IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20190322
Docket: M137014
Registry: Vancouver

Between:

Anthony Del Bianco

Plaintiff

And

Bing Jian Yang

Defendant

- And -

Docket: M158812
Registry: Vancouver

Between:

Anthony Del Bianco

Plaintiff

And

Florante Haban
Thyron Jay Merc Haban

Defendants

Before: The Honourable Mr. Justice Groves

Oral Reasons for Judgment

Counsel for Plaintiff:	R.K. Dewar K.P. Hyde
Counsel for Defendants in Both Actions:	I. Currie R.L. LaGroix
Place and Date of Trial/Hearing:	Vancouver, B.C. February 19-22, 25, 28, 2019 and March 1, 2019
Place and Date of Judgment:	Vancouver, B.C. March 22, 2019

[1] **THE COURT:** The plaintiff, Anthony Del Bianco, who for ease's sake I will refer to generally as the plaintiff but occasionally as Anthony Del Bianco, was injured in two motor vehicle accidents which happened on the 5th of November, 2011, and on the 7th of December, 2013.

[2] Liability for both accidents has been admitted just before trial, and as such, the trial proceeded on the basis of that admission. The issue at trial related to the damages allegedly suffered as a result of the accidents. The parties agreed that the damages are indivisible and that no percentage allocation need be made between the defendants in the two actions.

Background

[3] To give a brief background as to the plaintiff, he was born in 1984, and as such, at trial he was 34 years of age. He is married to Fania Del Bianco, who testified in this proceeding, a woman who began dating in high school in 2002, who he began living with in 2004, and who he married in 2008. As such, at the time of trial, they had been in a marital-type relationship for approximately 15 years.

[4] Since the accident, the parties have had two children, both boys, who are three and a half and two years of age at the date of trial. Fania Del Bianco is pregnant with a third child due next month.

[5] At trial the court heard from a number of experts as well as from a number of lay witnesses. As for the lay witnesses, these include, of course, the plaintiff; his wife, Fania, as mentioned; his brother and business partner Daniel Del Bianco; his close workmate or work helper Alexander Janes; an employee and long-time family friend, it appears, by the name of Oscar Ripoli; and Brendan Stone, who is the plaintiff's brother-in-law, but testified primarily as to his role as a coach and manager of a men's non-contact hockey league which the plaintiff periodically participates in.

Evidence

[6] As for expert evidence, the court heard from two economists; two orthopaedic surgeons, Dr. Peter Zarkadas and Dr. William Regan; an occupational therapist by

the name of Claudia Walker; and a functional capacity evaluator by the name of Darla Walsh.

[7] What is noteworthy in this trial is that many of the facts allegedly associated with the plaintiff's injuries are not significantly in dispute, save and except for one aspect of the plaintiff's complaints which the defendants challenge. I will deal with that in more detail later.

[8] The defence called no contrary medical or expert evidence, and no lay witnesses were called by the defence to present any alternative facts, which I will just make a note of, to never again use that term in a judgment.

[9] What is primarily not in dispute, or perhaps better put, has been proven in my view on a balance of probabilities, are a number of facts related to the pre-accident condition of the plaintiff and the post-accident limitations that the plaintiff suffers from.

[10] Prior to the accident -- and again, these accidents occurred in November of 2011 and December of 2013 -- the plaintiff was a 27-year-old active individual with a seemingly great life that he and his wife and extended family found to be of considerable joy.

[11] As noted, by 2011, he had been married to his wife, Fania, for three years and had been living with her for seven years. Fania was in the process or had recently completed her education at Simon Fraser University.

[12] The plaintiff out of high school, after some efforts at potentially becoming a mechanic, something he very much enjoyed doing prior to his injuries, and a brief one-year attendance at Douglas College taking essentially an accounting program, had found his niche in the world in what was described by several witnesses as the family business, being that of stone masonry work and stone cladding work.

[13] As the evidence unfolded before me, I learned that stone masonry work in a general sense is an apprenticeship-related program to which the plaintiff and his

brother, Daniel Del Bianco, have both moved through to become tradesmen in the area.

[14] Stone masonry work, as I understand it from the evidence in front of me, involves two distinct yet related aspects of interior and exterior finishing. The first relates to the application of tiles to surfaces, and the second relates to the application of large pieces of rock, stone or tile -- and by large, the evidence suggests anywhere between 20 and 400 pounds -- a process known as stone cladding. This stone cladding work involves primarily the attachment of large pieces of rock, notably granite and the like, to the exterior or interiors of buildings for the visual enhancement of the structure both internally and externally.

[15] The evidence primarily of Mr. Oscar Ripoli is particularly noteworthy in this regard. Mr. Ripoli has known both Daniel Del Bianco and the plaintiff since they were young men when they assisted their father and uncle, who, like them, were in the stone masonry business. This is apparently something they did as young men, perhaps in high school and thereabouts.

[16] Oscar Ripoli testified as to seeing over the years this initial contribution or assistance to family members as a high school student or perhaps as a summer job eventually moving into a circumstance where Daniel Del Bianco and the plaintiff are well known in the Lower Mainland as quality stone masons who do excellent work and whose skills are somewhat renowned. He in his evidence referred to them as the Wayne Gretzky and Mario Lemieux of the stone masonry business, a reference to star hockey players from the recent past.

[17] Oscar Ripoli's evidence in that regard is supported by the evidence of Alexander Janes, as well as supported by the context of the evidence of Daniel Del Bianco and the plaintiff as they both testified as to their progress in the stone masonry business which led to their commencing their own business initially in or about 2011, but eventually full-time in or about May of 2015. The business is now known as Corvus Ceramic Tiles Inc. ("Corvus"). Prior to their venturing into the

business on a full-time basis in 2015, it was known simply as Corvus Ceramic Tiles, an unincorporated partnership.

[18] In regards to the level of skill of the plaintiff and to a lesser degree his brother, and related to the ultimate and significantly contested argument about loss of future capacity and damages for it, it is important to note what the evidence tells the Court about this business, that of stone masonry work, and the role of the plaintiff in that business. This evidence comes from the plaintiff, his brother Daniel, and the noted Oscar Ripoli and Alexander Janes.

[19] After leaving Douglas College and, in fact, perhaps during his time at Douglas College, the plaintiff was employed by a company called C&S. This was a stone masonry company. The general manager of C&S appears to be someone by the name of Mr. Christianson. Oscar Ripoli also apparently worked for C&S.

[20] At some point, Mr. Christianson, the general manager of C&S, left C&S and set up his own business called Creo Tile. The evidence suggests that when this happened, many of the workers who had been under the supervision of Mr. Christianson at C&S joined them at Creo Tile, including the plaintiff and his brother Daniel.

[21] Essentially, it appears from the evidence, by setting up his own business, Mr. Christianson was able to take many of the skilled employees of C&S with him to this new business. Mr. Janes also worked at Creo Tile for a period of time.

[22] When the Del Bianco brothers decided to turn their evening and weekend partnership business into a full-time business entity, they left Creo Tile and with their previous partnership Corvus, now incorporated, they set up a business that then competed with Creo Tile and Mr. Christianson.

[23] History seems to have repeated itself here in that many of the employees who worked for Creo Tile eventually moved to Corvus. This included Mr. Janes, though he did have a stint in a different industry, and additionally Mr. Oscar Ripoli also joined Corvus.

[24] I am going into this history so as to show what is apparent, that people who work in this industry are transient. They can easily go from employer to employer, assuming they have skills and work relatively well. There does not seem to be any guarantee that in establishing a business, that the business in itself will develop any intrinsic value. Your value appears to be your ability to work the tools, to use a term used in this litigation. Contractors and perhaps subcontractors no doubt currently retain the services of Corvus, I find, based on the convincing evidence of Mr. Ripoli, because of the skills they know to exist in the two principals of this company, the Del Bianco brothers.

[25] Should the partnership break down, there would be little residual value in Corvus. Or if their employees choose to go out on their own, Corvus may end up simply being the two Del Bianco brothers only. One cannot help but conclude that there is very much a personal relationship or personal service-type business here in stone masonry work in the Lower Mainland which is dependent upon the skills of the principals as opposed to the reputation generally of the company. It is very much an individually oriented opportunity.

[26] With that history as context, and turning to my findings, I am struck here in the evidence about how dramatically these accidents and the injuries associated with them have affected Anthony Del Bianco.

[27] Prior to the accident, he was an extremely active young man, both in terms of work and outside activities. Though he had some knee problems and knee surgeries and was no longer playing competitive soccer, these surgeries did not slow him down from other activities or result in a significant time off work.

[28] In the soccer area, though he did not play competitively, he continued to coach his nephew in soccer, and he continued with other recreational activities, including hockey, rollerblading and the like.

[29] He was an extremely active man at home. He did much of the cleaning in the small basement suite that he and his wife reside in, including washing of the dishes,

sweeping, vacuuming and general cleanup. He cooked the vast majority of meals. Cooking appearing to be perhaps a family tradition, but particularly a passion of his. He cooked because he loved to do it, not out of obligation.

[30] He was involved with outside work at the house, a house that is owned by his mother and father. Both his parents have medical challenges of their own, and Anthony Del Bianco prior to the accident took pride in stepping up and helping his parents. Outside activities included mowing the lawn, sweeping the driveway, shoveling snow from the driveway as required, raking and general yard maintenance, but also included power washing of the house, general cleaning in regards to the exterior of the home including gutters, and the periodic occasional removal of junk.

[31] Mr. Del Bianco was able to do these activities within his home including cooking most of the meals, do his activities outside the home for the benefit of himself and the benefit of his parents, and was able to maintain an active social life and was able to work full-time prior to the accident.

[32] He and his wife were very active. One gets the impression that he would work full-time, but when he came home there was still very much of his day to continue, be it outside work, recreation, be it cooking, be it heading downtown or out generally to socialize, or working on his own on his car or on the cars of friends, an activity he very much enjoyed. Prior to the accident, Anthony Del Bianco was an extremely active, driven individual when it came to post-work outside pursuits.

[33] The post-accident plaintiff is very much different from the Anthony Del Bianco described in the evidence prior to the injuries. There is now evidence that relates to the limitations he has at work and his inability to do much because of the pain after work.

[34] As noted earlier, the chosen profession of the plaintiff is that of stone cladding installation. This involves the organizations of tools, supplies and equipment for the purpose of the job. It involves lifting and carrying either grouting materials or tools as

well as heavy stones and tiles and, for lack of a better term, sometimes manipulating these tiles in excess of two and three hundred pounds into cramped quarters involving physical exertion.

[35] It involves hammering and drilling above shoulder height. It involves numerous repetitive motions. It involves significant physical labour which, prior to the accident, the plaintiff was able to do and still maintain a very active life outside of work, but since the accident is only able to do with assistance.

[36] I am satisfied on the evidence, and I will speak more on this later, that he requires 20 percent of a full-time employee to assist him in doing his job. In other words, an assistant is required to assist him with 20 percent of that person's time in order for the plaintiff to do the job effectively to the level he did prior to the accident.

[37] Additionally, with business ownership, something the Del Bianco brothers have clearly worked toward for some period of time both before and after the accident, comes the responsibility of paperwork and administration. In the natural order of things, in other words absent the accident, it was testified to by both Daniel Del Bianco and Anthony Del Bianco that the plan was for Anthony Del Bianco, because of his one-year accounting training at Douglas College, to bear the majority of the responsibility for the accounting and bookwork side of the business. That was their deal.

[38] It seems like Daniel Del Bianco would then undertake more of the organization of the work jobs both at the site as well as arranging materials as his additional contribution to the company. That seems to be a logical breakdown of responsibility between the two joint owners.

[39] While the business was growing, Anthony Del Bianco was, despite the pain associated with his injuries, able to undertake this activity, this accounting-type activity. However, in the last year or so, and certainly in the months prior to trial, the evidence before me suggests that Anthony Del Bianco has to delegate this, and the company has had to pay for about four hours a week of work assistance in regards

to bookkeeping responsibilities which he is unable to complete on his own due to the fatigue associated with working a full day, managing his side of the business including employees, and doing the vast majority or the rest of the paperwork.

[40] Fania Del Bianco testified that she has begun since September of 2018 doing about four hours per week of work that would otherwise have been her husband's responsibility because of fatigue associated with these injuries.

[41] In regards to this circumstance, a circumstance I find to be an active, fit, engaging and energetic young man prior to the accident, and a tired, significantly hurting young man who is only able to get through his work day and not do much more, is the contrast that I find associated with these injuries related to the accident.

[42] Gone is the person who had significant energy and was able to work full-time, enjoy an active social life, exercise and keep fit, as well as maintaining a modest-sized home and a significant exterior of a home and yard all at the same time.

[43] What is left is a person who can do his job with assistance and cannot do much more. His outside sporting activities appears to consist of entertaining his children, which he can only do with some limitation, a circumstance that appears to affect him profoundly; as well as maintaining a half-time schedule, or thereabouts, playing men's non-contact hockey in an adult hockey league in Burnaby.

[44] The effect of the accidents on the plaintiff are profound in terms of his loss of enjoyment of life, in terms of the impact on his work, and the reasonable economic expectations he would have had but for the injuries suffered in the accident.

[45] Again, in regards to Mr. Del Bianco's evidence about his before and after circumstances, the evidence of all the collateral witnesses, people who knew him before and who have known him after, is completely consistent on the major points, and there has been no evidence called by the defence to challenge the assertions of the plaintiff's witnesses as to what he was like before the accident and what he is like now and the distinct difference between those two versions of Anthony Del Bianco.

[46] Despite effective attempts at cross-examination of both the plaintiff and most of his collateral witnesses, there was no major or significant challenge to the tenor of the evidence as to the incredibly active, happy and outgoing person who has, as a result of these injuries, become someone who enjoys life substantially less, is able to do significantly less both at work and at home, and who suffers from serious and constant pain on a daily basis resulting from the accidents.

[47] Turning to an analysis of Mr. Del Bianco's medical condition and the medical evidence, again it is of note that there is no contradictory medical evidence provided in this case as to the level of disability or the source of the injuries which the plaintiff complains about as being resulting from the two accidents in 2011 and 2013.

[48] I should say here that it was agreed at the beginning of trial that it was unnecessary for the court to undertake an analysis of what injuries were specifically related to which accident. It was conceded by all that liability was not in dispute, and that injuries suffered in the first accident were similar to those in the second and that there was an exasperation of the injuries in the first as a result of the second accident.

[49] In terms of the medical nature of the injuries, it is important to note the extent to which the plaintiff has sought treatment so as to eliminate any concern that he was not dealing with the injuries in an effective manner.

[50] The evidence suggests that since first the accident in 2011, Mr. Del Bianco has attended approximately 170 physiotherapy assessments and 117 massage therapy assessments. He has regularly taken prescription pain medicine as well as relying on over-the-counter medication such as Advil, Tylenol and Aleve. In addition, the evidence suggests that he has attended, as a result of the accidents, on at least 44 occasions at his general practitioner.

[51] As for his active therapy, the plaintiff testified, as did his workmate Alexander Janes, as to his regularly taking breaks for stretching and pain relief, and the plaintiff and his wife, Fania, the two people in the best position to observe this, testified that

an evening routine of the plaintiff is regular stretching, rest, and applying ice to the pain-affected neck and shoulder area.

[52] There is one aspect of the injuries alleged by the plaintiff which the defendants dispute, and that relates to what they say is the conflicting evidence in the two medical reports of Dr. Peter Zarkadas, an orthopedic surgeon.

[53] The medical reports are dated November 8, 2016, and June 11, 2018. In the first report, Dr. Zarkadas noted the current complaints to be right-sided neck and trapezial pain. I understand that trapezial pain to be pain on the muscle on the top of the shoulder to the shoulder blade. The second complaint noted in that first report is right general and left parascapular pain, which I understand to be the right shoulder blade area of Mr. Del Bianco. In the second report, there are three areas of pain noted by Dr. Zarkadas. He noted an additional complaint of right shoulder pain.

[54] It is important to note that Dr. Zarkadas was cross-examined about both his reports and he stood by his assessment in both reports that all complaints in both reports were causally related to the accident. Though he was challenged on this point, I accept the evidence of Dr. Zarkadas, as the challenge of his determination in this regard essentially fell flat. He was firm and direct in his analysis that all the complaints are related to the motor vehicle accidents.

[55] Additionally, I am satisfied that this apparent non-mention of right shoulder pain in the first report was simply an oversight either by Dr. Zarkadas in his notes or by the failure of the plaintiff, who is a lay person, to fully articulate his source of pain. I am supported in this by noting the clinical records of the plaintiff's general practitioner, which note the actual complaints of shoulder pain, which appears in a 2018 report but not the 2016 report, was noted by the general practitioner in 2016 prior to his attendance at Dr. Zarkadas.

[56] Additionally, there seems to be significant interaction between the right-side neck trapezial pain, right side parascapular pain, and the right shoulder. It is hard to imagine a non-trained medical individual, such as the plaintiff here, to be able to

articulate the distinct differences between those highly connected and related areas. Again, and specifically, there is in Exhibit 5 a pain diagram prepared by the plaintiff which encapsulates as his disclosed area of pain the entirety of the right neck, shoulder blade, and shoulder area as the constant source of pain for the plaintiff.

[57] Additionally, there is simply no alternative explanation, nor was there suggestion of an intervening factor not related to the accidents which would have caused the right shoulder pain to develop after the first attendance but before the second. And again, I note that it was reported, prior to the first attendance with Dr. Zarkadas, to a family doctor.

[58] Finally, I note Dr. Zarkadas as an experienced orthopaedic surgeon who regularly testifies in this Court. He appears to be alive to his obligation as a professional to investigate and comment on new symptoms which may have developed after the accident.

[59] I am satisfied that all of the injuries that the plaintiff suffered from as are noted in the evidence of the reports of Dr. Zarkadas, as confirmed in the evidence of Dr. Regan, are related to the accidents. Dr. Regan also confirmed that there is no history of prior right parascapular or right shoulder pain prior to the two accidents, and it is additionally his view, similar to that of Dr. Zarkadas, that the first accident initiated all the complaints in this area and the second accident aggravated these pre-existing complaints from the first.

Damages

[60] I now turn to the issue of damages. All heads of damages are in dispute between the parties, and unfortunately but perhaps not surprisingly, the plaintiff and the defendants suggest to the Court recovery for the plaintiff in sums that are vastly different from each other.

Special Damages

[61] There is, however, a limited amount of agreement. In regard to special damages, the parties have agreed that those should be awarded in the amount of

$12,089.26. I need not say more on that issue, other than to be satisfied, which I am, that the plaintiff has proven these damages on a balance of probabilities.

[62] These special damages relate to physiotherapy treatments, massage therapy treatments, medication, a modest amount of mileage to attend appointments and the like. Additionally, there is a subrogated claim for the plaintiff's prior insurer while he was employed at Creo Stone for some of these expenses, which is included in the amount awarded and agreed to.

Non-pecuniary Damages

[63] Turning to the issue of non-pecuniary damage, the plaintiff and the defendants again advance very different approaches to the determination of this loss. The defendants submit that the plaintiff is able to do everything he was capable of doing prior to the accident, but does so only with discomfort.

[64] They provide a number of authorities for a suggested range of monetary cases in which persons do physical jobs and who are post-accident able to continue to work with some pain and discomfort. These cases provided are *Lal v. Le*, 2016 BCSC 1324; *Mothe v. Silva*, 2015 BCSC 140; and *Smith v. Evashkevich*, 2016 BCSC 1228.

[65] There are also in each of these cases some recreational activities that the various plaintiffs were no longer able to undertake, a circumstance which the defence argues are similar in nature to that of Anthony Del Bianco.

[66] Essentially these are cases of continuing minor pain and discomfort; though of a permanent nature, relatively minor pain. The non-pecuniary loss awards in these cases was in the $40,000 to $50,000 range.

[67] The cases provided by the plaintiff collectively are cases in which there is, by the court's assessment, more significant injury, more significant long-term discomfort, and more considerable job disruption and personal activity disruption including an inability to undertake substantial activities more so than the cases

provided by the defendant. These cases include *Chawla v. Lambright*, 2017 BCSC 1884; *Hanson v. Yun*, 2013 BCSC 2313; *Biefeld v. Neetz*, 2016 BCSC 689; *Carver v. Or*, 2017 BCSC 1496; and *Leach v. Jesson*, 2017 BCSC 577.

[68] Having heard and considered all the evidence, I find the circumstances of the plaintiff to be much more similar to the circumstances in the plaintiff's authorities provided than the circumstances of the plaintiffs found in the cases provided by counsel for the defendants.

[69] The evidence, in my view, in this case was overwhelming that Anthony Del Bianco has suffered and continues to suffer considerable life-altering discomfort and pain which has now become chronic as a result of injuries sustained in these two accidents.

[70] The pain and the efforts to manage the pain has become a life focus for him. The pain has had a profound effect on his job, which, as a stoic individual, he continues to do but requires considerable assistance to do.

[71] His physical activity in his job is substantially more stressful than the physical activities undertaken by the plaintiffs in the cases relied upon by the defendant, and the plaintiff's pain is, I find, greater. The net effect of this, in my view, is that he suffers considerably more pain than did the plaintiffs in the defence authorities.

[72] Additionally, the effect on his non-work life has been substantial and is of considerable concern to him. Here he works. He must. He has a growing family to support. But after work, to use his words, his "tank is empty." He cannot do what he used to do. After work, that is almost it for him for the day.

[73] It is of note to me that this stoic individual, this plaintiff, became emotional when he talked about his desire for his children and his desire to be active with his children and how the injuries he suffered in the accidents has made things difficult for him to interact physically with even his young children, who I think I can fairly conclude are relatively light. Playing with them is a challenge. Pain is constant. His

ability to interact and play with his children has been hampered by his considerable pain resulting from the injuries he suffered in the accident.

[74] Additionally, there have been numerous restrictions now on what he did prior to the accident as a result of these injuries. It is not a minor disruption in his outside activities; it is an overwhelming adjustment. He no longer cooks the vast majority of the meals in his home, something he did as a passion and something he clearly enjoyed. He no longer undertakes the important role of cleaning activities in his home. He is now virtually incapable of maintaining the outside of the house as he used to, in that he cannot without pain do the yard work, including regular yard maintenance and grass cutting, and the outside home maintenance work, including power washing, that he used to do. The snow clearing he did this year because he had to get to work, he did with considerable pain, and thankfully he resides in an area where there is not much snow. He has of virtually no assistance to his aging parents in their home like he used to be, something he wanted to do for his parents and something he enjoyed.

[75] He must continuously undertake regular massage therapy treatments, and in the past, physical therapy treatments, as he has done since the accident. He is there every two weeks. Close to 300 appointments since the first accident. In addition to this passive therapy, he is regularly, more than daily, required to take breaks from work and stretch and exercise to relieve his pain, and when he gets home, stretching, icing his injured upper back and shoulder and neck is a daily requirement.

[76] The outside social activity is gone. The outside recreational activity is gone, save and except for occasional hockey. He no longer works on cars, his own and others, a passion he had, because of the physical exertion required to do so. He is never free of pain. It is constant. It affects every aspect of his life and affects everything he had wanted to do in terms of his career and his family prior to the accident. These injuries are profound, and one cannot help but conclude that as time goes on, the effect of these injuries will not only continue but will likely worsen.

[77] Though it is true that these injuries are not completely debilitating, they have had a profound effect on this individual. Considering the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34, I conclude that the injuries are serious, and because of the profound and all-encompassing nature of these injuries and their effect on this individual, there is a significant need for solace in this individual, which non-pecuniary damages are to designed to provide compensation for.

[78] Additionally, and I note, there is here a significant loss of housekeeping capacity. In some circumstances that can be a unique head of damage. The loss here, in my view, is better calculated as a non-pecuniary loss because the housekeeping work he did he did voluntarily and as a passion and as assistance to his parents, rather than as an obligation generally.

[79] I also say this because the loss relates primarily to his stoic work ethic, which causes significant pain, which results in an inability in regards to his own home, his suite in his parent's home, to assist as he did with cleaning, but also primarily relates to his inability to do meals, which, as I have noted, was one of his passions prior to the injury more so than an obligation.

[80] I also note that his inability to do outside household work as described in detail earlier is really an inability to assist his parents as he has previously enjoyed and desired to do.

[81] Having considered this as such as a component of his non-pecuniary loss, and having considered everything else noted above about the profound and all-encompassing nature of the pain and the effect it has had on his life, every aspect of it, and the constant discomfort this man suffers from, I award non-pecuniary damages in the amount of $130,000.

Past Wage Loss

[82] Turning to the claim for past wage loss. At the time the plaintiff was injured, he was working for a company called Creo Stone, as noted. Counsel for the plaintiff has calculated the loss of income as an employee of Creo Stone to be a gross loss

of $13,470, essentially a calculation of hours available to him to work which he could not work at because of the injuries. That is an after-tax loss of $9,430.

[83] In regards to this calculation, it appears that defendants' counsel has agreed with this past wage loss and agrees with the calculation, but that is only part of the claim advanced for past wage loss. The defendant only agrees with the $9,430.

[84] In regards to the submission advanced by plaintiff's counsel both as it relates to this head of damages as well as the often contentious area of loss of future capacity, I have come to the following conclusions based on the evidence. First off, despite the capably argued yet, no disrespect intended, theoretically confusing position advanced by the plaintiff, I am of the view that there is clear on the evidence a relatively straightforward way, using an economic model approach that the evidence supports, which allows the court to fairly compensate this plaintiff for losses proven while he has been self-employed both up to trial as past wage loss and going forward as loss of future capacity.

[85] Based on the believable evidence of the plaintiff and the important evidence of Mr. Janes, who testified in a direct and believable manner, it is fair conclude that as a result of the injuries suffered in these accidents, the plaintiff requires considerable assistance in maintaining his previous level of work output.

[86] As noted earlier in these reasons, the job of a stone mason, particularly the job of someone involved in stone cladding work, is particularly physically demanding. It requires the movement into place of large pieces of stone or tile which are of considerable weight.

[87] Both Mr. Janes and the plaintiff testified that approximately 20 percent of Mr. Janes' work involves providing assistance to the plaintiff, assistance which the plaintiff would not need but for the injuries suffered in the two accidents. That has been the circumstance since he began to be self-employed in his own company, Corvus. It is a circumstance that continues to today, and it is a circumstance that will

continue in all likelihood into the future, if not become more profound in the future as he ages.

[88] Additionally, and more recently as the business has grown, there has been an additional calculable loss suffered by the plaintiff which has its origins in the injuries suffered in the two accidents. As such, this does not relate in a significant way to past wage loss but is more profoundly effective on the future loss of capacity claim. That additional calculable loss, as I have phrased it, is the necessity of some of Anthony Del Bianco's book work or accounting responsibilities being done by someone else, currently Fania Del Bianco, who is now employed by Corvus.

[89] In addition to the net $9,430 in past wage loss the parties appear to have agreed Mr. Del Bianco incurred while working for Creo Stone, I would assess further past wage loss on the following basis. For the year starting in 2015, and in regards to that year, for two-thirds of that year, being May to December of 2015, through to and including 2017, the plaintiff has suffered an annual loss of $10,000 per year because of the requirement that he have assistance in his job and the requirement of paying for that assistance. This amount is calculated and proven by the evidence that Mr. Janes or someone similar provided 20 percent of their time to the plaintiff to assist him in doing his job. That 20 percent of a $50,000 employee is $10,000.

[90] What that means based on that analysis is that for 2015, there is an additional past wage loss of $6,667, being 8 of 12 months from May to December. For 2016 and 2017, there is a loss of $10,000 for each year. In 2018, there is a loss of $10,000, but I would add to that an additional sum of $1,700, being a loss calculated for the four months during which approximately $100 a week was expended, four hours at $25 an hour, for Fania Del Bianco to undertake part of the plaintiff's bookkeeping responsibilities that he was unable to do because of the pain from the months of September to December of 2018. Essentially, this calculation is an annual cost of $5,000, and for 2018, two-thirds of that is a past loss, being $1,700.

[91] So for 2018, the past loss I calculate at $11,700. For 2019, based on an annual loss of $15,000, $10,000 for Mr. Janes' help or assistance and the $5,000 a year for bookkeeping assistance, for the 62 days to trial of 2019 that loss is $2,548.

[92] What all this means in terms of mathematics is that I have concluded based on all the evidence that the past wage loss suffered as a result of the accident by Mr. Del Bianco while self-employed and prior to tax for a time period he started his business in May of 2015 to the beginning of trial in February of 2019 is $40,915. Discounting this for approximately 30 percent tax results in a net wage loss from this self-employed time period of $28,641. That amount added to the $9,430, the earlier referred to past wage loss while he worked at Creo Stone, brings a net past wage loss after tax of $38,071.

Loss of Earning Capacity

[93] Turning to loss of earning capacity. I am drawn and thankful to counsel for the plaintiff for their summary of the law provided and drafted in their argument which effectively sets out a test for the Court to consider in the area of loss of future capacity.

[94] I adopt the summary of the law in these reasons having considered it and reviewed the cases provided, including the cases of *Perren v. Lalari*, 2010 BCCA 140; *Brown v. Golaiy*, 1985 CanLII 149; *Rosvold v. Dunlop*, 2001 BCCA 1; and the other cases noted in the argument.

[95] The test for consideration of loss of future capacity I find as follows. As noted and provided by counsel for the plaintiff, first it must be determined whether or not the injury will result in a real substantial possibility that income will be lost in the future, bearing in mind that the test is not a balance of probability, but an assessment as to whether or not a real and substantial possibility of income loss exists.

[96] Secondly, the loss is assessed, not calculated, based on the likelihood of real and substantial possibilities occurring in the future.

[97] Thirdly, either the earnings approach as identified in the *Perren v. Lalari* case or the capital asset approach, the four factors set in the *Brown v. Golaiy* case, is to be used in assessing the loss.

[98] Fourthly, factual and mathematical anchors are to be used as a foundation to quantify the loss, including economic reports, the plaintiff's pre-collision employment history, training, capabilities, personality, work ethic and attitude.

[99] Next, the proven loss should be compensated in full even where the plaintiff is earning as much or more than he did prior to the accident.

[100] Next, positive and negative contingencies may be used to adjust the award.

[101] And finally, the overall fairness and reasonableness of the award needs to be considered.

[102] As indicated above, my approach in this area of loss of future earning capacity is based on an economic approach. What I have noted above is that in regards to annual loss, it is reasonable to conclude that there is now and will be in the future $15,000 of traceable losses annually suffered by the plaintiff which are directly related to the accident or accidents. Again this calculation is based on the assistance of wages from a fellow worker in order for Mr. Del Bianco to complete his work as a stone mason. It is directly calculable at 20 percent of the $50,000 employee salary, or $10,000 a year.

[103] Additionally, as noted, his role in the company vis-à-vis his brother and partner, Daniel Del Bianco, was that he was to be primarily responsible for the bookkeeping, billing and accounting side of the business. I conclude his inability to do this side of the business, the increasing and demanding nature of it as the company grows after he has done his full day of work on the tools without assistance, is a loss related to his injury. He now requires another employee to do approximately four hours of work a week which he would otherwise be able to do and was responsible to do but for the accident, and a rate of $25 an hour for that four hours a week works out to approximately $5,000 a year.

[104] Applying the economic evidence in this proceeding and the tables generated for such, the economic multiplier of a dollar loss according to the consulting economist's evidence for someone who works to age 65 years of age is $23,578. This multiplier takes into account a .5 percent real wage growth and the embedded 1.5 percent court-described discount. I accept this actuary evidence, and I also accept that it is reasonable for someone in Mr. Del Bianco's position to work to age 65.

[105] I make this determination as to his likelihood to work for the following reasons. Oscar Ripoli, a man still physically fit at age 58, is still doing the job. Secondly, Mr. Del Bianco is now 34 and he has young children. Additionally, his work does not generate any pension other than government pensions, and as such, the need to work and to save for retirement is considerable.

[106] I note he is not yet in the Vancouver housing market, though he intends to be in the near future when his parents sell their home, and that will no doubt result in him having to take on considerable financial costs and to work an extended period of time to pay for that.

[107] Finally, though his wife intends at some point to continue her education to potentially become a teacher, that is of course not guaranteed, and they have two young children, soon to be a third, which makes her attending at university for the additional training certainly impractical at this time.

[108] So for the foreseeable future, at least, it is more likely than not that he will be the primary wage earner. Additionally, his salary by Vancouver standards is modest. All these factors placed into the crystal ball that is sometimes a calculation of future lost capacity suggests to me that a usual retirement age of 65 is what Mr. Del Bianco is likely to settle on.

[109] Getting back to the multipliers, the $15,000 annual loss at a multiplier of $23,578 to age 65 creates an arguable starting point for a loss at $353,670. From

here, the court must consider contingencies and must consider overall reasonableness and fairness.

[110] Built into the multiplier already is a contingency for early demise. Based on the evidence before me, there is a possible contingency that Anthony Del Bianco may be able to move from some sort of less stressful job, perhaps as more of a supervisor, than actually, to use the term in evidence, working on the tools. That may have some effect on lessening his loss by being more supervisory than direct labour. However, that contingency in my view, considering all the evidence, is nebulous in and of itself, in that it appears from the evidence referred to earlier that in this industry, your success is based on your reputation as someone working the tools or on the tools more so than your reputation as a business itself.

[111] Additionally, there is in my view a real and substantial possibility that Anthony Del Bianco's circumstances will get worse. He is currently young, but he is suffering from considerable pain. As he ages, the effect of the chronic pain and continued disability is likely to wear on him, and he will likely require more assistance than less.

[112] In my view, in these circumstances the contingencies to be applied would suggest that the loss is likely greater than the straight economic calculation, and that that outweighs any contingency which would suggest that the loss could be less.

[113] I note as well that with future loss of capacity, we are not strictly calculating; we are assessing. I believe the evidence suggests strongly that the calculated or economic approach provides a range for consideration, and that with this all-encompassing pain there is a real and substantial possibility it is more likely than not that the losses in the future will be greater than the economic approach might suggest is a basis for an assessment. In all the circumstances, I assess loss of future capacity at $395,000.

Cost of Future Care

[114] Turning to the final issue of cost of future care. For the court to make an award for cost of future care, the court has to be satisfied that there is a medical justification for the expense and that the claim is a reasonable one.

[115] I agree with the submissions of counsel for the plaintiff, which were not significantly disputed in principle, that medical justification is not to be equated with medical necessity.

[116] As noted by the case of *Agar v. Morgan*, 2003 BCSC 630, a decision of Madam Justice Sinclair-Prowse, at para. 143 she says:

> Because the Supreme Court of Canada has restricted the damages recoverable for non-pecuniary losses, the proven pecuniary losses should be compensated in full.

[117] In the past, the plaintiff has used passive massage therapy and physiotherapy to relieve pain and to assist him in function. However, recently, his passive therapy has consisted exclusively of massage therapy.

[118] Having considered all the evidence, and noting as I do the lack of recent use of physiotherapy, I would assess the claim for cost of future care as follows. In regards to massage therapy, something recommended by the orthopaedic surgeons who examined the plaintiff, I would award massage therapy at 26 sessions per year to age 65 at a rate of $89.25 per session, being $85 plus GST.

[119] The 26 sessions per year at that cost works out to an annual cost of $2,320.50. Applying the multiplier to age 65, 22.057, brings a total award for massage therapy to $51,183.

[120] Additionally, in the area of massage therapy, I would award ten sessions per year from age 65 to 75. Less would be needed after retirement, but the pain is permanent and will continue. At $89.25 per session, inclusive of GST, for ten sessions per year works out to an annual cost of $892.50. Applying the multiplier for

ages 65 to 75 of 4.162 results in an award for massage therapy in this age frame at $3,715.

[121] I would award one year of kinesiologist sessions. This will assist the plaintiff in optimizing his ability to self-help with exercise and stretching, and provide other pain reduction techniques which will be of benefit to him. This is a one-time cost, which, according to the evidence, is approximately $1,750 for such costs. I would make that award in that amount.

[122] In terms of the house cleaning, house maintenance, and yard maintenance, I would only make these awards to age 65, it being my experience that the average person by age 65 absent injuries uses someone else to some degree to assist in these tasks.

[123] As for house cleaning, I would make an award for extraordinary, or perhaps better put, deep cleaning assistance twice a year for a total of 12 hours per year. That, at an average cost of $48.56, being $46.25 plus GST, creates an annual cost of $582.75. Applying the same multiplier to age 65 results in a housekeeping award of $12,854.

[124] As for house maintenance, I accept the argument of the plaintiff as to one hour every four weeks, which would create an annual cost of $819, being $780 plus GST. Using the multiplier to age 65 results in an award for house maintenance of $18,065.

[125] In regards to yard maintenance, again I accept the proposition advanced by the plaintiff that an annualized cost of $546, being $520 plus GST, for one hour every four weeks is a reasonable way to calculate this award. Using again the multiplier to age 65 results in an award for yard maintenance of $12,043.

[126] These claims for house maintenance, house cleaning, and yard maintenance are based on the believable evidence of the plaintiff and his wife that this year they will be moving into their own home as his with parents with whom they live intend to sell the family home and downsize.

[127] In regards to these latter three matters, there is medical justification. I have reviewed the evidence and the report of Claudia Walker as well as the reports of the two orthopaedic surgeons who have testified in these proceedings, and I am satisfied that, upon reading these reports, these modest claims for future care assistance are medically justified. The assistance in the home being medically justified in the opinion of the occupational therapist, and the more passive mobilities of care, being massage therapy and kinesiologist assistance, are recommended by the expert doctors.

[128] In regards to other claims under this head of damage advanced by the plaintiff, I have not made an award for physiotherapy, as the plaintiff appears to have stopped that passive mobility of care. In making an award for massage therapy every two weeks, there is of course an opportunity should the plaintiff choose to replace massage therapy with physiotherapy as his needs change or as they arise. There is no suggestion in the evidence that he is currently undertaking both, and as such, I would not award both.

[129] Additionally, I have not made as requested a one-time award for an annual gym or swim pass, as there is no evidence that this is something the plaintiff would undertake.

[130] I note as well that in awarding a year's sessions of kinesiology, that would no doubt include time in the gym learning advanced techniques to assist the plaintiff in dealing with his pain, and as such, an award for a gym pass would be a doubling up of an award.

[131] I note as well that the plaintiff successfully exercises and stretches and works through his pain with ice and similar therapies on his own now and in the past and is currently doing so without a required gym pass.

[132] That being said, the total of awards enumerated for cost of future care by my mathematical calculation come to $98,610.

[133] In conclusion, I summarize my monetary awards as follows: non-pecuniary damages, $130,000; net past wage loss or past earning capacity, $38,071; loss of future capacity, $395,000; cost of future care, $98,610; special damages, $12,089.26.

[134] For the reasons noted above, I have made no additional award for loss of housekeeping capacity, having considered that in my assessment of non-pecuniary damages and in that award.

[135] The damages I have assessed total $673,770.26.

Costs

[136] Turning to the issues of costs. The plaintiff is, *prima facie*, entitled to costs. Ms. Dewar, were there offers exchanged on this issue?

[137] MS. DEWAR: Yes, there were, My Lord. The plaintiff made a formal offer to settle on January 30th of $297,500, and that was not accepted by the defendants.

[138] THE COURT: January 30th of?

[139] MS. DEWAR: of 2019.

[140] THE COURT: Thank you. The plaintiff is entitled to his costs to the 29th of January, 2019, and double costs from the 30th of January, 2019. Thank you.

"Groves J."