IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McCafferty v. Jim Pattison Industries Ltd.,* 2026 BCSC 689

Date: 20260417
Docket: M164570
Registry: Vancouver

Between:

Michael McCafferty

Plaintiff

And

Jim Pattison Industries Ltd. dba Jim Pattison Lease,
Best Buy Canada Ltd./Magasins Best Buy Ltée,
Anthony Yannacopoulos,
Marilyn Lamont, and Christine Lamont

Defendants

Before: The Honourable Justice Morishita

Reasons for Judgment

Counsel for the Plaintiff:	R.A. Holness
Counsel for the Defendants:	D. Graves
Place and Dates of Trial:	Vancouver, B.C. October 6-8, 10, 2025
Place and Date of Judgment:	Vancouver, B.C. April 17, 2026

Table of Contents

INTRODUCTION

[1] The plaintiff, Mr. Michael McCafferty, was involved in two motor vehicle accidents. The first occurred on July 8, 2014 ("MVA1"), and the second on October 4, 2014 ("MVA2").

[2] Liability for both accidents has been admitted by the defendants. The parties advised that the Court need not address divisibility of injuries and apportionment as between MVA1 and MVA2.

[3] The plaintiff's position is that as a result of MVA1, he sustained a mild traumatic brain injury ("MTBI"), injuries to his neck and back, headaches, and symptoms of disrupted sleep/fatigue, stress, low mood, and anxiety. The plaintiff submits that MVA2 did not result in any new injuries, but aggravated some of his MVA1 injuries. The plaintiff says that these injuries continue, nine years after MVA1, and that the accident-caused injuries continue to impair his ability to enjoy his pre-accident lifestyle.

[4] In addition, although the plaintiff did not lose income from his regular full-time job as a security consultant, he submits that his accident-caused injuries negatively impacted his ability to pursue income-earning opportunities over and above his regular job. Going forward, the plaintiff -- who is 64-years-old -- submits that his current job is not secure and that if he loses it, he will have difficulty obtaining a similar position due to his impairments. Further, he argues that he continues to be limited in his ability to take on side jobs in addition to a regular job. Last, the plaintiff submits that he has an ongoing need for future treatment and care.

[5] The plaintiff tendered evidence from the following expert witnesses:

Name	**Expertise**	**Report Date(s)**
Dr. Mayda Lam	Family physician	Sep. 3, 2017
Dr. Tony Giantomaso	Physiatrist	Dec. 7, 2023
Mr. Darren Benning	Economist	Jul. 7, 2025

[6] In addition to testifying himself, the plaintiff called the following lay witnesses as part of his case:

Name	**Relationship**
Mr. Gary Wilson	Former supervisor
Mr. Karma Bhutia	Treating physiotherapist
Mr. Manj Sandhu	Treating physiotherapist
Ms. Kelly McCafferty	Plaintiff's spouse
Ms. Lori Devlin	Plaintiff's friend

[7] The plaintiff seeks the following award:

Non-pecuniary damages	$195,000.00
Past loss of income earning capacity	$150,982.00
Future loss of income earning capacity	$317,743.00
Special damages (by agreement)	$4,376.84
Cost of future care	$93,409.30
Total	**$761,511.14**

[8] The defendants concede that the plaintiff suffers from chronic neck pain as a result of the accidents. Nevertheless, they challenge the plaintiff's credibility and reliability and submit that the plaintiff's injuries and alleged impairments are not as severe as he claims. They submit that the evidence does not support an award for past or future loss of income earning capacity. Moreover, they argue that the plaintiff's cost of future care award should be very modest due to the dearth of evidence as to the cost and duration of the treatment items claimed.

[9] The defendants did not call any witnesses.

[10] They submit that the following award is appropriate:

Non-pecuniary damages	$90,000.00 - $110,000.00
Past loss of income earning capacity	Nil
Future loss of income earning capacity	Nil
Special damages (by agreement)	$4,376.84
Cost of future care	$9,630.00
Total	**$104,006.84 - $124,006.84**

[11] The main issues of contention between the parties are as follows: the credibility and reliability of the plaintiff, the nature and the severity of the injuries the plaintiff sustained, whether pre-trial the plaintiff would have worked more over and above his regular job had he not been injured, the likelihood that the plaintiff will suffer an income loss going forward due to his injuries, and if so, what amount, and finally, whether the plaintiff has proven the claimed future treatment costs.

[12] For the reasons that follow, I find that the plaintiff has proved that the accidents caused the following injuries: mild traumatic brain injury (resolved), soft tissue injuries to the neck and back, headaches, disrupted sleep, mood issues, and personality changes. Further, I find that the plaintiff is unlikely to experience significant and lasting improvement in his symptoms. I find that the plaintiff has not proven a past loss of income earning capacity but has established a future loss. Lastly, I find that the plaintiff is entitled to damages for cost of future care.

CREDIBILITY AND RELIABILITY

[13] The credibility and reliability of the plaintiff are central issues in any personal injury trial.

[14] Credibility and reliability are not the same thing. Credibility is concerned with a witness's veracity. Reliability, on the other hand, is concerned with the accuracy of

a witness's testimony; it involves consideration of a witness's ability to accurately observe, recall, and recount the events in issue: *Ford v. Lin*, 2022 BCCA 179 at para. 104

[15] The typical starting point in a credibility assessment is to presume truthfulness: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10.

[16] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Justice Dillon summarizes the key elements of a credibility assessment:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
>
> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB KB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[17] Additional factors that may be considered when assessing credibility include whether a witness's explanation defies logic or common sense, or if a witness is

evasive, long-winded, or argumentative in their responses: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*., 2019 BCSC 739 at para. 92.

[18] A court may accept all, some or none of a witness's evidence: *R. v. R.E.M*., 2008 SCC 51 at para. 65.

[19] The defendants concede that the plaintiff "is a hard-working family man," and not a malingerer. Nevertheless, the defendants say that it appeared clear to them that the plaintiff "was unable to give his evidence without thinking how it may affect his claim for compensation." Consequently, the defendants assert, both the severity of the plaintiff's pain and disability complaints and his evidence about his past and future work opportunities must be carefully analyzed and not accepted without reservation.

[20] In their written submissions, the defendants did not outright say they were challenging the plaintiff's credibility. However, on specific questioning from the Court, the defendants indicated that they are challenging the plaintiff's credibility and take the position that the plaintiff has been untruthful about the progress of his symptoms and his ability to work.

[21] In support of this position, the defendants point to inconsistencies between the plaintiff's evidence on direct examination and statements attributed to him in clinical records prepared by treatment providers. They further submit that, when confronted with these discrepancies, the plaintiff unreasonably refused to admit making the statements in question.

[22] Because the defendants' submissions on credibility and reliability are heavily reliant on alleged inconsistencies between the plaintiff's evidence and statements he purportedly made to treatment providers, it is useful to provide an overview of the applicable law regarding the use of clinical records.

[23] *Edmondson v. Payer*, 2011 BCSC 118, remains the leading case on the use of clinical records. At paragraphs 23–39 of *Edmondson,* Justice N. Smith sets out the following key points:

a) Clinical records are admissible at trial for limited purposes (para. 23).

b) Section 42 of the *Evidence Act* makes clinical records admissible to prove things such as a treatment provider's direct observations of the patient's medical condition, the results of tests performed or ordered by the treatment provider, and the medical advice given. It eliminates the need for treatment providers to give oral evidence of those facts, of which they are unlikely to have independent recollection. However, this does not make everything in a document admissible just because the document is admissible under the *Evidence Act* (para. 26).

c) Portions of clinical records that report statements made by the plaintiff, including the plaintiff's description of symptoms, are evidence of the fact the plaintiff made the recorded statements on those occasions. Where the recorded statements are inconsistent with the plaintiff's evidence at trial, they may be used in cross-examination to impeach the plaintiff's credibility (para. 29).

d) Unlike prior inconsistent statements of an ordinary witness, which may only be used to impeach credibility, prior inconsistent statements of a party may also be treated as admissions and accepted for the truth of their content (para. 30).

e) There are important qualifications that apply to statements contained in clinical records. These include the following:

    i. Clinical records are not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most

pertinent to the medical advice or treatment being sought on that day (para. 32).

ii. Statements in clinical records present difficulties because there can be no context. More specifically, a statement in a clinical record is only a brief summary or paraphrase of what the patient purportedly said, and there is no record of anything else that may have been said that might in some way explain, expand upon or qualify a particular treatment provider's notes (para. 34).

iii. Plaintiffs will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that they must have said what the treatment provider wrote (para. 34).

iv. Difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time (para. 35).

f) While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion. The same applies to a complete absence of a clinical record (paras. 36-37).[1]

[1] *Edmondson* was affirmed by the Court of Appeal: 2012 BCCA 114. I note, however, that the Court of Appeal stated that Justice N. Smith's comments about the absence of a clinical record do not amount to legal principles applicable to every case, but instead reflect a common sense approach to arguments raised in that specific case: para. 30.

g) The introduction of clinical records cannot be used to circumvent the requirements governing expert opinion evidence set out in Rule 11-6 of the *Supreme Court Civil Rules* (para. 38).

h) Clinical records may provide the assumed facts on which an expert may offer an opinion, including diagnosis; however, the court cannot itself use clinical records to arrive at a medical diagnosis in the absence of expert opinion (para. 39).

[24] Regarding prior inconsistent statements, the defendants emphasize the following examples.

[25] First, the defendants note an August 14, 2014 clinical record of Dr. Lam, the plaintiff's family doctor. In that record, under "subjective note," Dr. Lam writes: "[p]ain-free except for commuting two and from work on Skytrain: R neck pain and headache, but eases soon after." On cross-examination, the plaintiff first said he did not remember making that statement, but conceded it appeared contradictory. When pressed further, he denied making the statement, saying that he would never have said he was pain-free. He speculated that perhaps he was improving at the time.

[26] Second, the plaintiff was taken to Dr. Lam's October 7, 2014 clinical record, where under "subjective note," Dr. Lam writes: "[w]orking full time and coping well." When asked if he remembered making that statement, the plaintiff said he did not. When pressed further, the plaintiff qualified his answer, saying that he was not saying he did not recall making the statement, but rather that the statement had to be considered in context, and that "coping well" could mean he was coping well despite having a vehicle back into him.

[27] Third, the plaintiff was taken to Dr. Lam's March 26, 2015 clinical record, where under "subjective note," Dr. Lam writes: "starting to feel better overall." The plaintiff was asked if he remembered telling Dr. Lam this. The plaintiff's answer was non-responsive – to the effect that he was not sure of the context.

[28] Fourth, the defendants point to an inconsistency between his direct evidence that he was receiving “15 calls a month” for consulting work (but was not able to take it on due to his injuries), and his cross examination clarification that many of these calls were for free advice, that he would not have taken work that conflicted with his job at Lions Gate Risk Management, and that he could not recall one opportunity for additional work that he turned down.

[29] More generally, the defendants say there were significant inconsistencies between the plaintiff’s evidence at trial about his ability to work and documentation of such complaints in the clinical records and medical records – and more specifically, the absence of such complaints. As I will set out further in these reasons, at trial, the plaintiff testified to having difficulty doing security consulting work. In particular, his trial evidence is that it takes him longer to do his work, that he is limited in his ability to be on call after hours due to side effects of medication, that he is not able to take on additional side work, and that he may retire earlier than expected due to his injuries. However, there is no mention of these difficulties in the clinical records and/or the reports of Dr. Lam and Dr. Giantomaso. The plaintiff’s explanation is that when he visited Dr. Lam he did not like to complain and wished to remain positive.

[30] I will address Dr. Giantomaso’s report in greater detail later in these reasons, but the defendants are correct that there is no mention in Dr. Giantomaso’s report of reduced productivity, limitations in taking on call work, loss of opportunities to take on additional side work, and potential early retirement. Dr. Giantomaso’s report was somewhat dated. It was drafted on December 7, 2023 (almost two years before trial), based on an assessment completed that same day. Nevertheless, the plaintiff’s evidence on direct was that his symptoms had not changed in any real way since that 2023 assessment.

[31] When presented with this apparent incongruency, the plaintiff’s evidence was that he was not specifically asked questions at the assessment about those issues. When pressed on his evidence that his symptoms had not changed since the Dr. Giantomaso assessment – and the resulting inference that he did not have such

impairments at that time, and therefore does not have them now – the plaintiff responded that, since 2023, he has been feeling "worse and worse." The defendants characterize this as a change in evidence that was meant to justify why the plaintiff now says he needs to retire early, when in 2023 he had not mentioned that when speaking with Dr. Giantomaso. More specifically, the defendants say that such information was not conveyed to Dr. Giantomaso because at the time, that was not the case, and that it was only as the trial approached and the basis for a future income claim became an issue that it appears that the plaintiff "has made his own conclusion that he wants to retire." The defendants further say that the plaintiff's testimony that he is getting "worse and worse" is incongruent with Dr. Lam's testimony that the plaintiff's symptoms have had minimal change over the past two years. The defendants say that the plaintiff "is prepared to say his symptoms are worsening – in contrast to the objective evidence – because he believes that will increase the chances of [a] loss of future [earning capacity] award."

[32] I disagree with the defendants' position. I find Mr. McCafferty to be credible and generally reliable.

[33] Assessing credibility and reliability in personal injury cases is a challenging task. It is critical for the Court to assess the evidence in a detailed fashion. However, it is equally critical for the Court to step back and consider the issue from a higher level. In other words, the Court must assess both the forest and the trees.

[34] I will first address the inconsistencies between the plaintiff's evidence and statements in Dr. Lam's clinical records. The defendants point to three purported statements made by the plaintiff on August 14, 2014, October 7, 2014, and March 26, 2015, to the effect that he was pain-free, coping well, and feeling better overall. When presented with these potential prior inconsistent statements, the plaintiff either denied making the statements or said they were not correct or was non-responsive. Dr. Lam was not asked about these visits when she was cross-examined; however, these clinical entries, and others, were admitted into evidence as business records. Dr. Lam was a strong witness. She struck me as a thorough and diligent family

doctor. She testified that she typically asks her patients to describe their symptoms or what their main areas of concern are. She stated that she takes verbatim notes – more or less – about what the patient is telling her and then asks further questions to get relevant information. She said that after the appointment, she will edit her notes and finish up her notes in the evening.

[35] I am satisfied that the plaintiff made a statement to Dr. Lam on August 14, 2014 along the lines of being pain-free except for commuting to and from work. I am also satisfied that the plaintiff made the statements on October 7, 2014 that he was working full-time and coping well, and on March 26, 2015 that he was starting to feel better overall. However, I do not accept that any of those statements constitute admissions that the plaintiff was symptom-free at the time he made those statements, nor do I infer that the plaintiff's injuries had healed when he made those statements. In reaching these conclusions, I am mindful of Justice N. Smith's comments in *Edmondson* that clinical records are not a verbatim record of everything a patient said, and that statements in those records present difficulties because there is no context, or I would add, limited context.

[36] I note that Dr. Lam was not asked any questions about these visits in cross-examination. While it may be that she would not recall the clinical visit, 11 years after the fact, she may have been able to provide additional context after reviewing her notes. Nevertheless, her clinical records were admitted into evidence as business records. As such, the records are admissible to prove things such as her direct observations, the tests performed or ordered, and the medical advice given.

[37] Further, in limited circumstances, the court can consider prior consistent statements to rebut allegations of recent fabrication, allegations that a witness's story has been altered as a result of more recent events or motivations, or to enhance the court's assessment of the reliability of a witness's memory: *R. v. Badyal*, 2020 BCCA 127, at paras. 20-29. However, the court cannot use prior consistent statements to independently corroborate a witness's testimony: *Badyal* at

para. 28. In short, prior consistent statements can be used as a shield and not a sword.

[38] As indicated, I have found that Mr. McCafferty told Dr. Lam at the August 14, 2014, visit that he was "pain free except for commuting to and from work on Skytrain." However, there are other statements in that clinical record that are relevant, including a statement that the plaintiff tried archery over the weekend and "had to quit within 15 minutes due to neck pain and dizziness," and that he was attending physiotherapy once a week and was applying heat to his back after work, doing exercises and stretching with a ball daily. These prior consistent statements are admitted into evidence not for the proof of the contents or to corroborate the plaintiff's evidence, but rather to rebut the defendants' allegation and theory that Mr. McCafferty was largely improved shortly after the first accident and is now being untruthful about the nature of his symptoms or that his memory has been altered. Further, I note that in the clinical record, Dr. Lam noted limits in his neck range of motion, spasms in the neck (albeit minimal), and that she advised the plaintiff to avoid heavier housework.

[39] In regard to the October 7, 2014 clinical record, the defendants focus on the plaintiff's statement that he is working full-time and coping well in support of their allegation and theory that the plaintiff is not credible or reliable. However, in the clinical notes, right above those statements, Dr. Lam notes the plaintiff's statements that he "continues to have chronic [headaches] and neck pain and lower back pain," and that he continues with weekly physiotherapy "with some relief." The clinical entry indicates that Dr. Lam advised the plaintiff to continue with physiotherapy and daily exercises and recommended Advil for headaches and pain, and a trial of Tylenol for pain relief. Further, as indicated, the plaintiff testified that his statement that he was "coping well" could mean he was coping well despite having a vehicle back into him. This explanation makes sense, given that MVA2 occurred just a few days before this visit. Thus, read as a whole and in context, the clinical record makes clear that the plaintiff continued to have complaints as of October 7, 2014.

[40] In the March 26, 2015, clinical entry, the plaintiff did make a statement that he was “starting to feel better overall.” However, the clinical note records a statement that for the past two months, his back and hip were the same, that the plaintiff has headaches daily (albeit shorter in duration), that he is going to physiotherapy weekly, that he is taking Advil every night for body pains, and taking Tylenol three to four times a week for headaches. Those additional statements are admissible as prior consistent statements solely for the purpose of rebutting the defendants’ allegation and theory of recent fabrication and alteration of memory.

[41] I will next address the issues relating to what the plaintiff told or did not tell Dr. Giantomaso. At trial, the plaintiff gave evidence about the difficulties he has at work, his inability to take on additional part-time work, and his view that he will likely retire earlier than expected due to his injuries. Dr. Giantomaso’s report is brief. The body of the report is eight pages. In total, he devotes just over one page of the report to the subjective reports of the plaintiff. In this roughly one-page section, Dr. Giantomaso notes that the plaintiff reported that at the time of the accident, the plaintiff was working for a new employer as a security consultant and did not miss work. The report indicates that the plaintiff continued working but continued to have pain. Under “Educational/Vocational History,” Dr. Giantomaso notes that the plaintiff “is able to tolerate work and enjoys his work.” Under “Impairments”, which is in the opinion section of his report, Dr. Giantomaso indicates that the plaintiff discussed “ongoing activity limitation and participation restrictions in avocational, vocational and recreational realms post-trauma.” Dr. Giantomaso also notes that the plaintiff relayed that driving long hours can cause him discomfort. Dr. Giantomas concludes that the plaintiff is capable of full-time work in security consulting management, but on occasion will experience flare-ups that will require time off. Nevertheless, he says there is no indication that the plaintiff cannot continue to work.

[42] As indicated above, when asked about the apparent inconsistency between his trial evidence and the lack of such evidence in the Dr. Giantomaso report, the plaintiff’s response was that he was not asked questions about those issues. The defendants allege that the plaintiff did not provide such evidence to Dr. Giantomaso

because such evidence was not true. This is a clear allegation of recent fabrication. Addressing this issue is made difficult by the fact that Dr. Giantomaso did not testify at trial, as the defendants did not require him for cross-examination. Given the seriousness of the defendants' allegations, it was incumbent on them to cross-examine Dr. Giantomaso and ascertain whether or not he asked the plaintiff questions that could elicit the type of evidence he gave at trial about lost opportunities, reduced productivity, and the risk of an early retirement. Further, I note that Dr. Giantomaso's report is very brief. The subjective portion of the report lacks the level of detail and thoroughness that is commonly found in reports drafted by physiatrists. Accordingly, I believe the plaintiff when he says he was not asked questions that would have elicited more detailed evidence about his work capacity. Further, I also accept the plaintiff's evidence that he is not keen on complaining to his doctors and that he tries to put a positive spin on his situation. While that may impact his reliability, it does not negatively impact his credibility.

[43] Last, the plaintiff's inconsistent testimony about the number of calls he received about side work, or the incongruency between his evidence that his symptoms have stayed the same over the past few years and have been getting worse and worse do not significantly impact my assessment of his credibility. It is inevitable that there will be inconsistencies and incongruencies in a plaintiff's testimony. The issue is how many and of what significance.

[44] I am mindful of Justice N. Smith's comments in *Edmondson* at para. 35, that inconsistencies are almost inevitable when plaintiffs are asked about a number of clinical records that were made over a long period of time. In personal injury cases, plaintiffs are confronted with a demanding evidentiary burden. It is not uncommon for several years to elapse between the subject accident and the trial. The plaintiff's pre-accident and post-accident medical history is scrutinized in considerable detail. The evidentiary record often consists of hundreds of pages of clinical notes containing numerous prior statements, each of which may be put to the plaintiff in cross-examination. Despite this, plaintiffs are expected to provide coherent and consistent testimony regarding their medical and personal history over an extended period. The

plaintiff's task is often further complicated by the very injuries caused or contributed to by the subject accident. Memory deficits, sleep issues, fatigue, and changes in mood or personality are not uncommon consequences of chronic pain. Moreover, the lead-up to trial can be extremely stressful and exhausting. Accordingly, the trier of fact should be careful not to hold personal injury plaintiffs to unreasonably high standards when it comes to their ability to communicate their evidence.

[45] Moving to the bigger picture, overall, I found Mr. McCafferty to be an excellent and very credible witness. He generally gave his evidence in a matter-of-fact, understated manner. Mr. McCafferty struck me as a stoic person who tries his best not to burden others with his challenges. He presents as a person who does not like to complain, particularly to those outside of his close family. While I am mindful not to overemphasize the significance of demeanour, I note that Mr. McCafferty maintained a professional and respectful demeanour during cross-examination. There were a few instances of some defensiveness and non-responsiveness; however, the number and nature of those instances did not rise to the level of negatively impacting the plaintiff's credibility. Finally, in the context of my overall impression of him as a witness, and in light of my comments above about the difficulties personal injury plaintiffs face, the relatively few misstatements and overstatements that Mr. McCafferty made were understandable, and while they impact my assessment of his reliability to a small degree, they do not impact my assessment of his credibility.

[46] The defendants did not raise any credibility or reliability concerns about any of the other witnesses, nor did the court have any.

CAUSATION AND INJURIES SUSTAINED

Causation

[47] Madam Justice Stromberg-Stein provides a helpful summary of the applicable law in *Zenone v. Knight*, 2024 BCCA 200. She writes:

> [54] The test for showing causation is the "but for" test. It requires the plaintiff to demonstrate on a balance of probabilities that their injury would not

have occurred "but for" the negligence of the defendant: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14; *Clements v. Clements*, 2012 SCC 32 at para. 8.

[55] The "but for" test is to be applied in a "pragmatic" and "robust common sense fashion" and does not require "scientific evidence of the precise contribution the defendant's negligence made to the injury": *Clements* at paras. 9, 11, 46. Nor does it require the plaintiff to establish that the defendant's tortious act was the sole cause of the injury: *Athey* at paras. 17–19; see also *Blackwater v. Plint,* 2005 SCC 58 at paras. 78–81. In every case, there may be a myriad of other non-tortious factors which were necessary preconditions to the injury occurring. What is required is a "substantial connection" between the injury and the defendant's tortious conduct: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 23, citing *Snell v. Farrell,* [1990] 2 S.C.R. 311 at 327.

[56] In *Clements*, Chief Justice McLachlin explained:

> [10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. See *Snell* and *Athey v. Leonati*, [1996] 3 S.C.R. 458. …
>
> [11] Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable. As Sopinka J. put it in *Snell*, at p. 330:
>
> > The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept [that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" (*Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, at p. 970)]. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a "robust and pragmatic approach to the . . . facts" (p. 569).

Plaintiff's Pre-Accident Condition

[48] The plaintiff's pre-accident health is not at issue. There was no evidence that he was suffering from any physical or emotional injuries or issues in the years leading up to MVA1. Moreover, the plaintiff's long-time family physician, Dr. Lam, notes that the plaintiff had no prior history of neck or back injury or symptoms.

[49] I accept the evidence of the plaintiff and his wife, Ms. McCafferty, that in the years leading up to MVA1, the plaintiff lived an active and full life without any limitations. Specifically, I accept that in the five years leading up to MVA1, the plaintiff was engaged in a number of activities, including: coaching and training in martial arts, running/jogging (including training for a half-marathon); bike riding; boating; snowshoeing; and engaging in competitive archery. Further, around the house, the plaintiff and his wife generally split home maintenance, cleaning, and grocery shopping. In the five years before MVA1, the plaintiff did not have any limitations engaging in any activities or in completing household chores and maintenance.

Injuries

[50] The plaintiff claims the following injuries:

a) mild traumatic brain injury;

b) soft tissue injuries to his neck and back;

c) headaches;

d) disrupted sleep and fatigue; and

e) stress, low mood, and anxiety.

[51] I will address each claimed injury below.

Mild Traumatic Brain Injury

[52] The plaintiff described being stunned and disoriented immediately after MVA1. He testified that he had experienced concussions in the past, and that the symptoms he felt after the accident were similar to past experiences where he was concussed. The plaintiff described experiencing some disorientation in the days following MVA1; however, there was no evidence that he suffered any lingering effects of a concussion, such as cognitive issues, dizziness, light/sound sensitivity, or nausea.

[53] In his December 7, 2023 medical-legal report, Dr. Giantomaso diagnoses the plaintiff with suffering from an MTBI due to MVA1. Dr. Giantomaso does not set out the diagnostic criteria for an MTBI, nor does he discuss in depth how he reached this diagnosis. Nevertheless, he indicates that there was a concussive force through the body and head and that there was a brief alteration of consciousness.
Dr. Giantomaso states that there are no significant ongoing sequelae (i.e. ongoing symptoms or impacts) of brain injury; however, he does not state when the plaintiff stopped experiencing MTBI symptoms.

[54] As indicated, the defendants did not require Dr. Giantomaso for cross-examination. His opinion is unchallenged.

[55] I accept that the plaintiff suffered an MTBI. Nevertheless, I find that the symptoms and impact of the MTBI were minor and resolved by MVA2, which was three months later.

Soft Tissue Injuries to the Neck and Back

[56] The plaintiff recalls experiencing general symptoms in his entire body at the scene of MVA1. As the day progressed, the soreness increased, and he experienced symptoms in both his neck and his back. In the first week post-MVA1, the plaintiff says he experienced neck and back pain and a constant headache. The neck pain was primarily on the right side and extended from below the right ear down to the top of the right shoulder and through the right upper back/scapular area.

[57] In the month following MVA1, the plaintiff says that his body continued to be extremely sore. The neck pain persisted, regardless of what he did. He tried to manage the pain by taking painkillers and applying heat. He attended physiotherapy at the recommendation of Dr. Lam, his family doctor; however, he found that his neck pain and headaches did not improve with the treatments (although his back pain did).

[58] MVA2 occurred on October 4, 2014, approximately three months after MVA1. The plaintiff's evidence is that just prior to MVA2, he was still experiencing neck pain (which extended to the top of and back of the right shoulder and upper right back), along with right-sided headaches and lower back pain.

[59] The plaintiff describes his neck/right shoulder/right upper back pain as constant pressure that feels like his head is too heavy. Turning his head too quickly or experiencing any side-to-side jarring triggers sharp neck pain that can last about five to ten minutes.

[60] With respect to the lower back, the plaintiff says that the pain is located just above the buttocks, on the right side. He states that the pain was constant initially, but started to improve with physiotherapy. After about two weeks of physiotherapy, his back started to improve and he was feeling less pain.

[61] Immediately following MVA2, the plaintiff experienced an aggravation of the neck pain he experienced after MVA1. He describes it as a very minor aggravation that lasted about a day.

[62] The plaintiff recalls experiencing pins and needles-type sensations in his right elbow, right hand, and right fingers; however, he does not recall when.

[63] The plaintiff has engaged in numerous treatments and therapies, including physiotherapy, massage therapy, kinesiology/active rehabilitation, acupuncture, and injections. In addition, he has taken various medications, both prescription and over the counter, and uses a TENS machine regularly. As indicated, the physiotherapy and kinesiology helped with the back injury, but did not help with the neck pain or the

headaches. The plaintiff continues to do the exercises he learned from the physiotherapists and kinesiologists, which have strengthened his back, which is no longer a problem for him. Registered massage therapy significantly aggravated his pain, so he discontinued that modality after about 10 treatments. In 2018, the plaintiff was referred to Dr. Waspe, a physiatrist, who administered trigger point injections. The plaintiff saw Dr. Waspe roughly every three months for a period of about two years. The plaintiff subsequently went to MuscleMD for the trigger point injections, after which he was referred to Dr. Bamgbade, who performs more invasive ultrasound-guided injections at six-month intervals. The plaintiff testified that the trigger point injections would typically provide him with some relief from his neck pain, albeit temporarily. He states that the more invasive injections administered by Dr. Bamgbade provide him with longer-lasting relief – up to one-to-two weeks. The downside of these injections is that the plaintiff experiences significant nausea after the injections, followed by a couple of days of hiccups. He is not allowed to drive after receiving the injections. As such, his wife takes him to these appointments. She testified that they take a bucket with them on these trips, because the plaintiff sometimes vomits after the injections.

[64] Despite engaging in considerable treatments, the plaintiff says his neck, upper right back, and right shoulder pain have not improved. As indicated, the plaintiff's back pain resolved with treatment.

[65] Dr. Giantomaso's opinion is that as a result of MVA1, the plaintiff suffered a strain/sprain to his cervical spine (i.e. neck), thoracic spine (i.e. upper and mid-back) and his lumbar spine (i.e. low back). He indicates that the neck and upper/mid back injuries are chronic, while the low back injury has resolved. Dr. Giantomaso noted in his report that his physical examination findings were consistent with the plaintiff's reports of complaints. In particular, he noted trigger points (i.e. muscle knots) in the occipitalis, mid-cervical paraspinals, and upper cervicothoracic regions – worse on the right than the left side. On the day of his examination, Dr. Giantomaso did not note any lower back pain. In addition, Dr. Giantomaso noted pain with "Spurling's

maneuver" and localized pain with end range of motion, particularly on extension to the right (i.e. bending to the right).

[66] Dr. Giantomaso's opinion is that MVA2 did not cause any significant, long-lasting injuries.

[67] In her September 3, 2017 report, Dr. Lam diagnoses the plaintiff with a soft tissue injury to the neck, worse on the right. In addition, she diagnoses the plaintiff with right C4/C5 radiculopathy, causing right shoulder pain, and a soft tissue injury to the lower back. Dr. Lam's opinion is that these injuries were caused by MVA1 and that MVA2 caused a worsening of the MVA1 injuries, particularly the right neck pain. In her view, both accidents have contributed to Mr. McCafferty's injuries.

[68] Unfortunately, both Dr. Lam and Dr. Giantomaso's reports were dated – September 3, 2017 and December 7, 2023, respectively. In her testimony, Dr. Lam gave evidence about her observations and findings of the plaintiff in appointments that occurred since her report. She noted that at his 2023 and 2024 appointments, she continued to observe muscle spasm in the plaintiff's neck, right trapezius/upper back, and right shoulder area, along with tightness and/or tenderness in the right trapezius/upper back and right shoulder area.

[69] On cross-examination, Dr. Lam stated that from her perspective, overall, the plaintiff has experienced minimal change in his condition over the past few years.

[70] I find that as a result of MVA1, the plaintiff sustained soft tissue injuries to his neck, right upper back, right shoulder area (top and back of the right shoulder), and lower back. In addition, I accept Dr. Lam's unchallenged opinion that MVA1 caused right C4/C5 radiculopathy, causing right shoulder pain. I find that the lower back injury largely resolved approximately one year after MVA1, which is when complaints of lower back pain, as documented by Dr. Lam in her medical report, ended. From Dr. Lam's report, the plaintiff continued to experience occasional feelings of fatigue in the lower back up to the date of her 2017 report. By the time the plaintiff saw Dr. Giantomaso in 2023, the lower back complaints had ceased. I find that MVA2

resulted in a very brief aggravation of the neck and back injuries the plaintiff sustained in MVA1. I accept the plaintiff's evidence that he has experienced no meaningful or lasting improvement in his neck, right upper back, and right shoulder symptoms.

Headaches

[71] The plaintiff started experiencing a constant headache immediately after MVA1 for about two to three days, after which he experienced them about three times a week. When he gets a headache, they typically last 60-90 minutes. He says that the headaches are more on the right side and start at the back of the head and move to the front of his head behind the right eye. Prior to getting a special neck pillow in 2015, he would wake up in the morning with headaches. The headaches tend to be triggered if he moves his neck in a particular direction, or if he moves it too quickly.

[72] Overall, since the very initial improvement, the plaintiff has experienced very little change in his headache symptoms. The plaintiff's evidence is that since 2017, he has had headaches three times a week; however, the frequency can increase if he experiences triggers.

[73] In his report, Dr. Giantomaso diagnosed the plaintiff with chronic post-traumatic headaches, including cervicogenic headache with mixed migrainous features. In his discussion in the diagnoses section, Dr. Giantomaso indicates that the plaintiff's history is most consistent with "greater occipital neuralgia currently but in the past in the first few years after the accidents [the plaintiff] did not experience headaches with migrainous features." Dr. Giantomaso was not required for cross-examination. As such, the technical terms in the report were not elaborated on. In any event, I interpret and understand Dr. Giantomaso's opinion to mean that the plaintiff has chronic headaches caused by the neck injury, and that after the first few years post-accident, those headaches could include migraine features.

[74] In her report, Dr. Lam diagnoses the plaintiff with cervicogenic headaches.

[75] I accept the opinions of Dr. Giantomaso and Dr. Lam and the plaintiff's evidence about the onset, frequency, and severity of headaches. Specifically, I find that MVA1 caused a neck injury, resulting in the plaintiff suffering from cervicogenic headaches. I find that other than the initial improvement, the plaintiff's headache symptoms and frequency have largely remained unchanged. More specifically, I find that on average, the plaintiff experiences three headaches a week that can last between 60-90 minutes and that the headache frequency can increase if he is exposed to triggers such as sudden movements or being jarred side to side.

Other Symptoms

[76] The plaintiff testified that since MVA1, his sleep has been significantly impacted, which increases his fatigue during the day. His evidence is that he wakes up during the night due to pain. More specifically, moving or changing positions can jar his neck, which causes him to wake up due to pain. Prior to MVA1, the plaintiff says he had no issues sleeping and would typically sleep seven to eight hours a night. In the first year post-MVA1, the plaintiff typically slept three to four hours a night. In 2015, he was recommended to get a special neck pillow, which has helped. Since then, he typically gets about five hours of sleep a night. The plaintiff's evidence was corroborated by his wife. Ms. McCafferty testified that the plaintiff gets up throughout the night; however, she did notice an improvement when he changed pillows and introduced a nightly routine, which includes using a bean bag that is heated up in the microwave. Ms. McCafferty also corroborated the plaintiff's evidence that he had no issues with sleep before MVA1.

[77] Mr. McCafferty also testified to experiencing significant changes in his mood and personality following MVA1. He said that he experiences anxiety and is short-tempered with his wife and family. He said that he is not the same person he was before the accidents and does not feel optimistic about the future.

[78] Ms. McCafferty said that prior to MVA1, the plaintiff was a fun-loving, easy-going guy who always had a smile on his face. Since the accidents, she says that the plaintiff has become irritable, impatient, and does not communicate and listen

very well. She says they have struggled in their relationship over the last few years and that he is a different person.

[79] Lori Devlin, the McCaffertys' long-time friend, testified to the changes she has observed in the plaintiff. She said that prior to the accidents, the plaintiff was always "the life of the party," and someone who was quick to tell a joke and make his friends laugh. She said that since the accidents he has become withdrawn and is "not the same."

[80] Neither Dr. Giantomaso nor Dr. Lam diagnosed the plaintiff with any psychiatric disorders. Dr. Lam, whose report was very dated, indicated that the plaintiff "did not sustain any psychological injury as a result of his two accidents." In his diagnosis section, Dr. Giantomaso noted that the plaintiff had a "history of low mood and stress issues related to work."

[81] There was evidence from both the plaintiff and Dr. Lam that the plaintiff has been prescribed and is taking Cipralex, which she testified is a medication for anxiety and/or depression. Dr. Lam briefly gave some evidence about the reason why the plaintiff was taking the medication; however, given this opinion evidence was not in her report (and thus no notice was given), it is not admissible. That said, the fact that the plaintiff takes the medication is relevant to another issue, which is addressed further in these reasons.

[82] While there is no admissible opinion before me that the plaintiff suffers from a psychiatric disorder or sleep disorder due to the accidents, I find that as a result of the injuries caused by the accident (specifically, chronic neck/upper back/shoulder pain and headaches), the plaintiff experiences secondary symptoms of decreased sleep (and associated fatigue) and mood disturbance, including personality changes.

Prognosis

[83] Dr. Giantomaso's opinion is that the plaintiff has met "maximal medical improvement" and that it is "extremely unlikely that any further permanent resolution of symptoms will occur." He states that because the plaintiff has met maximal

medical improvement, he will “continue to experience chronic pain to some degree permanently into the future.” Dr. Giantomaso makes recommendations for future treatment, which if followed, may decrease the plaintiff’s pain and increase his function in the future; however, he cautions that his recommendations are part of a long-term pain management strategy and should not necessarily be considered curative.

[84] Dr. Lam’s opinion is that because three years had passed (as at the date of her report), the plaintiff was unlikely to attain complete recovery from his injuries and would have chronic right neck and shoulder pain. She notes, however, that the plaintiff should be able to gradually increase his activity tolerance.

[85] Dr. Giantomaso was not requested for cross-examination. Thus, his opinion on prognosis was not challenged. Dr. Lam was not asked any questions in cross-examination about her prognosis.

[86] I accept the experts’ opinion on the prognosis of the plaintiff’s injuries and symptoms. Specifically, I find that the plaintiff is unlikely to experience any significant and lasting improvement in his injuries and symptoms. In other words, the symptoms he described above, which I accept, will likely continue with a similar frequency, quality, and severity for the rest of his life. The plaintiff has been diligent with his treatments and in following the advice of his medical practitioners. Dr. Giantomaso does make recommendations for future treatments, but notes that these are more aimed at long-term management.

[87] The parties made no submissions about contingencies for improvement or worsening of symptoms. In any event, I find that based on the evidence before me, whether the plaintiff’s condition will improve with further treatments or time, or worsen, is speculative.

NON-PECUNIARY DAMAGES

[88] In *Langford (City) v. Matthews*, 2024 BCCA 214, Justice Horsman (for the Court), helpfully summarizes the applicable law as follows:

> [44] Non-pecuniary damages are intended to compensate the plaintiff for pain and suffering caused by their injuries and the consequences of those injuries, including the loss of amenities and enjoyment of life: *McCliggot* at para. 43. The amount of an award for non-pecuniary damages is determined by a functional approach that does not depend solely on the gravity of the injury, but also on the circumstances of the particular plaintiff: *McCliggot* at para. 44. While an assessment of comparator awards is important, damage awards in each case will vary to meet the specific circumstances of that case: *Howes v. Liu*, 2023 BCCA 316 at para. 26. In British Columbia, the assessment of non-pecuniary damages is generally guided by the non-exhaustive list of factors set out by this Court in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. They include the plaintiff's age, the nature of the injury, the severity and duration of pain, level of disability, emotional suffering, loss or impairment of life, impairment of family, marital and social relationships, impairment of physical and mental abilities, and loss of lifestyle.

[89] The plaintiff claims non-pecuniary damages of $195,000.00 (including an award for loss of housekeeping capacity), and submits that the following cases are analogous:

a) *Cross v. Peaker*, 2025 BCSC 344 ($195,000.00); and

b) *Manoharan v. Kaur*, 2016 BCSC 692 ($170,000.00 or $217,684.00 adjusted for inflation).

[90] The defendants argue that non-pecuniary damages in the range of $90,000.00 to $110,000.00 are appropriate, and rely on the following cases:

a) *Suico v. Liu*, 2025 BCSC 114 ($85,000.00);

b) *Meyers v. Hall*, 2025 BCSC 1751 ($105,000.00); and

c) *Henry v. Fontaine*, 2022 BCSC 930 ($80,00.00).

[91] The cases relied on by the plaintiff are not overly assistive. The plaintiff in *Cross* was much younger than Mr. McCafferty and suffered more significant injuries,

including injury to the shoulder joint and more significant and frequent headaches. The *Manoharan* case is too dated to consider.

[92] Similarly, the cases relied on by the defendants are also not overly assistive. The plaintiff in *Suico* suffered less significant injuries than Mr. McCarfferty. In *Meyers*, the plaintiff's condition had significantly improved by the time of the trial. The injuries sustained by the plaintiff in *Henry*, and the resulting impact appear to be fairly analogous to this case; nevertheless, I am mindful that the Court in that case had concerns about the plaintiff's reliability. In my view, those concerns likely had some impact on the non-pecuniary award, which in my view reflects the lower end of the likely range. Further, I note that while comparable cases can be helpful in assessing non-pecuniary damages, they only serve as a rough guide; each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189; *Hau v. Patterson*, 2020 BCSC 1069 at para. 75.

[93] After considering the *Stapley* factors and the circumstances of this case, I am of the view that the plaintiff is entitled to non-pecuniary damages that are at the upper end of the applicable range. I reach this conclusion for the following reasons.

[94] The plaintiff described himself as a stoic person who does not like to talk about his injuries. On cross-examination, when trying to explain some inconsistencies, the plaintiff implied that he would not necessarily share with his doctors the full extent of his issues, particularly as it relates to work limitations. He said that it is in his nature to respond to a question about how he is doing by saying he is doing well. The defendants argued that it "makes no sense" for a person to withhold such information from their doctors in order to appear stoic. As indicated, they submit that the plaintiff's lack of complaints to his family doctor are not due to him being stoic, but rather, him being honest to the doctor at the time and being dishonest with the court at trial. I do not accept this argument. As indicated, I have found the plaintiff to be credible. I find him to be an extremely stoic person. After considering all the evidence, I find that the plaintiff, in fact, minimizes and downplays the severity of his injuries and pain. The plaintiff described his injuries and his pain in

an understated, matter-of-fact fashion. Some of his evidence about his injuries and pain was somewhat non-specific. I did not infer from this that his injuries were not significant. Rather, in my view, it was indicative of a person who tries as best they can not to focus on their injuries, and as someone who tries to avoid talking about or describing their injuries to other people.

[95] The plaintiff has been diligent in his treatment and has followed the advice of his treating medical professionals. The plaintiff has received injections – both trigger point injections and more invasive ultrasound-guided injections. Both types of injections only provide temporary relief. The ultrasound-guided injections have significant side effects, including nausea and hiccups. In my view, the plaintiff would not be continuing to pursue injections if his injuries and their impact were not significant. He does not strike me as a person who would pursue rather invasive medical treatment that comes with side effects unless his pain was significant. I note that the plaintiff has generally been conservative and reasonable with his treatments. For example, he attended physiotherapy and kinesiology, learned the exercises and stretches and proceeded to complete them on his own. In other words, the plaintiff has not gotten into a pattern where he has been over-relying on treatments.

[96] The plaintiff has experienced little to no improvement in his neck/upper back/shoulder symptoms or his headaches in over ten years. The medical opinion is that he is unlikely at this point to experience sustained improvement and that the focus going forward is on managing his chronic pain.

[97] The plaintiff's injuries and symptoms have had a consequential effect on his life. I accept the evidence of the plaintiff and his wife that prior to MVA1, the plaintiff was a very active person. I accept the plaintiff's evidence that pre-accident he engaged in numerous recreational activities, including martial arts (practising and coaching), competitive archery, jogging, assisting with the care of his daughter's horse, bike rides, winter sports such as snowshoeing and cross-country skiing, and hiking. The plaintiff and his wife did not overstate the activities he was engaged in pre-accident. With the exception of archery, the plaintiff's recreational pursuits and

activities were informal, and he was not pursuing any one activity on a regular basis or a higher-than-average level. Nevertheless, I am satisfied based on the evidence that pre-MVA1, the plaintiff and his family were very active people.

[98] There are some gaps in the evidence about the plaintiff's activities and recreation after the accidents. He testified that between MVA1 and MVA2, he was trying to return to his pre-MVA1 level of activity. He said that he tried everything, including archery and golf, but without much success. He tried to go on long walks, but was only able to go on shorter walks. He indicated that all his avocational activities were affected, and then when he tries to be more active, he gets more pain and pays for it for the next day or two. The plaintiff's evidence is that he gained about 35 pounds since MVA1, which he attributes to not doing the activities he was doing before the MVA, specifically martial arts, archery, and walking. The plaintiff also testified that when he travels with his wife and/or friends and family, he is significantly limited in the activities that he can do. He will often stay in the hotel or resort when family and/or friends go on excursions or activities such as hiking or boating.

[99] Ms. McCafferty's evidence about the plaintiff's activity level pre-accident was consistent with the plaintiff's. Ms. McCafferty gave evidence of the changes in the plaintiff's activity level post-accident. She got emotional when she noted that the plaintiff had missed out on a lot of the activities they used to do together as a couple or as a family. She stated that while they do go on walks together, they are much shorter in duration. She testified that they no longer hike together. If they are travelling or going on a family hike, the plaintiff will wait for them at the bottom of the hike. He is limited in the type of bike rides that they do – they need to go on flat trails and/or he will only go part-way. When they travel, he will not participate in more strenuous activities and cannot tolerate longer periods of walking. The plaintiff always needs to know how long simple outings are and have a game plan in place if he needs to stop and go back to the hotel. Ms. McCafferty said that if the plaintiff is in a car too long or has done something to aggravate his symptoms, he will move more slowly or in a more rigid manner and will grimace and become irritable.

[100] Ms. Devlin's evidence about the plaintiff's activity level on trips was consistent with that of the plaintiff and Ms. McCafferty. Specifically, she noted that the plaintiff does not participate in physical activities when they travel together. He does not go on excursions, and he often stays back at the hotel or remains on the beach, while everyone else does something more physical. This was not the case prior to the accident, when, according to Ms. Devlin, the plaintiff was always very active and always playing with the kids and going on all the rides.

[101] I accept this evidence of the plaintiff, Ms. McCafferty, and Ms. Devlin.

[102] Last, the plaintiff's injuries have had a significantly negative effect on his sense of self-worth and his relationship with his spouse and daughters. Both the plaintiff and Ms. McCafferty noted that the plaintiff relies on others, including Ms. McCafferty, to do more physical tasks around the house. For example, the plaintiff noted that he does not do much of the housework any longer and discussed an occasion where he could not help move a dresser they sold onto the back of the purchaser's truck – and had Ms. McCafferty assist instead. Ms. McCafferty testified that the plaintiff feels embarrassed and, at times, humiliated for not being able to do physical tasks.

[103] Overall, Ms. McCafferty said that the plaintiff's injuries have had a huge impact on the family. Mr. McCafferty has less patience with his family, is irritable, and has become a different person. Ms. McCafferty said she is missing out on having her husband and their daughters are missing out on having their dad – and that the plaintiff has, in turn, missed out on a lot.

[104] The plaintiff also seeks an award for loss of housekeeping capacity as part of his claim for non-pecuniary damages.

[105] In *Prasad v. Ross-Smith*, 2023 BCSC 513 at para. 129, Justice Basran provided a helpful summary of the principles which apply to the loss of housekeeping capacity:

> The principles applicable to the loss of housekeeping capacity are:
>
> - Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
> - A plaintiff who has suffered an injury that would make a reasonable person in the same circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
> - Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.
> - As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
> - Evidence of the loss of housekeeping capacity is provided by the work being performed by others, even if done gratuitously.
> - Evidence of a plaintiff's incapacity resulting in actual expenditures, or of family members or friends routinely undertaking functions that would otherwise have to be paid for, supports a separate award of pecuniary damages.
> - "[…] pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities."
>
> See: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; *Kim v. Lin*, 2018 BCCA 77 at paras. 28–34; *Riley v. Ritsco*, 2018 BCCA 366 at para. 98; *McKee v. Hicks*, 2023 BCCA 109 at para. 112.

[106] I accept the plaintiff's evidence that he has difficulty with most housework. I also accept the plaintiff and Ms. McCafferty's evidence that prior to MVA1 they split the household chores and that post-accidents, Ms. McCafferty has been doing most of the work.

[107] Dr. Lam's report does note that the plaintiff has some difficulties with housework, although she noted generally that she expected his tolerance level for activities would improve in the future, with fewer flares of symptoms after increased

activity. Nevertheless, she noted that he would likely need to continue to pace his activities for some time, possibly another two years (from the date of the report). The plaintiff's condition has not improved since Dr. Lam's report, thus I find that the plaintiff will likely need to continue to pace his activities, including housework, for the foreseeable future.

[108] The plaintiff is awarded $180,000.00 in non-pecuniary damages, which includes an award of $25.000.00 for loss of housekeeping capacity.

PAST LOSS OF INCOME EARNING CAPACITY

[109] In *Lamarque v. Rouse*, 2023 BCCA 392, Justice Horsman (for the court), helpfully summarizes the applicable law as follows:

> [29] An award of damages for loss of past earning capacity compensates the claimant for the loss of the value of the work they would have, not could have, performed, but were unable to perform due to the accident-related injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The standard of proof for past hypothetical events is: whether there is a "real and substantial possibility" that the events would occur: *Grewal v. Naumann*, 2017 BCCA 158, at para. 48; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. If the claimant establishes a real and substantial possibility, the court must then determine the measure of damages by assessing the likelihood of the event: *Grewal* at para. 48.
>
> [30] In many cases, a claimant's actual lost income will be the most reliable measure of a loss of earning capacity. However, there is no hard and fast rule that only loss of actual income is compensable. It must be remembered that it is not the actual lost income that is compensable, but the loss of capacity: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. An award of damages for past loss of earning capacity compensates a claimant for any pecuniary loss resulting in an inability to work, and evidence supporting such loss can take different forms. In *Ibbitson*, for example, the plaintiff, who worked in the forest industry, maintained his pre-accident level of income by working longer hours. Thus, he was found to have suffered a pecuniary disadvantage that was compensable through an award of damages for loss of earning capacity: *Ibbitson* at paras. 20–21.

[110] At the time of both accidents, the plaintiff was employed with the City of Vancouver as a Portfolio Security Manager. The plaintiff started this position less than three months prior to MVA1, on April 28, 2014. When MVA1 occurred, the plaintiff was earning $40.05 an hour, working 35 hours a week.

[111] The plaintiff was born on February 8, 1962. At the time of MVA1, he was 52-years-old.

[112] The plaintiff is a highly qualified and very experienced security and law enforcement professional. He completed a number of programs at the Justice Institute of British Columbia, including the Youth Custody Worker Employment Readiness Program (1999), the Deputy Sheriff Employment Readiness Program (1999), and the Adult Corrections Officer Employment Readiness Program (1999). In addition, he worked as a sheriff for the BC Sheriff Service for over a decade. During his time with the BC Sheriff Service, he gained significant expertise in developing threat management programs and operational plans for high-profile/high-security cases and events. Towards the end of his time with the BC Sheriff Service, the plaintiff served as the Senior Intelligence Coordinator with the Integrated Threat Assessment Unit.

[113] Although he loved his time in the Sheriff Service, in 2012 the plaintiff was approached by the director of integrated protection services of Vancouver Coastal Health Authority, and asked to come work with them. The position offered a significant pay raise from his sheriff position. The plaintiff's daughter wanted a horse, and the plaintiff decided to make a career change in order to benefit his family financially. In the new role, the plaintiff was responsible for corporate security, including assessing security threats at the health authorities and developing operational plans. He had four people reporting to him. The plaintiff ultimately left this role in 2013, taking a buyout package, as a result of a bullying complaint he made against his director.

[114] After his position with the health authority ended, the plaintiff found a position with the City of Vancouver that was posted online. The plaintiff understood that there were about 65 applicants for the position, of which 10 (including himself) were shortlisted. As part of the interview process, he was asked to do a security assessment of a City-owned property and present his findings to an interview panel. The plaintiff was offered a job shortly after his presentation. The plaintiff started

working in the City's corporate security department on April 28, 2014. In his role as Portfolio Security Manager, the plaintiff was responsible for doing threat risk assessments of City properties, including civic buildings, theatres, firehalls, police stations, and community centres.

[115] Gary Wilson was the City's Corporate Security Manager – and the plaintiff's immediate supervisor from 2014 to September 2015. Mr. Wilson was one of the people who interviewed the plaintiff. He testified that the report the plaintiff drafted as part of the application process was "exceptional," and the best he had seen by anyone at that stage. Mr. Wilson said that the plaintiff was responsible for managing non-frontline security risk for a portfolio of city properties, which included completing risk assessments, conducting investigations after incidents and making recommendations on improving and mitigating security risks, interviewing and meeting with city employees at various properties, and working on security plans for meetings and events. Mr. Wilson said that the plaintiff was an excellent employee. He said the plaintiff instilled confidence in other people, was very organized, was personable and approachable, and had a high level of expertise. Mr. Wilson said that the plaintiff was "amazingly diligent" and had the nickname "Machine" because of his strong work ethic, dependability, and ability to work for long periods in order to get tasks completed.

[116] According to Mr. Wilson, the plaintiff's regular hours were 8:00 a.m. to 4:00 p.m., but there was some expectation that the plaintiff and others in similar roles would be available to field a call in the middle of the night. Further, Mr. Wilson testified that travel to work sites was integral to the plaintiff's work, as it was important to attend City buildings to attend meetings and to build relationships with people working at these buildings.

[117] The plaintiff did not lose any income from his work with the City of Vancouver following MVA1 or MVA2; however, he testified that his accident injuries were aggravated by and impacted his work. Specifically, the plaintiff said that he had difficulty with prolonged sitting and standing, which required him to take more

breaks, which reduced his productivity. In addition, he noted that his headaches would get triggered by long periods of sitting or standing, sharp movements, or when jarred while driving. The plaintiff also said that his injuries limited the amount of walking he could do, which impacted his ability to conduct security assessments. The plaintiff testified that he did not miss work after the accidents because his job with the City was new, and as such, he did not have any sick time. Further, he said that he did not want to risk losing the job and felt that he could not just "not go in" because of his injuries. The plaintiff said that Mr. Wilson and the City were aware of his injuries and were very accommodating. The City had an ergonomic assessment completed and purchased him a sit-stand desk. In addition, according to the plaintiff, Mr. Wilson would allow him to go home early if his symptoms were bad.

[118] The plaintiff testified that he had none of these issues before MVA1.

[119] Mr. Wilson testified that after MVA1, he noticed that the plaintiff's neck mobility was impacted. Specifically, the plaintiff would not turn his head to have a conversation, but rather would turn his entire torso. He also noted that the plaintiff walked in a stiff fashion that looked laboured, and that he would have to stand up periodically to stretch. Mr. Wilson stated that the plaintiff's attendance at work was not impacted by the accidents. He said that the plaintiff was a "professional" and that he just "powered through," but noted that the plaintiff often did not look comfortable.

[120] I accept the evidence of the plaintiff and Mr. Wilson about the plaintiff's difficulty with work-related tasks and reduced productivity.

[121] Mr. Wilson left the City of Vancouver in September 2015, following a conflict with his supervisor. Unfortunately for the plaintiff, the City hired the plaintiff's former supervisor at the health authority to replace Mr. Wilson – the supervisor that the plaintiff made a bullying complaint against. The plaintiff knew that he could not work for that person and advised the City. The plaintiff took vacation and banked sick time from May to June 2016, while the City figured out what to do about the situation. The City ultimately offered the plaintiff a buyout package, which he accepted. His last day with the City was June 21, 2016.

[122] The plaintiff started looking for work after he was let go from the City. Through past colleagues, he was put in touch with a private security and risk management company called Lions Gate Risk Management Group. The plaintiff was asked to do a risk assessment of a Lions Gate client's building. After submitting the assessment, Lions Gate started to give the plaintiff work on a part-time basis in the fall of 2016. In March 2017, the plaintiff was offered and accepted a full-time position with Lions Gate as a Senior Security Consultant. His base salary was $90,000.00. The plaintiff's work at Lions Gate was fairly similar to his work at the City. His duties primarily involved completing risk assessments of properties and facilities and conducting privacy impact assessment consultations with clients. The plaintiff testified that shortly after he started working for Lions Gate, he let the principals know about his accident injuries, and advised that because of those injuries, he would be unable to do any of the executive protection work that Lions Gate engaged in.

[123] The plaintiff testified that Lions Gate was very accommodating of his injuries. His work hours were flexible, and he was able to work from home quite often, which helped him manage his symptoms. The plaintiff has not missed any time or lost any income from his work at Lions Gate due to his injuries. However, he says that his productivity is reduced and that he spends more time doing work that he could have completed in less time pre-accident.

[124] Lions Gate was bought out by Scarlett Security & Risk Group. Two years after the purchase, Scarlett implemented a number of changes, including changing the business model and letting go of most of the employees, including the plaintiff's supervisor and that supervisor's replacement. In April 2025, the plaintiff was offered, and he accepted a promotion as Director of Risk Management. The promotion came with a $25,000.00 salary increase. There are only three people at the office now, including the plaintiff. Much of the work is contracted out. I will return to the potential implications of these changes when I address the plaintiff's claim for future loss of income-earning capacity.

[125] The plaintiff's claim for past loss of income-earning capacity is based on the argument that but for his accident injuries, he would have taken on part-time work in addition to his full-time day job. The plaintiff grounded this argument on the plaintiff's evidence that prior to MVA1, he did side work, including security work in the film industry. The plaintiff submits that had he not been injured, he would have continued this work, or taken on other security or risk assessment work. In support of this argument, the plaintiff points to 2012 and 2013, when he earned about $1,674.14 and $1,763.47, respectively, in income over and above his day job, which counsel says is attributed to security work in the film industry. Plaintiff counsel says that this side work accounted for about 2% of the plaintiff's earnings in those years and that, but for the accidents, the plaintiff would have earned about $5,000.00 a year for this side work, which amounts to a past loss of $56,250.00.

[126] In addition, the plaintiff says he would have earned 10% more in earnings from Lions Gate from 2017 to trial had he not been injured, which amounts to $55,730.00.

[127] In total, the plaintiff claims $111,980.00 in past loss of income-earning capacity.

[128] Overall, I find that the plaintiff has established a real and substantial possibility of past loss of income-earning capacity. I accept that his ongoing neck injury and headaches are aggravated by prolonged sitting, standing, and travel by car and rapid transit. I also accept that the plaintiff is required to take more breaks due to his injuries and has reduced productivity.

[129] But the inquiry does not end there. I must determine whether the loss of capacity resulted in a pecuniary loss. The evidence did not satisfy me that there was any likelihood that the loss of capacity resulted in a past income loss.

[130] There was limited evidence about the plaintiff's work history in the film industry. The documentary evidence is scant – two T4s issued in 2013 from film-related companies totaling $1,763.47. There were no T4s from the film industry for

2012. Instead, the plaintiff assumes that the difference between the T4 income listed on his tax returns and the T4 amount from his day job was from income earned in the film industry. The plaintiff's evidence about how much work he did with the film industry prior to MVA1 was vague. I do not say that as a criticism of the plaintiff – it was a long time ago. However, there was no evidence from anyone in the film industry about the availability of work since 2014 and the potential earnings. In short, there was insufficient evidence for the court to conclude that there was any likelihood of the plaintiff engaging in this work absent the accidents and if so, what the likely earnings would have been.

[131] Similarly, the plaintiff has not established any likelihood that he would have earned more income from Lions Gate absent the accidents. The evidence is that the plaintiff was accommodated by sympathetic employers and able to complete the duties of his job – namely conducting risk assessments. The plaintiff testified that one line of Lions Gate's business was executive protection. The plaintiff testified that he was unable to do this work due to his injuries; nevertheless, there was no expert opinion evidence that the plaintiff's injuries prevent the plaintiff from engaging in executive protection work. Further, there was insufficient evidence about the availability of that type of work at Lions Gate, over and above the plaintiff's regular duties and work. In sum, the plaintiff failed to provide sufficient evidence to support this claim beyond speculation.

[132] The plaintiff further alleges that, absent the accidents, he would have earned more income by taking on security/risk consulting work over and above his day job. Because of his reduced productivity, I accept that there was a real and substantial possibility that the plaintiff was less able to complete side work in the security/risk consulting field; however, there was insufficient evidence at trial as to the availability of such work to the plaintiff. In other words, the plaintiff was unable to establish any likelihood of a pecuniary loss.

[133] Accordingly, I decline to award the plaintiff any damages for past loss of income-earning capacity.

FUTURE LOSS OF INCOME EARNING CAPACITY

[134] In *Lamarque*, Justice Horsman again provides a helpful summary of the applicable law. She writes (for the court):

> [37] The central task for the court in assessing a claim for loss of future earning capacity is to compare the claimant's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157. As with past hypothetical events, future hypothetical events need not be proven on a balance of probabilities. A hypothetical future possibility will be accounted for as long as it is a real and substantial possibility. If a claimant establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event: *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., dissenting on other grounds, in *Grewal* at para. 48.
>
> [38] A diminishment in earning capacity does not justify an award of damages for future loss of earning capacity in the absence of evidence that the impairment will result in a pecuniary loss. A claimant must always prove there is a real and substantial possibility of a future event leading to an income loss. If the claimant discharges that burden, then the loss must be quantified based on either an earnings approach or a capital asset approach. The earnings approach is more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at paras. 4 and 32.
>
> [39] In *Rab*, this Court set out a three-step process for considering claims for loss of future earning capacity: (1) does the evidence disclose a potential future event that could give rise to a loss of capacity?; (2) is there a real and substantial possibility that the future event will cause a loss of capacity; and (3) what is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?: *Rab* at para. 47.
>
> [40] The process of quantifying damages for loss of capacity at the third step of the *Rab* test is often challenging. Courts have adopted various approaches to assigning a dollar figure to the loss of capacity to earn income, including, where appropriate, awarding a claimant's entire income for one or more years: *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), 1995 CanLII 2871 at para. 43. Any approach that is adopted must be supported by the evidence: *Rab* at para. 75.

[135] As a final step, the court must determine whether the damage award is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117.

Steps 1 and 2 of the *Rab* Analysis

[136] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court of Appeal elaborates on the first and second steps of the *Rab* analysis. The court writes:

> [11] With respect to the first step, I note two considerations as outlined in *Rab* at paras. 29–30. First, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.

[137] For situations in which there has been no clear loss of income at the time of trial, the "*Brown* factors", as outlined in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), come into play: *Ploskon-Ciesla*, at para. 12.

[138] The *Brown* factors comprise a means of assessing whether there has been an impairment or diminishment of income-earning capacity. The factors are as follows:

a) Is the plaintiff less capable overall of engaging in all types of employment?

b) Is the plaintiff less marketable or attractive as an employee?

c) Has the plaintiff lost the opportunity to take advantage of all job opportunities had they not been injured; and

d) Is the plaintiff less valuable to themselves as a person capable of earning money in a competitive labour market?

[139] I note that even if the plaintiff makes out one or more of the *Brown* factors, and thus demonstrates a loss of income-earning capacity, it does not mean that they

have established a real and substantial possibility that this impaired or diminished earning capacity would lead to an income loss: *Ploskon-Ciesla*, at para. 12.

[140] I find that step one of the *Rab* test has been established. In other words, I find that the plaintiff has suffered an impairment or diminishment to his income-earning capacity. I accept that his ongoing neck injury and headaches are aggravated by prolonged sitting, standing, and travel by car and rapid transit. I also accept that the plaintiff is required to take more breaks due to his injuries and has reduced productivity.

[141] I have found that the plaintiff is unlikely to experience any significant and lasting improvement in his injuries and symptoms. It follows that his work impairments will continue into the foreseeable future. These impairments make the plaintiff less capable overall of engaging in all types of employment. Moreover, he is less attractive as an employee, will lose opportunities to take advantage of all job opportunities, and is less valuable to himself in a competitive labour market. I find that the plaintiff requires a sympathetic employer who is willing to accommodate his impairments by allowing him to work from home in order to reduce travel time, along with flexibility to visit job sites after hours, and the ability to take more breaks and to leave work early when his symptoms are aggravated or to attend treatments. Further, I note and accept the plaintiff's evidence that he is unable to be on call after hours, due to the side effects of the injury-related medication he is prescribed. Moreover, the plaintiff has been advised by his family doctor to avoid shift work and not to work past 9:00 p.m.

[142] In sum, I conclude that the evidence establishes accident-caused impairments that are chronic and could give rise to a loss of capacity.

[143] Step 2 of the *Rab* analysis asks whether there is a real and substantial possibility that the potential future event giving rise to a loss of capacity identified in Step 1 will cause a pecuniary loss to the plaintiff.

[144] I find that the evidence establishes a real and substantial possibility that the plaintiff's loss of capacity will cause the plaintiff a pecuniary loss. I make this conclusion based on the following factual findings:

a) To date, the plaintiff has relied on sympathetic employers who are willing to accommodate his injuries and impairments. There is a real and substantial possibility that this will no longer continue. The principals at Lions Gate were aware of the plaintiff's limitations and accommodated him. His position was also more amenable to accommodation – in that he could work from home more regularly and could do some aspects of his job outside of regular business hours. The plaintiff's work situation has changed considerably. Lions Gate was purchased by Scarlett. The plaintiff testified that Scarlett had made considerable changes, the most significant of which was changing the business model of Lions Gate and letting go of most of the employees, including the plaintiff's boss and the person who replaced that boss. Although no witnesses were called from Lions Gate or Scarlett, I have found the plaintiff to be a credible witness, and I accept his evidence about the changes that have occurred since Scarlett took over.

b) Scarlett's business model relies much more heavily on the use of contractors. In his director position, in addition to his security/risk reports, the plaintiff is responsible for overseeing the executive protection program and the crime scene security personnel contract with a local police force. The crime scene security contract involves Scarlett providing security for crime scenes on an on-call 24-hour basis. As such, in his director role, the plaintiff is now required to be available outside of regular working hours and may be required at times to work evenings and weekends. The plaintiff has since advised Scarlett of his limitations and provided them with a September 22, 2025 letter from Dr. Lam. The letter states that due to chronic medical issues the plaintiff is unable to be on-call 24/7, and that he has been advised to avoid shift work and cannot work past 9:00 p.m. I pause to note that the September 22, 2025 letter from Dr. Lam was not

served under Rule 11-6 of the *Supreme Court Civil Rules*. However, the letter was admitted into evidence by agreement for the fact that the plaintiff received the letter from Dr. Lam, that he used it as support when he informed his employer that he cannot do duties that involve him being on call 24/7 or working past 9:00 p.m., and that the court can rely on the letter for the truth of Dr. Lam's opinion saying that he cannot be on-call 24/7 and cannot work past 9:00 p.m. While the letter does not state that the restrictions are caused by the accident injuries, based on the evidence and my factual findings, no other reasonable inference can be made. I find that the plaintiff is unable to fully complete the duties required of him in his role as director.

c) The plaintiff said that he is less able to manage his workload. By way of example, he testified he was required, in the week preceding trial, to complete security assessments at three sites for a client. He was supposed to visit all three sites in one day and then complete the report after the visits. The plaintiff did not feel able to do all three assessments in one day and provide the report in the timelines he had given to the client. As such, he asked the client if he could visit one site, provide a report on that site only, and complete the other site visits and reports at a later date. The plaintiff said he needed the accommodation because he needed more time to rest. I am mindful that the plaintiff was likely facing an especially demanding week. Earlier that week he was leading training sessions. He also had the stress and work involved with this trial. Nevertheless, the plaintiff struck me as someone who prioritized work, meeting deadlines, and abiding by his word (i.e. if he told a client he would do something, he would do it). In my view, the plaintiff would have had no difficulty meeting these timelines and obligations absent his accident-caused injuries and impairments.

[145] Given all the changes that have occurred with his employer, the change in the plaintiff's role, and the plaintiff's inability to meet the requirements of the role of

director, there is a real and substantial possibility that the plaintiff will be demoted from his role as director or be let go from Scarlett. Should this occur, given his age (i.e. 64) and his limitations, it may be very difficult for the plaintiff to secure a similar position elsewhere, or a position similar to his previous position. In sum, the plaintiff has established a real and substantial possibility of a future event causing a pecuniary loss.

Step 3 of the *Rab* Analysis

[146] Step 3 in the *Rab* analysis involves assessing the value of the potential future loss, which includes assessing the relative likelihood of the possibility occurring. There are two approaches to valuing the potential future loss: the earnings approach and the capital asset approach.

[147] The Court of Appeal in *Ploskon-Ciesla* elaborates on these approaches as follows:

> [16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the "earnings approach" or the "capital asset approach": *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.
>
> [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[148] The earnings approach typically involves a determination of the plaintiff's without-accident future earning capacity, using expert actuarial and economic evidence, as well as the plaintiff's past earnings history: *Rattan v. Li*, 2022 BCSC 648 at para. 150.

[149] In *Pallos v. Insurance Co. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), the Court of Appeal identified three potential methods of valuing

a potential future loss of capacity using the capital asset approach. At para. 43, they write:

> The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income.

[150] The plaintiff submits that an award of $317,743.00 is appropriate. They assess this amount based on the earnings approach. Specifically, the plaintiff says that absent the accidents, the plaintiff would have continued to earn $5,000.00 a year from film security work to age 70, minus a 40% contingency – which amounts to a present value loss of $15,639.00 using the economist's economic multiplier to age 70. In addition, the plaintiff says that because of the accidents, the plaintiff will need to retire five years earlier than planned (i.e. 65 instead of 70). The plaintiff submits that this aspect of the claim should be assessed at $302,104.00, based on annual earnings of $110,000.00, applying a 20% negative contingency, and using the economic multiplier.

[151] The plaintiff did not elaborate on what the negative contingencies are.

[152] The defendants submit that the evidence does not support a loss of future income-earning capacity. I have not accepted that argument. Nevertheless, the defendants helpfully provided an alternative argument should the court disagree with their position on entitlement. The defendants submit that the court could assess the loss using the earnings approach or the capital asset approach. Under the earnings approach, the defendants say that if the court concludes that the plaintiff will retire two years early, with a 25% likelihood, the loss would be $62,500, based on the plaintiff's current annual salary of $125,000.00. Alternatively, if the Court finds that there is a 50% likelihood that the plaintiff gets demoted to his previous job, which earned $100,000.00, then the loss (to age 70) would be $81,250.00. Using the capital asset approach, the defendants say that the Court could find that the

plaintiff's future income will be reduced by 10-15% a year, which results in a potential loss of $57,000 - $94,000.

[153] In my view, the capital asset approach is appropriate. The plaintiff has not lost any income since the accidents, and in fact, his income has increased.

[154] Further, in my view, assessing the loss based on one or more years of salary is also appropriate. Using this approach is resorted to in circumstances where the loss is not easily measurable: *Jurczak v. Mauro*, 2013 BCCA 507, at para. 30. In circumstances where the court can ground itself much more easily in factual and mathematical anchors, it is likely preferable for the Court to use the other valuation methods set out in *Pallos*, i.e. by estimating an annual income loss, projecting it over the plaintiff's remaining working years, and calculating its present value; or by applying a percentage loss of earning capacity to the expected annual income and determining its present value over those years. In this case, the evidence establishes a loss, but it is not readily quantifiable, as there are limited factual and mathematical anchors to ground the assessment.

[155] I echo Justice Kent's comments in *Moen v. Grantham*, 2024 BCSC 937, at para. 302, that there is little guidance in the case law to determine the applicable annual income multiple the court should use when valuing a loss of capacity using that method. In the case before Justice Kent, counsel noted that some decisions award in the range of one to two years, and others go to five years, while still others go higher. The defendants in that case suggested that for minor disruptions, a range of one to two years is appropriate. For moderate disruptions, a range of four to five years is appropriate, and for more serious disruptions, more than five years is appropriate. While counsel in that case noted that there was no jurisprudence echoing such ranges, it was offered to Justice Kent in the absence of clear guidance from the case law.

[156] In *Moen*, Justice Kent ultimately did not assess the plaintiff's loss using the annual income multiple approach. Thus, he did not endorse or reject counsel's suggested range. While I am mindful that there must be flexibility in how the court

quantifies damages for loss of capacity, when valuing the loss based on annual income multiples, it seems reasonable that the starting point (i.e. before considering contingencies) for cases involving modest impacts should be one to two years, for moderate impacts three to four years, and for more serious or severe impacts, five years or greater. I use the term "modest" instead of "minor," because in my view "minor" is inappropriate because it suggests an impact that is insignificant and negligible – i.e. not beyond *de minimis*.

[157] I conclude that the starting point for assessing the plaintiff's loss in this case should be two years of annual salary, or $250,000.00. I arrive at this number being mindful of the plaintiff's age, the nature of his injuries, the level of his impairment, and the nature of his job and the work he is engaged in.

[158] With respect to age, I accept that absent the accidents, the plaintiff was likely to work past age 65 and was likely to work until around 70 years old. The plaintiff presented as someone who draws a strong sense of his identity from work, and the pride he had for his work was apparent in his testimony. Moreover, while a younger age generally supports a higher base award, reflecting a greater number of affected working years, proximity to retirement age may amplify the impact of a loss of capacity, as older people often face barriers in securing alternative employment.

[159] The plaintiff's injuries impair his work capacity to a modest degree. He is generally able to do his regular day job duties; however, he requires accommodation. Specifically, he needs more frequent breaks and the ability to work from home in order to reduce commuting time – which can aggravate his injuries. The plaintiff's injuries and impairments have reduced his productivity, and thus, he takes longer to do things. In addition, because of the medication he is on and his sleep issues, he is not able to be on-call, nor is he recommended to work past 9:00 p.m. In sum, the plaintiff is working more hours for the same pay and cannot do all the duties required of him in his current role as director.

[160] Assessing the likelihood of future hypothetical events occurring and causing pecuniary loss is challenging. The plaintiff's productivity is reduced and he is working

more hours to complete his work. Without an accommodating employer, this reduction in productivity will result in pecuniary loss. Moreover, the plaintiff cannot perform the duties required of his position. In my view, there is a 90% likelihood that the plaintiff will not continue in his current position as director. Specifically, he will either be demoted, he will voluntarily demote himself, or he will be let go. I find that within that 90%, there is a 66.6% chance that the plaintiff will be demoted (either by the employer's choice or his own) and a 33.3% chance that he will be let go. If he is demoted, that would likely result in a salary reduction of $25,000.00 per year. If he is let go, that would result in a salary loss of $125,000.00 a year, which would be offset by some amount of notice or payment in lieu of notice. Further, if he were let go, he could find alternative employment; however, whether that would be full-time work, part-time, or contract work is unclear, nor is it clear if he would be able to find an employer who is willing to accommodate him. There is also a risk that he would not be able to find significant replacement employment in his field, given his age and impairments. It is not possible to attach a specific percentage likelihood for each of these hypothetical events and associated variables and then mathematically arrive at an aggregate percentage likelihood. In any event, quantifying the loss is not a mathematical exercise. Considering all these hypothetical events and the likelihood of these individual events, in my view, it is appropriate to apply a negative contingency of 25%.

[161] With respect to other contingencies, as indicated above, I find that the plaintiff's condition is unlikely to improve; however, it is also unlikely to get worse. I had no evidence about general contingencies, such as labour market contingencies. There is case law indicating that a negative contingency of 20% is appropriate where there is no specific evidence regarding general contingencies: see *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79, 1985 CanLII 179 (B.C.S.C.), *Dunn v. Heise,* 2021 BCSC 754 at para. 202, and *Hann v. Lun*, 2022 BCSC 1839 at paras. 111–113. Nevertheless, as stated by Justice Gomery (then of this Court), it is doubtful that a 20% adjustment for general labour market contingencies could now be justified as a general rule, given the repeated recent assertions by the Court of

Appeal that an adjustment to reflect general contingencies should be modest: *Johansen v. Lee*, 2024 BCSC 1310, at para. 130-131.

[162] General labour market contingencies account for the statistical likelihood of a person not participating in the labour force, experiencing unemployment, or choosing to work part-time or seasonally. In my view, given the plaintiff's demonstrated work ethic and work history, he has a much greater attachment to the workforce than the average person. In these circumstances, applying a 20% general contingency is not justified. In my view, a 10% general negative contingency is appropriate.

[163] Accounting for contingencies, the two-year salary amount of $250,000.00 is reduced to $162,500.00.

[164] As a last step, the Court must determine whether the damage award is fair and reasonable on the whole. In my view, this amount is fair and reasonable to the plaintiff and defendants. Accordingly, I award the plaintiff $162,500.00 in loss of future income earning capacity.

SPECIAL DAMAGES

[165] The parties agreed to special damages of $4,376.84.

COST OF FUTURE CARE

[166] The plaintiff claims the following cost of future care items:

Future Care Item	**Amount Claimed**
Trigger point injections and nerve blocks	$1,400.00 (annually)
Medication (Tylenol, magnesium and patches)	$526.44 (annually)
Active rehabilitation sessions	$3,600.00
Occasional passive therapies (physio, massage, acupuncture)	$2,425.80 (annually)
Mental health support (psychology or counselling)	$900.00 (annually)

Mileage and miscellaneous travel	$200.00 (annually)

[167] The annual cost of future care claimed by the plaintiff amounts to $5,452.24. The plaintiff served an expert report of Darren Benning, economist, dated July 7, 2025, which includes a cost of future care multiplier assuming a normal life expectancy. Using this multiplier results in a present value of the above annual future care costs that total $93,409.30. When the one-time cost of $3,600.00 for active rehabilitation sessions is added to the present value of the annual costs, the total is $93,409.30.

[168] The defendants submit that the following future care items and amounts are reasonable:

a) $1,650.00 for over-the-counter pain medication; and

b) $7,980.00 for acupuncture treatments.

[169] The defendants' position is that the remaining care items are either not supported by the evidence or that the plaintiff is unlikely to use them.

[170] In *Pang v. Nowakowski*, 2021 BCCA 478, Mr. Justice Voith (for the Court), helpfully summarizes the applicable law as follows:

> [56] The legal framework that is relevant to a future cost of care award is well-established. Recently in *Quigley*, this Court said:
>
> > [43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred: *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) at p. 462; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.
> >
> > [44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have

> medical justification and be reasonable: *Aberdeen* at para. 42; *Gao* at para. 69.
>
> [57] Several additional principles are relevant:
>
> i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 40 and 54; *Hans v. Volvo Trucks North America Inc.*, 2018 BCCA 410 at paras. 86–87.
>
> ii) The court must be satisfied that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred: *Shapiro v. Dailey*, 2012 BCCA 128 at paras. 54–55;
>
> iii) The court must be satisfied that there is no significant overlap in the various care items being sought: *Johal v. Meyede*, 2015 BCSC 1070 at para. 9(f); *Brodeur v. Provincial Health Services Authority*, 2016 BCSC 968 at para. 356; *Myers v. Gallo*, 2017 BCSC 2291 at para. 231.
>
> [58] Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *O'Connell v. Yung*, 2012 BCCA 57 at para. 55. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties: *Shapiro* at para. 51; *Krangle* at paras. 21–22. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss: *Perren* at para. 32; *Rizzolo v. Brett*, 2010 BCCA 398 at para. 49. See also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 245–248, 1978 CanLII 1.

Trigger Point Injections and Nerve Blocks

[171] Dr. Giantomaso recommends greater occipital nerve blocks as well as facet joint injections, which could be arranged from a pain clinic or through a physiatrist. He indicates that these injections would be completed on an as-needed basis, but no more than four times a year. If facet joint blocks lose efficacy, Dr. Giantomaso writes that radiofrequency ablation could be considered in the future.

[172] I am satisfied that the injections recommended by Dr. Giantomaso are medically justified, and that the plaintiff would undergo such treatment if recommended. Nevertheless, there was no evidence before the court about the cost

of these injections and procedures, and whether or not they are covered under the medical services plan.

[173] Accordingly, I decline to award these items.

Medication

[174] The plaintiff claims the costs of over-the-counter medication, specifically Tylenol, magnesium, and “patches.” Dr. Ginatomaso recommends that the plaintiff consider medication such as Lyrica, gabapentin, or Cymbalta. In addition, he states it is reasonable for the plaintiff to use topical lidocaine, diclofenac, and Flexeril transdermal cream. Dr. Lam notes that the plaintiff has been prescribed Celebrex, Elavil, Cymbalta, Lyrica, and diclofenac 10% gel, the latter of which he was continuing to use. She noted that the plaintiff prefers to avoid oral medications, but that Celebrex or an over-the-counter anti-inflammatory medication such as Advil may be helpful.

[175] The plaintiff’s evidence is that he regularly uses a medicated ointment that contains Voltaren (i.e. diclofenac). He also uses Tylenol from time to time and takes a subtherapeutic dose of Cipralex. He confirmed that he does not like taking pills and that he found the side effects associated with Celebrex and Lyrica intolerable.

[176] I am satisfied that all the above medications are medically justified; however, I am not satisfied that the plaintiff will take any of the medication, with the exception of over-the-counter painkillers, Cipralex, and the 10% diclofenac gel – all of which he is currently using. Unfortunately, there was no evidence before the court as to the cost of these items. The defendants have submitted that $1,650.00 for over-the-counter pain medication is reasonable, which is based on a cost of $100 per year for the next 16.5 years (taking the plaintiff to age 80). In my view, an award of $2,000.00 is appropriate, taking into account $1,650.00 for over-the-counter pain medication, and the 10% diclofenac gel, assuming it is also over the counter. While the Cipralex is medically justified, I am not awarding that item because I do not have evidence as to its cost.

Chaperoned Active Rehabilitation Sessions

[177] Dr. Giantomaso recommends 16-24 sessions of active rehabilitation, after which he could complete the exercises at home or in the community.

[178] The plaintiff attended active rehabilitation approximately ten years ago and found it helpful for his back. He continues to do the exercises he was taught on his own. Nevertheless, it would likely be helpful for him to engage in further sessions to target his neck and shoulder and to determine if a change in his exercise program would be helpful. I find the care item medically justified. Unfortunately, there was no evidence about the cost of active rehabilitation. The plaintiff has suggested 20 sessions at $180.00 per session, but it is not clear where they got that figure from. The court did not have the benefit of a cost of future care report; however, given the modest future care recommendations, the cost of such a report may not have been justified, especially given the limits on disbursements imposed by the *Disbursements and Expert Evidence Regulation*, B.C. Reg. 210/2020.

[179] Given concerns about proportionality, and the potential prejudice caused by the *Regulation*, it is in my view permissible for the court to take a somewhat rough and ready approach to assessing the cost of future care items, provided that the cost of the care item sought is modest and there is some evidence on which to anchor the assessment. With this in mind, I have reviewed the plaintiff's schedule of special damages and supporting receipts. That documentation indicates that in 2015, the plaintiff's kinesiology sessions were billed at $20.00 a session, and "ICBC physiotherapy" at $30.00 a session. The terms "kinesiology" and "active rehabilitation" are sometimes used interchangeably. It is unlikely that those amounts were the entire cost of the session, because in 2017, there were receipts for "private physiotherapy" in the range of $60.00 to $65.00. Thus, the $20.00 and $30.00 amounts are likely "user fees" that the plaintiff paid out of pocket, with a further amount being billed to ICBC directly. Subsequent account statements show 2023 physiotherapy billings of $70.00. Based on the evidence I have, taking into account inflation, and on the assumption that kinesiology is not as expensive as

physiotherapy, it is reasonable to estimate that in 2026, kinesiology sessions are likely to be in the range of $70.00.

[180] I award the plaintiff $1,680.00 for active rehabilitation (24 sessions at $70.00 per session).

Passive Therapies

[181] The plaintiff claims $2,425.80 annually for passive therapies such as physiotherapy, chiropractic, massage therapy, and acupuncture. Using Mr. Benning's multiplier of 16.472 (reflecting the present value of an award to the plaintiff's likely life expectancy) results in a sum of $39,957.78.

[182] The defendants submit that a reasonable amount is $7,980.00, reflecting 12 acupuncture treatments a year until age 70, at ICBC's current approved rate of $95.00 per session.

[183] Dr. Giantomaso's opinion is that these passive therapies are unlikely to change the plaintiff's overall prognosis; however, they could be useful on occasion to decrease the intensity and duration of any future flare-ups. Dr. Lam's opinion is that the plaintiff may require further physiotherapy (including IMS treatments) to help with headaches and with any flare-ups of neck and shoulder symptoms.

[184] I find that future passive treatments are medically justified and that the plaintiff is likely to engage in such treatments, if recommended, with the exception of massage therapy. Again, the court does not have the benefit of a report which costs out these treatments. Nevertheless, in my view, the amount proposed by the defendants is reasonable.

[185] I award the plaintiff 12 sessions a year (at a cost of $95.00 per session), which amounts to $1,140.00 a year. I will use Mr. Bennings present value multiplier of 16.472 (reflecting the present value of an award to the plaintiff's likely life expectancy), which amounts to $18,778.08.

Mental Health Support

[186] The plaintiff claims $900.00 annually for psychology or counselling.

[187] Dr. Giantomaso's opinion is that ongoing support through community mental health services, psychology, or counselling is reasonable in regard to any ongoing mental health issues. Although the plaintiff has not been diagnosed with mental health disorders, he is experiencing symptoms of anxiety, along with mood issues, which are impacting his relationships. Accordingly, I find there is medical justification for psychology and counselling. While the plaintiff is not keen on talking about his injuries and symptoms, he is diligent in following the recommendations of his treatment providers. Nevertheless, there was no evidence about the cost of counselling, and I find there is no evidence on which I could base an estimate. Accordingly, I decline to award this cost of future care item.

Mileage and Miscellaneous Travel

[188] The plaintiff claims $200.00 annually for mileage to treatment sessions. The plaintiff did not provide a rationale for this amount. Nevertheless, I note that the plaintiff claimed special damages of $1,778.00 for mileage covering a period of just over 11 years (or roughly $160.00 a year). In my view, it is reasonable to assume that the plaintiff will incur a similar cost for mileage to treatment appointments going forward.

[189] Accordingly, I award the plaintiff mileage of $160.00 per year to the end of his expected life. Using Mr. Benning's multiplier of 16.472 results in a present value amount of $2,635.52.

Conclusion on Cost of Future Care

[190] I award the plaintiff $25,093.60 in cost of future care, which is broken down as follows:

Future Care Item	**Award**
Injections	0

Medication	$2,000.00
Active rehabilitation	$1,680.00
Passive therapies	$18,778.08
Mental health support	0
Mileage	$2,635.52
Total	**$25,093.60**

CONCLUSION

[191] The plaintiff is awarded the following damages against the defendants, jointly and severally:

a) Non-pecuniary damages	$180,000.00
b) Past loss of income-earning capacity	$0
c) Future loss of income-earning capacity	$162,500.00
d) Special damages	$4,376.84
e) Cost of future care	$25,093.60
Total	**$371,970.44**

[192] Total damages are awarded in the amount of $371,970.44, less any statutory deductions.

[193] If the parties cannot agree on costs, they may schedule a one-hour 9:00 am hearing, to be set no later than 45 days from the release of these reasons. The parties must file written submissions and briefs of authorities no later than seven days before the hearing. The written submissions must not exceed 2,500 words, and the brief of authorities must not exceed five authorities. If a Request to Appear for a costs hearing is not filed within 45 days of the release of these reasons, the plaintiff shall have his costs at Scale B.

"Morishita J."