisory capacity.

[167] Accordingly, I would assess Mr. Clemas' income loss for 2012 as $20,000 plus an additional $10,000 for the approximately one-half of 2013 up to the date of trial. Adding these amounts to the figures for 2009-2011, Mr. Clemas' past income loss totals $110,099.31. Adjusted for income tax, using the rate of 33.7% supplied by counsel, the result is a net award of $72,995.

[168] Turning to the claim for loss of future earning capacity, the principles governing an assessment of such a claim are well described by Mr. Justice Voith in *Brewster v. Li*, 2013 BCSC 774 at para 142:

> [142] The legal framework for the assessment of the plaintiff's future wage loss claim has been described numerous times. The decision of *Reilly v. Lynn*, 2003 BCCA 49, 10 B.C.L.R. (4th) 16 contains a useful summary of some of the principles and approaches that are to be used when assessing future earning capacity:
>
> > [100] An award for loss of earning capacity presents particular difficulties. As Dickson J. (as he then was) said, in ***Andrews v. Grand & Toy Alberta Ltd***., [1978] 2 S.C.R. 229 at 251:
> >
> > > We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: ***The Queen v. Jennings***, *supra*. A capital asset has been lost: what was its value?
> >
> > [101] The relevant principles may be briefly summarized. The standard of proof in relation to

> future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: ***Athey v. Leonati***, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: ***Athey v. Leonati***, *supra*, at para. 27, ***Steenblok v. Funk*** (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: ***Milina v. Bartsch*** (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: ***Rosvold v. Dunlop*** (2001), 84 B.C.L.R. (3d) 158, 2001 BCCA 1 at para. 11; ***Ryder v. Paquette***, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: ***Mulholland (Guardian ad litem of) v. Riley Estate*** (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: ***Milina v. Bartsch***, *supra*, at 79. In adjusting for contingencies, the remarks of Dickson J. in ***Andrews v. Grand & Toy Alberta Ltd.***, *supra*, at 253, are a useful guide:
>
> > First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse ... Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small[.][Underlining added in *Reilly v. Lynn*.]

[169] In *Morgan v. Galbraith,* 2013 BCCA 305, the Court of Appeal, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, described the approach to be taken by the trial judge when assessing a claim for loss of future earning capacity. Madam Justice Garson stated at para. 53:

> …in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach…or the capital asset approach[.]

[170] The earnings approach is generally appropriate where the plaintiff has some earnings history and where the court can reasonably estimate what the likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Gilbert v. Bottle,* 2011 BCSC 1389 at para. 233. While there is a more mathematical component to this approach, the assessment of damages is a matter of judgment not mere calculation.

[171] The capital asset approach, which is typically used in cases in which the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff: i) has been rendered less capable overall of earning income from all types of employment; ii) is less marketable or attractive as a potential employee; iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) is less valuable to herself as a person capable of earning income in a competitive labour

market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Gilbert v. Bottle,* 2011 BCSC 1389.

[172] In this case, given that Mr. Clemas has an established earnings record both pre and post-accident, I am satisfied that the earnings method is appropriate for assessing his claim. As noted, Mr. Turnbull estimated Mr. Clemas' loss under this head by comparing what Mr. Clemas earned at PRL in 2012 to what he could have earned at R.C. Installations, again using the figure of $110,548. He calculated an annual loss of $63,196 which he extrapolated until Mr. Clemas reached age 65 which resulted in a present value of Mr. Clemas' alleged loss of $815,000.

[173] I have found, however, that it is not reasonable to use the figure of $110,548 as the benchmark for assessing Mr. Clemas' loss. Rather, I have found $80,000 to be a more accurate figure of what Mr. Clemas would have earned. Further, given Mr. Clemas' pre-existing condition and the likelihood that it would have been triggered even without the accident, I think it doubtful that Mr. Clemas would have continued as a plumber until age 65. I think it more likely that he would have had to change occupations by age 60.

[174] I therefore find that Mr. Clemas will suffer an income loss annually of approximately $20,000 until age 60. Using the multiplier provided by Mr. Turnbull, which was not challenged by the defendants, I estimate his future income loss to be $204,400, rounded to $205,000.

[175] I would note that had I employed the capital asset approach to assessing Mr. Clemas' loss, I would have arrived at a similar figure. Taking account of the factors identified by the Court in *Brown v. Golaiy, supra*, I think that approximately $200,000 would be a reasonable amount to compensate Mr. Clemas for his diminished earning capacity.

Cost of Future Care

[176] Mr. Clemas' claim under this head of damages includes the cost of two types of treatment identified by Dr. Frobb as being of possible benefit to Mr. Clemas. The first is prolotherapy which involves a series of injections intended to strengthen the connective tissues of the back. Dr. Frobb's evidence was that a course of six treatments would cost $1,500 and that this treatment is not covered under the public medical services plan. The second possible course of treatment is a facet rhizotomy, which involves using an electric current to deaden the nerves in the affected area so as to reduce pain. According to Dr. Frobb, this treatment costs between $5,000-10,000 every 6 to 18 months. The cost of this treatment is covered by the medical services plan, however there is a one to two year wait time for the treatment.

[177] In my view, the cost of these treatments is not recoverable from the defendants. Neither treatment has been recommended by a treating physician. Rather, Dr. Frobb simply identifies the treatments as a possible course of action, and with respect to the facet rhizotomy, he notes that Mr. Clemas would have to be assessed by a spinal pain interventionalist to determine if he is a suitable candidate for the procedure. There is no evidence that Mr. Clemas has done anything to investigate the possibility of pursuing either or both of the treatments or that he has been assessed for suitability. Further, the facet rhizotomy is available in the public health system. While this would not necessarily disqualify someone from claiming the cost of the procedure if done privately, there would have to be evidence supporting the need for the procedure to be

done quickly. No such evidence exists in this case.

[178] I do accept that Mr. Clemas will continue to require some treatment going forward including periodic manual therapy from Dr. Frobb or a chiropractor, acupuncture and pain medication. I think Mr. Clemas' estimate of $540 on average every 12 months is reasonable. Using the multiplier set out in Mr. Turnbull's second report, which was not challenged by the defendants, results in a future care cost to age 60, by my calculation, of $5,500.00. I have limited Mr. Clemas' recovery to age 60 given my finding that he would have experienced similar symptoms in the future without the accident.

Special Damages

[179] Mr. Clemas claims damages in the amount of $2,903.19. Some of this amount is supported by invoices with the balance based on Mr. Clemas' estimates of what he spends on pain medication. He submits that his estimates are conservative. In the circumstances, I think that a reasonable amount under this head is $2,500.00.

Loss of Housekeeping Capacity

[180] Mr. Clemas submits that as a result of the injury to his lower back, and the corresponding physical limitations, he has had to cut back on housekeeping and yard maintenance work. He says that his father does much of the yard work and that his wife does virtually all of the housework. Mr. Clemas seeks an award of $20,000 under this head.

[181] In his evidence, Richard Clemas testified that Michael was never required to do much in the way of house maintenance on the house that he rents from Richard. Michael Clemas himself testified that he would cut the grass at the house and that he is now to the point that he cuts the grass about 60% of the time and that his stepson does it the rest of the time. With respect to housework, Julie Clemas testified that prior to the accident, she did most of the housework and that she continues to do so after the accident.

[182] In *Jones v. Davenport,* 2008 BCSC 18, Mr. Justice Halfyard stated, at para. 92, that the plaintiff must:

> …establish a real and substantial possibility that she will continue in the future to be unable to perform all of her usual and necessary household work. It would also need to be shown that the work that she will not be able to do, will require her to pay someone else to do, or will require others to do it for her gratuitously.

[183] Based on the evidence, I am not convinced that there has been a significant impact on Mr. Clemas' involvement in house or yard maintenance and I decline to award damages under this head.

SUMMARY

[184] In summary, Mr. Clemas is awarded the following:

a)	Non-Pecuniary Damages	$63,750.00
b)	Past Income Loss	72,995.00
c)	Loss of Future Earning Capacity	205,000.00

d) Cost of Future Care	5,500.00
e) Special Damages	2,500.00
f) Diminished Housekeeping Capacity	0
Total	$349,745.00

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

"Skolrood J."